IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF PUC DOCKET HP14-001, ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE	FILE NO. 28332 **APPELLANT YANKTON SIOUX TRIBE'S OPENING BRIEF**

APPELLANT YANKTON SIOUX TRIBE'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

The Yankton Sioux Tribe ("Tribe") appeals the *Order and Memorandum Decision* ("*Order*") entered June 19, 2017, by the Circuit Court of South Dakota, Sixth Judicial Circuit ("Circuit Court"), in Case No. CIV-16-33. The *Order* affirmed the *Final Decision and Order Finding Certification Valid and Accepting Certification* ("*2016 Final Decision,"* entered by the South Dakota Public Utilities Commission ("Commission") on January 21, 2016, in Docket HP14-001. The *Order* is a final order reviewable by this Court pursuant to SDCL 15-26A-3. The Tribe filed its notice of appeal on July 19, 2017.

STATEMENT OF LEGAL ISSUES

1. Whether the Commission erred when it denied the Tribe's *Motion to Dismiss*, when it denied the Tribe's *Joint Motion in Limine,* and when it took inconsistent positions with regard to the "Tracking Table of Changes," all of which denied the Tribe its substantive right to due process before the Commission.

The Circuit Court found that it was not clearly erroneous for the Commission to find that the pipeline that was the subject of Docket HP14-001 is the same pipeline that was the subject of Docket HP09-001, and affirmed the Commission's admission of the Tracking Table of Changes.

Relevant Constitutional and Statutory Provisions:

a. SDCL 15-6-12(b)(5)

b. SDCL 49-41B-4

c. SDCL 49-41B-27

2. Whether the Commission erred by issuing the *Order Granting Motion to Define Issues and Setting Procedural Schedule*.

The Circuit Court affirmed the Commission's *Order Granting Motion to Define Issues and Setting Procedural Schedule*, finding no clear error or abuse of discretion in the Commission's limitation on the scope of discovery.

Relevant Constitutional and Statutory Provisions:

a. SDCL 15-6-26

b. SDCL 49-41B-24

c. SDCL 49-41B-27

d. ARSD 20:10:01:01.02

3. Whether the Commission erred when it placed the burden of proof on the intervening parties rather than on TransCanada Keystone Pipeline, LP ("TransCanada"), the applicant, and when it found that the intervening parties failed to establish any reason why TransCanada could not continue to meet the conditions on which the Commission issued its permit to construct the proposed Keystone XL pipeline in 2010 ("2010 Permit").

The Circuit Court did not find clear error in the Commission's application of the burden of proof. The Circuit Court did not find that the Commission inappropriately shifted the burden of proof, and that any shift that may have occurred was within the Commission's purview and not clearly erroneous.

Relevant Constitutional and Statutory Provisions:

a. SDCL 49-41B-27

b. ARSD 20:10:01:15.01

4. Whether the Commission erred when it found that TransCanada properly certified that it remains eligible to construct the proposed Keystone XL pipeline and that

TransCanada's submission of a signed "*Certification*" met TransCanada's burden of proof.

The Circuit Court affirmed the Commission's decision, finding that the Commission did not commit clear error when it determined that TransCanada met its burden of proof.

Relevant Constitutional and Statutory Provisions:

a. SDCL 1-26-36

b. SDCL 49-41B-27

c. SDCL 2-14-1

d. ARSD 20:10:01:15.01

e. FRCP Rule 23(c)(1)(A)

5. Whether the Commission erred when it concluded that TransCanada is as *able* today to meet the conditions upon which the 2010 Permit was issued, and based its decision on whether TransCanada continues to be *able* to meet the 2010 conditions.

The Circuit Court did not find clear error in the Commission's application of the burden of proof. The Circuit Court did not find that the Commission inappropriately shifted the burden of proof, and that any shift that may have occurred was within the Commission's purview and not clearly erroneous. The Commission further found that if the Tribe wants to show that it is impossible for TransCanada to comply with the 2010 Permit, it must do so affirmatively.

Relevant Constitutional and Statutory Provisions:

a. SDCL 49-41B-27

6. Whether the Commission erred when issued the *Order Granting Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights* and precluded testimony and consideration of tribal aboriginal and treaty rights.

The Circuit Court affirmed the Commission's decision, finding no clear error was committed when the Commission found no authority that Native American tribes have aboriginal title or usufructuary rights with respect to the proposed route of the Keystone XL pipeline.

Relevant Constitutional and Statutory Provisions:

a. Treaty of Fort Laramie with Sioux, etc., Sept. 17, 1851, 11 Stat. 749

b. SDCL 49-41B-1

c. SDCL 49-41B-20

d. SDCL 49-41B-27

e. SDCL 49-41B-36

7. Whether the Commission erred when decided that tribes are not treated as local units of government and that no permit condition requires that TransCanada consult with tribes about the proposed Keystone XL pipeline.

The Circuit Court found that the Tribe is a sovereign nation within the bounds of the United States, but that it is not a local unit of government *within the State of South Dakota's government structure*.

Relevant Constitutional and Statutory Provisions:

a. SDCL 49-41B-22

STATEMENT OF THE CASE

This matter originally came before the South Dakota Public Utilities Commission, comprised of three members: Kristie Fiegen, Chairperson; Gary Hanson, Vice Chairman; and Chris Nelson, Commissioner. The case before the Commission was to determine whether TransCanada, a Canadian pipeline company, continued to meet the conditions upon which it received the 2010 Permit, such that "certification" could be granted pursuant to SDCL 49-41B-27. The Commission ultimately ruled in TransCanada's favor, accepting certification and authorizing TransCanada to proceed with construction of the proposed pipeline. The Tribe appealed the Commission's order to the Circuit Court for the Sixth Judicial Circuit, before the Honorable John L. Brown, which upheld the Commission's Order. The Tribe appealed the Circuit Court Order.

STATEMENT OF FACTS

On March 12, 2009, TransCanada filed an application with the Commission in Docket HP09-001 requesting a permit to construct a hydrocarbon pipeline through South Dakota. *Pet'n. for Order Accepting Certification ("2014 Petition"),* AR 000205. South Dakota law required TransCanada to provide key information including a description of the nature, location, and purpose of the proposed pipeline to the Commission in its permit application in order for the Commission to make an informed, sound decision on the project. SDCL 49-41B-11. The Commission issued its *Amended Final Decision and Order* ("*2010 Final Decision*") and the 2010 Permit allowing TransCanada to construct the proposed pipeline on June 29, 2010, based on that information. *2014 Petition*, AR 000204-05. As a part of the *2010 Final Decision*, the Commission issued a detailed list of its findings of fact and conclusions of law that led to its decision. *Id*. at 000205.

Through the *2010 Final Decision,* the Commission issued a permit authorizing construction of the project as that project was described and defined in the findings of fact contained in the *2010 Final Decision* ("2010 Project"). The *2010 Project* was accompanied by a list of 50 permit conditions, not inclusive of subconditions, with which TransCanada needed to comply in order to comply with the 2010 Permit. *Id*.

On September 15, 2014, after more than four years had passed since the issuance of the permit for the 2010 Project described in the *2010 Final Decision,* TransCanada filed a new petition ("*2014 Petition*") with the Commission in Docket HP14-001 to construct a pipeline to transport diluted bitumen, or dilbit, a heavy black viscous oil made from tar sands (http://ostseis.anl.gov/guide/tarsands/), mined in Alberta, Canada, through South Dakota. *2014 Petition,* AR 000204-05. The subject of the *2014 Petition* was also a project for a pipeline ("2014 Project") to transport dilbit (Dr. Stansbury Rpt., AR 003312) through South Dakota. *Id*. In conjunction with this new *2014 Petition,* TransCanada submitted the "*Certification*" asserting that the conditions upon which the Commission granted the facility permit in Docket HP09-001 continued to be satisfied. *Certification,* AR 000046-47. The *2014 Petition* requested that the Commission issue an order accepting its *Certification* pursuant to SDCL 49-41B-27. *2014 Petition,* AR 000204. As an appendix to the *2014 Petition,* TransCanada submitted a "Tracking Table of Changes" that identifies thirty findings contained in the *Final Decision* and, for each finding, sets out a new, different finding. *KXL Pipeline Quarterly Rpt.,* AR 000079-83.

On October 15, 2014, the Tribe filed a petition to intervene in Public Utilities Commission Docket HP14-001 and was granted intervenor status on November 4, 2014. *YST Application,* AR 000321; *Order Granting Intervention,* 001012. On October 30,

2014, before any party had even sought discovery, TransCanada filed the *Motion to Define the Scope of Discovery* seeking to restrict discovery to evidence related to just two issues: 1) whether the project continued to meet the conditions on which the 2010 Permit was granted, and 2) the "changes to the Findings of Fact" in the *2010 Final Decision. TC Mtn. to Define Scope*, AR 001000-09. Through that motion, TransCanada purported to unilaterally amend the *2010 Final Decision* and asked the Commission to do the same. *Id*. On December 17, 2014, the Commission granted TransCanada's *Motion to Define the Scope of Discovery. Order Granting Mtn. to Define Scope*, AR 001528-29. On December 2, 2014, the Tribe filed a *Motion to Dismiss* which challenged TransCanada's attempt to couch its *2014 Petition* as applying to the same pipeline that was permitted in 2010 pursuant to the *2010 Final Decision* and the 2010 Permit, despite the thirty findings TransCanada admitted were inapplicable to the *2014 Petition* as demonstrated in the Tracking Table of Changes. *YST Mtn. to Dismiss*, AR 001362-65. Without explanation or rationale, the Commission denied the Tribe's *Motion to Dismiss* on January 8, 2015. *Order Denying Mtns. to Dismiss*, AR 001697-98. Seeking to prevent the Tribe from protecting its treaty interests, TransCanada filed *Applicant's Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights* on May 26, 2015. *TC Mtn. to Preclude*, AR 006813-22. The Commission granted TransCanada's motion on June 15, 2015. *Order Granting TC Mtn. to Preclude*, AR 007383. On July 10, 2015, the Tribe along with other intervenors filed a *Joint Motion in Limine* requesting that the Commission exclude all evidence offered by TransCanada in support of its Tracking Table of Changes. *Jt. Mtn. in Limine*, AR 009481-86. The Commission denied the *Joint Motion in Limine. Order Denying Jt. Mtn. in Limine*, AR 020312-13.

Over the course of approximately eleven months, the Parties filed motions and exchanged discovery in preparation for the final evidentiary hearing, which was held over the course of two weeks. *2016 Final Decision,* AR 031683. At the end of the hearing, the Tribe and other intervenors submitted a *Joint Motion to Deny the Petition for Certification* on the grounds that TransCanada failed to meet its burden of proof. *PUC Tr.,* AR 027338-45. The Commission denied the joint motion. *Id*. at 027361-67. On January 21, 2016, the Commission issued the *2016 Final Decision.* AR 031668-95.

On February 19, 2016, the Tribe filed a *Notice of Appeal* with the Sixth Judicial Circuit Court, challenging the *2016 Final Decision*. The case was assigned to the Honorable John L. Brown. Following a hearing held on March 18, 2017, the Circuit Court issued the *Order* on June 19, 2017, affirming the Commission's *2016 Final Decision*.

ARGUMENT

I. THE COMMISSION ERRED WHEN IT DENIED THE TRIBE'S *MOTION TO DISMISS*, WHEN IT DENIED THE TRIBE'S *JOINT MOTION IN LIMINE*, AND WHEN IT TOOK INCONSISTENT POSITIONS WITH REGARD TO THE TRACKING TABLE OF CHANGES, ALL OF WHICH DENIED THE TRIBE ITS RIGHT TO DUE PROCESS BEFORE THE COMMISSION.

The Circuit Court committed reversible error when it upheld the Commission's decisions to deny the Tribe's *Motion to Dismiss* and *Joint Motion in Limine*, when it upheld the Commission's inconsistent positions with regard to the Tracking Table of Changes, and when it found that it was not clearly erroneous for the Commission to find that the 2014 Project is the same project as described in Docket HP09-001, all of which denied the Tribe its right to due process before the Commission. *Cir. Ct. Decision* at 28. The fundamental requirement of due process is the opportunity to be heard at a

meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The Commission violated this right when it took the foregoing actions.

The Tribe filed a *Motion to Dismiss* on December 12, 2014, arguing that TransCanada's *2014 Petition* must be dismissed pursuant to SDCL 15-6-12(b)(5) for failure to state a claim upon which relief can be granted. *YST Mtn. to Dismiss*, AR 001362-65. The Tribe argued that TransCanada never received a permit from the Commission for its 2014 Project because the 2014 Project was materially different from the 2010 Project, which did have a permit. *Id*. Instead of filing a petition for certification pursuant to SDCL 49-41B-27, TransCanada should have applied for a new permit under SDCL 49-41B-4. Accordingly, the Commission should have dismissed the *2014 Petition*. Without a permit, a permit cannot be certified; if there is no permit to certify, there is no cause of action under SDCL 49-41B-27. The *2014 Petition*, therefore, should have been dismissed.

In support of its motion, the Tribe stated that TransCanada asked the Commission to accept a "certification" along with the *2014 Petition* that the 2014 Project described in the *2014 Petition* continued to meet the conditions upon which the 2010 Permit was issued for the 2010 Project in Docket HP09-001. *YST Mtn. to Dismiss*, AR 001362-65. The *2014 Petition*, however, included an appendix, called "Tracking Table of Changes," which identified thirty ways the 2010 Project was different and distinct from the 2014 Project. *KXL Pipeline Quarterly Rpt.*, AR 000079-83. As a result of these deviations, the 2014 Project constitutes a new and separate project, requiring a new 49-41B-4 permit separate from the 2010 Permit. The Commission's denial of the *Motion to Dismiss* constitutes arbitrary and capricious decision-making, abuse of discretion, and

unwarranted exercise of discretion. Accordingly, the Commission's actions concerning the Tracking Table of Changes infringed on the Tribe's due process rights including its opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The Circuit Court therefore erred when it affirmed the Commission's ruling on the Tribe's *Motion to Dismiss*.

By upholding the Commission's rulings which unlawfully infringed on the Tribe's due process rights, the Circuit Court committed reversible error and its decision must be overturned.

II. THE COMMISSION ERRED BY ISSUING THE *ORDER GRANTING MOTION TO DEFINE ISSUES AND SETTING PROCEDURAL SCHEDULE*.

The Circuit Court committed reversible error when it affirmed the Commission's *Order Granting Motion to Define Issues and Setting Procedural Schedule* and found no clear error or abuse of discretion in the Commission's limitation on the scope of discovery. *Cir. Ct. Decision* at 23. Pursuant to ARSD 20:10:01:01.02, "the rules of civil procedure as used in the circuit courts of this states shall apply [to administrative proceedings]." The rules of civil procedure provide that the scope of discovery includes any non-privileged matter as long as the subject matter is relevant to the pending action, and that "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears to be reasonably calculated to lead to the discovery of admissible evidence. SDCL 15-6-26(b). A court can limit the scope of discovery only by a court order, which can only be issued if the movant meets the statutory requirements to obtain a protective order. TransCanada filed a *Motion to Define the Scope of Discovery* on October 30, 2014. *TC Mtn. to Define Scope,* AR 001000-09. Although TransCanada did not ask explicitly for a protective order, TransCanada's

motion amounted to a request for a protective order because only protective orders allow the Commission to limit the scope of discovery. *Id.*; SDCL § 15-6-26(c)(4).

To qualify for a protective order, TransCanada needed to meet the conditions outlined in SDCL 15-6-26(c), which requires a requesting party to certify to the tribunal that it conferred or attempted to confer in good faith and to show good cause for the protective order. However, TransCanada failed to show good cause for the issuance of the protective order. *TC Mtn. to Define Scope*, AR 001000-09. TransCanada also failed to confer or attempt to confer in good faith with other affected parties, and failed to include in its motion the statutorily required certification to this effect. *Id*. Furthermore, it was improper for TransCanada to seek a protective order before any party had sought discovery because no dispute existed to necessitate such an order: "When discovery efforts go beyond those subjects not 'reasonably calculated to lead to the discovery of admissible evidence,' a court has authority to issue protective orders, quash subpoenas, and grant terms when appropriate." *Public Entity Pool for Liability v. Score*, 658 N.W.2d 64, 72 (S.D. 2003), *citing* SDCL 15-6-26(c), 37(a)(4), 45(b) and 45(d)(1). The Commission therefore does not have authority to enter a protective order or otherwise limit discovery unless and until discovery efforts exceed the lawful scope of discovery. Before discovery has commenced and a dispute has arisen, there can be no grounds for a protective order so TransCanada's motion was premature and the Circuit Court erred by affirming the Commission's order granting that motion.

Additionally, when the Commission issued the order limiting the scope of discovery, it defeated the purposes of discovery. The Supreme Court has explained that "broad construction of the discovery rules is necessary to satisfy the three distinct

purposes of discovery: (1) narrow the issues; (2) obtain evidence for use at trial; (3) secure information that may lead to admissible evidence at trial." *Kaarup v. St. Paul Fire and Marine Ins. Co.*, 436 N.W.2d 17, 19 (S.D. 1989), c*iting* 8 C. Wright and A. Miller, Federal Practice and Procedure, § 2001 (1970). Accordingly, the Commission's order jettisoned relevant issues by inappropriately limiting discovery, thereby defeating one of the very purposes of discovery as identified by the Supreme Court.

The Commission argued that SDCL § 49-41B-27 must be read *in pari materia* with SDCL § 49-41B-24, which grants the Commission broad authority to make complete findings regarding whether a permit should be granted, denied, or granted conditionally. *Cir. Ct. Decision* at 22-23. The Circuit Court granted the Commission deference based on the Commission's status as a specialized administrative agency. *Id.* at 23. The Commission was not entitled to such deference, however, because the Commission abused its discretion by acting contrary to law. A court may limit the scope of discovery only with a court order that is consistent with the Rules of Civil Procedure. SDCL 15-6-26(b). Because the Commission limited the scope of discovery in violation of the Rules, it abused its discretion and was not entitled to agency deference.

Although the Commission argued that that SDCL § 49-41B-27 must be read *in pari materia* with SDCL § 49-41B-24, the Commission's interpretation does not control in this case because the latter statute only pertains to initial permit applications, which is not the posture of this case. *See* SDCL§ 49-41B-24 (statute requires Commission to render a decision "within 12 months of receipt of the initial application for a permit…"). Instead, the present case involves the certification of a permit that has been extant for over four years. *YST Cir. Ct. Opening Brief* at 1-2. Accordingly, even if the

Commission's *in pari materia* interpretation is valid, that interpretation does not control the case at hand because SDCL § 49-41B-24 only grants the Commission broad authority over initial permit applications. Furthermore, nothing in SDCL 49-41B-24 authorizes the Commission to diminish the lawful scope of discovery. Thus, as a matter of law, the Commission did not have the authority to grant TransCanada's *Motion to Define Discovery* and limit the scope of discovery. Because the Parties were entitled to seek discovery to the full extent permitted by SDCL 15-6-26(b), the Circuit Court erred in affirming the Commission's *Order Granting Motion to Define Scope* which limited discovery contrary to law.

III. THE COMMISSION ERRED BY PLACING THE BURDEN OF PROOF ON THE INTERVENING PARTIES RATHER THAN ON TRANSCANADA AND BY FINDING THAT THE INTERVENING PARTIES FAILED TO ESTABLISH ANY REASON WHY TRANSCANADA COULD NOT CONTINUE TO MEET THE CONDITIONS ON WHICH THE 2010 PERMIT WAS ISSUED.

The Circuit Court committed reversible error when it failed to find clear error in the Commission's application of the burden of proof and when it found that the Commission did not improperly shift the burden of proof from TransCanada to the intervening parties.

A. TRANSCANADA HAS THE BURDEN TO PRESENT EVIDENCE SHOWING IT CONTINUED TO COMPLY WITH ALL 50 OF THE CONDITIONS AND THE ADDITIONAL BURDEN TO PROVE ALL OF THE FACTUAL ALLEGATIONS WHICH FORMED THE BASIS OF ITS PETITION.

Other than in rare contexts not applicable here, each and every party seeking any sort of order or relief from an adjudicatory body has the burden to produce the evidence which supports its request as well as the additional burden to prove its entitlement to the relief it requests. A plaintiff has the burden of proof in a civil case. *E.g.*, *Mettler v. Williamson*, 424 N.W. 2d 670 (S.D. 1988). A prosecutor has the burden in a criminal

case. *E.g.*, *State v. Wilcox*, 204 N.W. 369, 48 S.D. 289 (1925) ("It is a cardinal rule in criminal prosecutions that the burden of proof rest with the prosecutor."). On nearly every motion, the movant-- whether plaintiff, petitioner, defendant, respondent, or third party-- has the burden of proof on that motion. *E.g.*, *Boylen v. Tyler*, 641 N.W. 2d 134 (S.D. 2002); *Gross v. Conn. Mut. Life Ins. Co*., 361 N.W. 2d 259 (S.D. 1985). This is a cornerstone of adjudication in countries which provide due process. There is absolutely no basis here to relieve TransCanada of the burden of all petitioners—to prove that it is entitled to the relief it seeks from the adjudicatory body.

This legal rule is even more clearly stated in ARSD 20:10:01:15.01. ARSD 20:10:01:15.01 is one of the Commission's General Rules of Practice, and it applies in every contested case proceeding. The rule requires:

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

ARSD 20:10:01:15.01 (emphasis added). This is the on-point rule, which the Commission is required to enforce, and it defeats the argument TransCanada and Public Utilities Commission Staff ("PUC Staff") make in their post-hearing briefs. As the petitioner, TransCanada had the burden of proof as to factual allegations which formed the basis of the *2014 Petition*. *Id*. A plain reading of the rule required the Commission to place the burden of proof on TransCanada. *Id*. The Commission issued no order to alter this standard. ARSD 20:10:01:15.01 also discusses both components of the burden of proof: the burden to produce evidence, and the ultimate burden to show that the weight of

all evidence produced favors the petitioner. Under this rule, as is also generally the case, both components of the burden of proof lie with the petitioner.

The law imposing upon TransCanada the burden of proof for the factual allegations in its petition is so clear that even TransCanada, when it initiated this contested case, acknowledged its burden. *2014 Petition*, AR 000204-09. In its petition, TransCanada set forth its factual allegations and then concluded with a request that the Commission find that that TransCanada still meets the conditions contained in the 2010 Permit. *Id*. TransCanada petitioned for the following relief:

> The attached Certification, together with this petition and the supporting appendices provides the necessary basis for the Commission to find that the Project continues to meet the conditions upon which the June 2010 permit was issued. Accordingly, Keystone respectfully requests that the Commission accept its certification under SDCL §49-41B-27.

Id. (emphasis added). As is clear from TransCanada's own petition, TransCanada understood that it was "necessary" for TransCanada to provide facts supporting a finding that the project continues to meet all the conditions imposed by its original permit. TransCanada further understood that it could not meet its burden merely by submitting a conclusory "certification." *Id*. TransCanada bore, and has previously acknowledged that it bore, the burdens of production and proof of the core factual assertion in its petition, i.e., its assertion that it continues to meet the 2010 Permit conditions. ARSD 20:10:01:15.01; *2014 Petition*, AR 000209. Like every other petitioner, plaintiff, or movant, TransCanada had the burden to show that it was entitled to the finding that it requested, and it has expressly acknowledged that such a finding is a prerequisite for the relief that it has requested from the Commission—acceptance of its "certification."

The *burden of production* must lie with TransCanada. In order to reach the

correct decision on issues before it and to meet its obligations to the people of South Dakota and the companies that come before the Commission, the Commission must be presented with the relevant facts. Nearly all of those facts are in the possession of the petitioning companies, therefore the burden to produce evidence must be on the companies. *E.g.*, *Davis v. State*, 2011 S.D. 51, 804 N.W.2d 618, 628 (S.D. 2011); *Eite v. Rapid City Area School Dist. 51-4*, 739 N.W.2d 264 (S.D. 2007); *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008); *Dubner v City and County of San Francisco*, 266 F3d 959, 965 (9th Cir 2001). Here, TransCanada did not produce any evidence on several key issues, yet it asserted that it should prevail on those issues because, it contends incorrectly, the intervenors also did not produce evidence on those issues.

The *burden of proof* must also lie with TransCanada. Contrary to TransCanada's sole argument, even if the burden of production shifts in a case, the burden of proof always remains with TransCanada. *TC Appeal Br. in Response to Common Arguments* at 9-10. This Court has repeatedly and consistently held that even in the rare situations where the burden of production shifts as a case progresses, the burden of proof does not shift—it always remains with the petitioner.

> For many years the term 'burden of proof' was ambiguous because the term was used to describe two distinct concepts. Burden of proof was frequently used to refer to what we now call the burden of persuasion-the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose. But it was also used to refer to what we now call the burden of production-a party's obligation to come forward with evidence to support its claim.

Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 512 U.S. 267, 272, 114 S.Ct. 2251, 2255, 129 L.Ed.2d 221, 228 (1994). "'It is generally said that the burden of production may pass from party to party as the case progresses while the burden of persuasion rests

> throughout on the party asserting the affirmative of an issue.'" *Hayes v. Luckey*, 33 F.Supp.2d 987, 990 (N.D.Ala.1997) (citation omitted).

Davis v. State, 804 N.W.2d at 628 (quoting *Gordon v. St. Mary's Healthcare Ctr.*, 617 N.W.2d 151, 157-58 (S.D. 2000). *See also Eite*, 739 N.W.2d 264.

The Commission's own prior precedent is in accord with all of the authorities discussed above. *In re Northern States Power Co. for Confirmation of Angus C. Anson Combustion Turbine Facility*, 2000 Westlaw 36322410 (S.D.P.U.C. March 20 2000) (hereinafter, "*In re NSP*"). In *In Re NSP*, the Commission had to interpret SDCL §49-41B-27, the same statute that TransCanada claimed imposed the burden of proof on the intervening parties. Like TransCanada, NSP had previously obtained a permit for regulated construction activities but had failed to commence construction within four years of permit issuance. *Id.* NSP submitted a "certification" and other information to the Commission and asked the Commission to accept that certification. *Id*. The Commission accepted the certification based upon a *finding* that the certification was acceptable. Contrary to the Commission's new interpretation of SDCL 49-41B-27, the Commission, in *In re NSP*, based its finding upon the certification "and the information provided to it by NSP." *Id.*

The statute, regulations, common law, and Commission' precedent unanimously establish that the burden of proof rested with TransCanada to certify that the proposed Keystone XL pipeline project continued to meet all 50 conditions upon which the original 2010 Permit was issued. The Circuit Court's affirmation of the Commission's findings to the contrary impermissibly prejudiced proceedings and was in clear error.

B. THE COMMISSION ERRED IN ITS FINAL DECISION BY PLACING THE BURDEN OF PROOF ON INTERVENING PARTIES RATHER THAN TRANSCANADA, AND BY CONCLUDING THE INTERVENING PARTIES

FAILED TO ESTABLISH ANY REASON WHY TRANSCANADA COULD NOT CONTINUE TO MEET THE CONDITIONS ON WHICH THE 2010 PERMIT WAS ISSUED.

As laid out above, ARSD 20:10:01:15.01 is the appropriate rule governing the burden of proof in contested proceedings, such as Docket HP14-001, before the Commission. The rule requires that "[i]n any contested case...petitioner has the burden of proof going forward with presentation of evidence unless otherwise ordered by the commission." ARSD 20:10:01:15.01. The Commission issued no such order in this case, and did not even cite to the applicable rule. *2016 Final Deci*sion, AR 031694. Thus, under the directly applicable statute and administrative rule, the burden in of proof during the proceedings of Docket HP14-001 belonged solely to TransCanada.

These authorities notwithstanding, the Commission time and time again ruled in favor of TransCanada on the grounds that the intervenors had failed to meet some nonexistent burden of proof. *2016 Final Decision*, AR 031686-87, 031964. This is contrary to the plain language and purpose of SDCL 49-41B-27 and ARSD 20:10:01:15.01.

The Commission's unfounded and incorrect belief that the burden of proof should be shifted to the Tribe and other intervenors was clearly displayed in Finding #31 of the *2016 Final Decision* where the Commission stated that "[n]o evidence was presented that [TransCanada] cannot satisfy any of these conditions in the future." *2016 Final Decision,* AR 031694. Similar findings illuminating the Commission's burden shifting onto the intervening parties were made in Paragraphs 32, 33, 34, 37, 38, 39, 40 and 42 of the *2016 Final Decision* and in Paragraphs 9 and 10 of the Conclusions of Law. *Id.* at 031686-67, 031694. These findings run in direct conflict with the burden of proof assigned to Commission proceedings as outlined in ARSD 20:10:01:15.01 by abdicating

TransCanada from its duty to prove it can satisfy the conditions, and requiring the Tribe and other intervenors to prove that TransCanada *cannot* satisfy the conditions.

Furthermore, the Commission committed an obvious legal error when it claimed TransCanada was not required to submit substantial evidence and that it carried its burden of proof by merely submitting an unsupported and conclusory document entitled a "certification," which contained an unfounded assertion that all 50 permit conditions were being met and would continue to be met. *PUC Tr.*, AR 031660. The Commission went on to issue its *2016 Final Decision* based upon the same convoluted argument that TransCanada prevailed in meeting its burden of proof based solely on the "certification." *2016 Final Decision*, AR 031694.

This argument is so plainly unsupportable that not even TransCanada agreed with the Commission's position. Instead, TransCanada provided a slightly more nuanced assertion that by the mere act of labeling a document a "certification" and then filing that document, even if the document is false, TransCanada had created a rebuttable presumption in its favor, shifting both the burden of production and the burden of proof to the intervenors. *TC Post Hr'g. Br.*, AR 029505-06; *TC Appeal Br. in Response to Common Arguments* at 9-10.

As discussed *infra* Section IV, TransCanada unquestionably failed to meet its burden of proof. Now that it has plainly failed to produce evidence or prove the factual allegations set forth in its petition, its only possible argument is its desperate and bald assertion that it does not have the burden which every petitioner, plaintiff, or movant has. As a matter of law, TransCanada is wrong, and the Circuit Court erred in upholding the Commission's erroneous findings and conclusions.

C. EVEN IF THE BURDEN OF PRODUCTION DID SHIFT, THE INTERVENORS MET THEIR BURDEN AND SHIFTED IT BACK AND TRANSCANADA DID NOT THEN MEET THE ULTIMATE BURDEN.

The Tribe reasserts its position stated in Section III B., *supra*, that the Circuit Court committed reversible error when it failed to find clear error in the Commission's application of the burden of proof on intervening parties by considering whether interveners provided sufficient evidence to overcome a shifting of the burden of production based on TransCanada's "certification." However, should this Court find that the burden did shift based on the "certification" or otherwise, the intervenors have clearly presented sufficient rebuttal evidence to shift the burden of production back to TransCanada. If the "certification" statement from Corey Goulet is found sufficient to shift the burden, then comparable statements from the Tribe and other intervenors must hold equal weight and therefore shift the burden back to TransCanada.

On October 30, 2015, the Tribe filed a "certification" much like that filed by TransCanada. *YST Certification*, AR 031232-41. The Tribe's "certification" consists of a sworn statement attested to by Yankton Sioux Tribal Chairman Robert Flying Hawk that TransCanada does not meet all 50 permit conditions. *Id*. at 031232. In addition, at least one of the intervenors' witnesses pointed out while under oath that TransCanada failed to comply with one or more conditions. *PUC Tr.,* AR 026937 (Direct Testimony of Paula Antoine (citing Conditions 2 and 3); *Prefiled Rebuttal Test. of Paula Antoine*, AR 007578-600 (citing Conditions 1 and 3). This testimony must be given equal evidentiary weight to TransCanada's "certification" and would likewise shift the burden back to TransCanada. If merely filing a document labeled "certification" is sufficient to meet the burden of proof intended by SDCL 49-41B-27, then the burden would have

shifted back to TransCanada upon testimony and the Tribe's filing of a certification to the contrary.

Because the Commission misplaced the burden of proof contrary to law, the proceedings were fundamentally unjust and the Circuit Court committed reversible error in finding the Commission properly shifted the burden of proof in this case.

IV. THE COMMISSION ERRED WHEN IT FOUND THAT TRANSCANADA PROPERLY CERTIFIED THAT IT REMAINS ELIGIBLE TO CONSTRUCT THE KEYSTONE XL PIPELINE AND THAT TRANSCANADA'S SUBMISSION OF A SIGNED "CERTIFICATION" MET TRANSCANADA'S BURDEN OF PROOF.

The Circuit Court committed reversible error when it affirmed the Commission's decision to accept certification and found that TransCanada met its burden of proof, despite the fact that the Commission's decision relied solely on a conclusory "certification" submitted by TransCanada, three descriptive Appendices to the "certification," and diminutive testimony at evidentiary hearing. *Cir. Ct. Decision* at 20.

A. THE COMMISSION MUST BASE ITS DECISION ON THE SUBMISSION OF SUBSTANTIAL EVIDENCE.

As discussed above, pursuant to ARSD 20:10:01:15.01, in contested proceedings such as HP14-001, the petitioner carries "the burden of going forward with presentation of evidence." Although the statutes and rules governing the Commission make clear which party bears the burden of proof in contested proceedings, they do not specify what standard of proof must be met. Instead, the standard of proof required in agency decision-making must be determined by looking to the State's common law.

In determining whether an agency decision is "arbitrary or capricious" under SDCL § 1-26-36, this Court has held that a circuit court applied the proper standard of review to the agency decision when it "examined the record to determine 'whether there

was substantial evidence supporting [the City Council's] decision and whether the decision was reasonable and not arbitrary.'" *M.G. Oil Co. v. City of Rapid City*, 793 N.W.2d 816 (S.D. 2011). The circuit court had cited *Olson v. City of Deadwood*, 480 N.W.2d 770, 774-75 (S.D.1992), for its use of the substantial evidence standard. *Id.* In *Olson*, the Supreme Court employed the substantial evidence test to determine whether or not the decision of the agency Deadwood Board of Adjustment should be upheld. As the Court clarified in that case, the standard in assessing an agency decision is "whether an order of the board is supported by substantial evidence *and* is reasonable and not arbitrary." *Id.* (emphasis added). Because the Commission is a South Dakota agency, its decisions must be based upon substantial evidence and must be reasonable and not arbitrary. *Id.* This means that TransCanada, as the petitioner and the burden bearer, was required to prove by substantial evidence that it continued to comply with each and every one of the 50 conditions upon which the 2010 Permit was granted. Because it failed to do so, the Circuit Court erred in upholding the Commission's decision.

B. THE *CERTIFICATION* DOES NOT CONSTITUTE EVIDENCE SUFFICIENT TO PROVE CONTINUED COMPLIANCE WITH THE 50 CONDITIONS.

In conjunction with its *2014 Petition*, TransCanada submitted a filing captioned "certification" with the Commission when it initiated this action. *Certification*, AR 000046-47. This document consists of a sworn statement by Corey Goulet, President of the TransCanada Pipeline business unit, attesting that TransCanada certified that the conditions upon which the 2010 Permit was granted continued to be satisfied. Both the Circuit Court and the Commission erred when they incorrectly assumed that the document TransCanada labeled a "certification" was in fact a certification as that term is used in SDCL §49-41B-27. TransCanada continually argued that the document it labeled

"certification" must be accepted as such under the statute.

"Certify," however, means more than filing a conclusory document. Words "used [in the South Dakota Codified Laws] are to be understood in their ordinary sense." SDCL § 2-14-1. "Certify" means "to authenticate or verify in writing." Black's Law Dictionary (10th ed. 2014). But the Circuit Court, Commission and TransCanada stop short of the next step in the legal analysis: what do "authenticate" or "verify" mean? The central element in the definitions of both "authenticate" and "verify" is that the allegedly authenticating or verifying document must prove the allegations contained therein. *Id.* *Black's Law Dictionary* defines "verify" as "to prove to be true; to confirm or establish the truth or truthfulness of, to authenticate" and defines "authenticate" in the current context as "to show (something) to be true or real." *Id.* Therefore, "to certify" for purposes of SDCL 41-41B-27, understood in its ordinary sense, required TransCanada to prove it met and continued to meet all 50 conditions the Commission set in 2010.

This is the common understanding of the meaning of "to certify." For example, Federal Rules of Civil Procedure Rule 23(c)(1)(A) requires that "the court must determine by order whether to certify the action as a class action." "[C]ertification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-351 (2011), quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982). A judge cannot simply issue an order announcing class certification; he must support his decision with the facts of each case. Similarly, TransCanada could not simply file a certification. The Commission was obligated to undergo a rigorous analysis which

would require complete and substantial evidence relating to each condition in order to verify that it continued to meet each and every one of the 50 conditions.

Therefore, TransCanada's and the Commission's arguments circle back to the exact same question: has TransCanada proven that the assertions contained in the *Certification*—that TransCanada is in compliance and will remain in compliance with all 50 conditions—are true.[1] Because TransCanada failed to show the allegations to be true with respect to every condition, the document cannot be accepted as a certification.

Mr. Goulet's statement in the *Certification* is a broad generalization with respect to the conditions and it does not specifically address even one of the 50 conditions or how the project continues to comply with any of those conditions. *Certification*, AR 000046-47. This blanket statement is void of any substance and provides no probative value with respect to whether or not TransCanada actually continued to meet the conditions. Additionally, Mr. Goulet's testimony at the evidentiary hearing showed a lack the personal knowledge necessary to be able to provide a credible opinion regarding whether TransCanada continued to meet each of the 50 conditions. For example, Mr. Goulet was asked questions concerning Condition 1 and he answered that he was not personally familiar. *PUC Tr.*, AR 024111. He was asked about Conditions 6, 7, and 34 and,

[1] As discussed above, TransCanada and PUC Staff rely upon logically flawed "form over substance" arguments. If it were willing to use such arguments, the Tribe could rely upon a logically sound "form over substance" argument that the document labeled a certification must be rejected because, as is undisputable, the document, standing alone, does not prove that TransCanada is in compliance or that it will remain in compliance. But the core purpose of the statutes at issue is to provide that the Commission determines, on the merits, based upon all of the evidence presented in the lengthy hearing in this matter, whether or not TransCanada has met its burden of production and of proof that it is in compliance and will remain in compliance with the 2010 Permit conditions.

similarly, Mr. Goulet stated he was not aware of whether TransCanada did or did not take certain actions concerning those conditions. *PUC Tr.*, AR 024113-14, 024128. With respect to Condition 6, Mr. Goulet stated that he did not even know whether TransCanada considered the Tribe to be a local unit of government – so how could he possibly have known that Condition 6, which requires TransCanada advise local governments prior to implementing deviations from the original route, was met? *PUC Tr.*, AR 024128. For many of these questions Mr. Goulet deferred to someone else. *Id.*; AR 024159, 024162. When asked about Condition 10, Mr. Goulet responded that he "d[id] not have personal knowledge of whether TransCanada has contacted Yankton Law enforcement." AR 024130.

When questions about the process TransCanada undertook for its permitting from the U.S. Army Corps of Engineers concerning high consequence areas, Mr. Goulet could similarly not answer the question and stated that another witness "may" know. *PUC Tr.*, AR 024251. In response to a question concerning Condition 35, Mr. Goulet stated that he did not know what TransCanada was doing to comply with that condition. *PUC Tr.*, AR 024260-61. Mr. Goulet's sworn testimony was inconsistent with his own sworn statements contained in the *Certification*. This alone should preclude TransCanada from relying on the *Certification* as evidence of continued compliance with the 50 conditions. Mr. Goulet's "certification" was a broad, inaccurate legal conclusion for which he admittedly lacks sufficient knowledge. It was neither sufficient to meet TransCanada's burden of proof nor to shift the burden of proof in this case to the Tribe and other intervenors. The Circuit Court therefore erred in issuing the *Order* and upholding the Commission's application of the burden of proof.

C. TRANSCANADA FAILED TO PROFFER SUFFICIENT EVIDENCE THROUGH ITS ATTACHED DOCUMENTS AND TESTIMONY AT THE EVIDENTIARY HEARING TO PROVE COMPLIANCE WITH ALL 50 CONDITIONS.

The Commission and TransCanada assert, and the Circuit Court agreed, that even if the *Certification* alone does not constitute substantial evidence, TransCanada provided substantial evidence to prove continued compliance with all 50 conditions of the 2010 Permit. TransCanada and the Circuit Court similarly claim that it is demonstrably untrue that it failed to produce substantial evidence, as "31,00 plus pages of record, nine days of hearing, and 2,507 pages of evidentiary transcript and dozens of exhibits were 'sufficiently adequate to support a conclusion in this case.'" *Cir. Ct. Decision* at 20; *TC Appeal Br. in Response to Common Arguments* at 16. However, identifying the number of transcript pages and the length of the evidentiary hearing does nothing to indicate what substantive evidence TransCanada actually presented to fulfill its burden. In fact, while the *Order* found that the voluminous nature of the record supported a conclusion, the Court seemingly bypassed any analysis as to whether the documents or testimony provided by TransCanada amounted to substantial evidence supporting the conclusion of the Commission. *Cir. Ct. Decision* at 20.

In addition to its *Certification* discussed *supra*, TransCanada's *2014 Petition* included two appendices which it claimed equated substantial evidence satisfying its burden of proof. *TC Letter re: Certification,* AR 000045. Appendix B is entitled "TransCanada's June 30, 2014 Quarterly Report to the Commission," a report which was otherwise required under Condition 8 of the 2010 Permit, and included a table with the status of TransCanada's implementation of the 50 permit conditions. AR 000049-78. Appendix C, commonly referred to as the "Tracking Table of Changes," outlined 30 findings of fact from the *2010 Final Decision* that had changed since its issuance in 2010.

AR 000079-83. While Appendix B could have provided relevant evidence to the Commission, its probative worth as to TransCanada's continued compliance was limited by definitive statements of future compliance without any accompanying plan or evidence showing how compliance would be - and was being - achieved. Likewise, Appendix C does nothing to prove TransCanada's continued compliance, but rather attests to the fact the 2014 Project TransCanada put forth in its application for certification is a different project from the 2010 Project originally permitted in 2010. Listing the Commission's findings of fact that have changed fell fatally short of TransCanada's burden to affirmatively prove that the project continued to meet the 50 conditions under these changed circumstances.

The evidence proffered by TransCanada at the evidentiary hearing also failed to prove compliance with each of the 50 conditions contained in the 2010 Permit. Despite TransCanada's contentions, none of evidence or testimony submitted during the evidentiary hearing constituted substantive evidence that TransCanada continued to meet the 50 conditions. A cursory review of the hearing transcripts shows that the vast majority of testimony gathered from TransCanada's witnesses was based on the Tribe's and other intervenors' cross examinations, and is composed of recitals of statutory language and general conclusions as to TransCanada's *ability* to meet the 50 permit conditions. *See PUC Tr.*, AR 027456-59 (Direct Testimony of Corey Goulet, 027467-71 (Direct Testimony of Meera Kothari), 027486 (Direct Testimony of Heidi Tilquist); 027508-12 (Direct Testimony of Jon Schmidt).

During the evidentiary hearing, TransCanada also either entirely failed to address Conditions 2-4, 7, 9-11, 14, 17-23, 25, 28, 33, 37-40, 45, and 46, or failed to address

them in their entirety. The record is void of any reference to most of these conditions. Those conditions that were addressed during the hearing were inadequate or refuted by further testimony. *YST Post Hrg. Reply Br.*, AR 041269-70. Conditions such as 1-3, 5, 7, 23, 34, 42, and 43 may have been touched on by TransCanada's witnesses, but their testimony on those conditions was rebutted by intervenor testimony. *Id.*; *PUC Tr.*, AR 007536-42, 007984-85, 021935, 024563, 024792-95, 024838-39, 026301-02, 026909-10.

For example, Condition 1 requires compliance with all applicable laws and regulations in TransCanada's construction and operation of the 2010 Project. Such laws include property laws and laws relating to water rights. Intervenors provided testimony as to "*Winters* rights," which are water rights retained by tribes, and which would be violated if the project is constructed. *PUC Tr.*, AR 026828-29. As testified to by Doug Crow Ghost, no federal or state agency has taken into account potential impacts of the pipeline on tribal water rights. *Id*. Just because it has not yet been determined how these legally protected rights will be violated does not mean they will not be violated. Nor does it mean TransCanada is exempt from the laws that protect them. By failing to acknowledge the existence of or need to comply with the tribes' water rights, TransCanada failed to prove compliance with Condition 1.

For the foregoing reasons, TransCanada has failed to meet its burden of proof to certify that the proposed project continued to meet all 50 conditions on which the 2010 Permit was granted. TransCanada has failed to meet its burden of proof for certification and the Circuit Court thus committed reversible error when it failed to determine that the Commission's findings were arbitrary and capricious, given the lack of substantive evidence submitted in the record.

V. THE COMMISSION ERRED WHEN IT CONCLUDED THAT TRANSCANADA IS AS *ABLE* TODAY TO MEET THE CONDITIONS UPON WHICH THE 2010 PERMIT WAS ISSUED, AND BY BASING ITS DECISION ON WHETHER TRANSCANADA CONTINUES TO BE *ABLE* TO MEET THE 2010 PERMIT CONDITIONS.

The Circuit Court committed reversible error when it upheld the Commission's decision that TransCanada met its burden of proof by submitting evidence of its current *ability* to meet permit conditions, rather than evidence that it continued to actually meet those conditions. *Cir. Ct. Decision* at 15-16, 20. The issue for which TransCanada bore the burden of proof was whether or not the project "*continues to* meet the conditions upon which the permit was issued." SDCL 49-41B-27 (emphasis added). The statute does not say that the applicant can certify that the project *can* meet the conditions upon which the permit was issued. *Id.* The *ability* of a project to comply with permit conditions is not relevant to certification. Notwithstanding the plain statutory language, the Commission concluded that "[TransCanada] is as able today to meet the conditions as it was when the permit was issued… [TransCanada] offered sufficient evidence to show that [TransCanada] can continue to meet the conditions." *2016 Final Decision* at 27 (emphasis added). The Commission applied the wrong standard for certification, and the Circuit Court upheld this incorrect standard. *Id.*; *Cir. Ct. Decision* at 15-17. TransCanada failed to prove that it *continued to* meet the conditions upon which the 2010 Permit was issued, therefore it failed to meet its burden of proof and the Circuit Court should have overturned the Commission's decision. The Circuit Court committed reversible error by upholding the wrong standard for certification, and its decision must be reversed.

VI. THE COMMISSION ERRED WHEN IT ISSUED THE *ORDER GRANTING MOTION TO PRECLUDE CONSIDERATION OF ABORIGINAL TITLE OR USUFRUCTUARY*

***RIGHTS* AND PRECLUDED TESTIMONY AND CONSIDERATION OF TRIBAL TREATY RIGHTS.**

The Circuit Court committed reversible error when it upheld the Commission's issuance of the *Order Granting Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights* and the Commission's preclusion of testimony and consideration of tribal treaty rights. *Cir. Ct. Decision* at 34. Further, the Circuit Court committed reversible error in finding no clear error when the Commission found no authority that Native American tribes have usufructuary rights with respect to the proposed pipeline route. *Id*. Under SDCL 49-41B-27, TransCanada had the burden of proof to show that its certification was valid. *2014 Final Decision* at AR 031694. This means that the Commission had the obligation to consider all evidence relevant to whether or not TransCanada properly certified that the 2014 Project continued to meet the conditions upon which the 2010 Permit was issued. Furthermore, as a matter of due process, the Tribe was entitled to present all relevant evidence, even if such evidence is controversial.

On May 26, 2015, TransCanada filed *Applicant's Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights*, seeking to preclude the Commission from considering aboriginal title or usufructuary rights in its certification determination. *TC Mtn. to Preclude*, AR 006813-22. TransCanada based its motion on three allegations: 1) that the Commission lacks authority to determine whether such rights exist; 2) that assertion of such rights is a challenge to the proposed route, over which the Commission lacks authority; and 3) that such rights do not exist with respect to the proposed project's route. All three of these allegations were made in error and should have been rejected. However, the Circuit Court affirmed the Commission's decision,

A. COMMISSION'S AUTHORITY OVER LAND USE RIGHTS

While the Commission certainly lacked jurisdiction to adjudicate land use rights in this matter for purposes *other than* its own determination on permit certification, the Commission just as clearly *did* have authority to take those claims and rights into account when it made the certification determination, and the Circuit Court erred in finding otherwise. As stated above, the Commission was required to hear all relevant evidence to make an informed, reasoned decision. To the extent tribal land use rights were relevant, the Commission should have allowed testimony and argument pertaining to those rights. The Tribe's 1851 Fort Laramie Treaty Territory encompasses the full route of the proposed pipeline from the point where it enters South Dakota to the point where it exits South Dakota. *See* Treaty of Fort Laramie with Sioux, etc., Sept. 17, 1851, art. 5, 11 Stat. 749; KXL Pipeline Map, AR 000048. Pursuant to Condition 1 and SDCL 49-41B-27, TransCanada was required to show continued compliance with applicable laws, including federal law, in its construction and operation of the pipeline. *2010 Final Decision* at 25. The Tribe's usufructuary rights are protected by federal law, making those rights relevant to the proceeding. Because the 1851 Fort Laramie Treaty reserved usufructuary rights to the Tribe in the lands that would be impacted by the pipeline, the Commission was required to consider those rights and the impact of the pipeline on those rights. The Circuit Court erred in finding otherwise. *Cir. Ct. Decision* at 34.

B. COMMISSION'S AUTHORITY OVER ROUTE AND RELATED ISSUES

The Circuit Court erroneously upheld TransCanada's and the Commission's position that the Commission is prohibited from considering evidence related to the proposed route. *Cir. Ct. Decision* at 34. While the Commission is restricted from selecting or altering the route (SDCL 49-41B-36), it is necessary that the Commission

consider factors tied to the location of a proposed project when those factors are relevant to its certification decision pursuant to SDCL § 49-41B-27. Although the Tribe's assertion of its usufructuary rights did pertain to the route of the proposed pipeline, the impact on those rights was nonetheless a permissible consideration for the Commission under Chapter 49-41B. Under TransCanada's and the Commission's logic, the Commission would be unable to hear all relevant facts about the disadvantages of a proposed project because many of those are directly related to the route. The Commission would be restricted to considering only broad concerns about the project as a whole, unable to consider potential impacts to specific locations such as rivers, residential areas, or specific hazards. This is clearly not what the legislature intended.

The legislature enacted SDCL Chapter 49-41B in order to balance the welfare of the people and the environmental quality of the state with the necessity of expanding industry. SDCL § 49-41B-1. To ensure that new facilities will produce minimal adverse effects on the environment and upon the citizens, the legislature requires that a "facility may not be constructed or operated in this state without first obtaining a permit from the commission." *Id*. This cannot be done without giving consideration to the environment and citizens in the vicinity of a proposed project's route.

Though the Commission cannot route a facility, it can deny a permit. SDCL 49-41B-36 directs that "[n]othing in this chapter is a delegation to the commission of the authority to route a transmission facility." However, "SDCL 49-41B-20 grants the PUC the authority to approve or to disapprove permit applications, <u>including the proposed route</u>." *In re Nebraska Pub. Power Dist. Etc.*, 354 N.W.2d 713, 721 (S.D. 1984) (emphasis added). Furthermore, if an application is disapproved based on the route, "the

applicant can revise the route and seek PUC approval. SDCL 49-41B-22.1 through 49-41B-22.2." *Id*. Thus, while Commission cannot accept a proposed reroute submitted by another party or propose a reroute itself, it is clearly within the Commission's authority to deny a permit – and therefore to deny permit certification - for reasons relating to the proposed route.

C. EXISTENCE OF TRIBAL USUFRUCTUARY RIGHTS ALONG PROPOSED ROUTE

TransCanada's allegation that the Tribe does not have usufructuary rights to the land along the proposed project route (inherently asking the Commission to make a determination that the tribe does not have such rights) is not only false but also absurd, given that TransCanada claimed the Commission lacked authority to make that determination. TransCanada therefore provided no valid basis for its motion, which the Commission should have denied.

Finally, the Circuit Court erred when it found "no clear error was committed when the [Commission] found no authority that Native American Tribes have aboriginal title or usufructuary rights with respect to the proposed route of the Keystone XL Pipeline." *Cir. Ct. Decision* at 34. The Tribe's usufructuary rights in the land at issue have existed since the Treaty at Fort Laramie was signed in 1851. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 352 (7th Cir. 1983) ("Both aboriginal and treaty-recognized title carry with them a right to *use* the land for the Indians' traditional subsistence activities of hunting, fishing, and gathering." (Emphasis in original.)). The 1851 Fort Laramie Treaty is the authority for the Tribe's usufructuary rights along the pipeline route. Treaty of Fort Laramie with Sioux, etc., Sept. 17, 1851, art. 5, 11 Stat. 749. The Commission is authorized to consider the Tribe's concerns with respect to its usufructuary rights regardless of whether those rights have

been adjudicated as such in court. While the South Dakota Supreme Court has made clear that the Commission cannot exercise *purely* judicial functions, it does not and cannot prohibit the Commission from interpreting the law. To do so would preclude the Commission from functioning as an administrative tribunal.

Because the Commission's decision to preclude relevant testimony and evidence violated the Tribe's due process rights and severely impaired the Commission's ability to fulfill its duties under SDCL Chapter 49-41B, the Circuit Court's order affirming the Commission's decision must be reversed.

VII. THE COMMISSION ERRED WHEN IT DECIDED THAT TRIBES SHOULD NOT BE TREATED AS LOCAL UNITS OF GOVERNMENT, AND THAT NO PERMIT CONDITION REQUIRED TRANSCANADA TO CONSULT WITH TRIBES ABOUT THE KEYSTONE XL PIPELINE.

The Circuit Court committed reversible error when it upheld the Commission's decision that tribes should not be treated as local units of government and that no permit condition required TransCanada to consult with tribes about the Keystone XL pipeline. *Cir. Ct. Decision* at 36. SDCL 49-41B-22(4) requires a permit applicant to consider "the views of governing bodies of affected local units of government." (Emphasis added.) Furthermore, Condition 34,b of the 2010 Permit requires TransCanada to "seek out and consider local knowledge, including the knowledge of…local landowners and government officials." *2014 Petition App. B,* AR 000072 (emphasis added). With respect to the Tribe, TransCanada did neither.

In the *2016 Final Decision,* the Commission pointed out that the statute does not specify that it applies to Tribes, but the Commission left out the fact that the statute does not specify that it applies counties, municipalities, or any other units of government either. *2016 Final Decision,* AR 031690. Rather than following the plain language of

the statute, the Commission essentially read words and requirements into the statute that are simply not there. The Circuit Court found that the Tribe "is not a local unit of government within the State of South Dakota's government structure." *Cir. Ct. Decision* at 36 (emphasis added). The exact language of the statute reads: "The applicant has the burden of proof to establish that … (4) the facility will not unduly interfere with the orderly development of the region with due consideration having been given to the views of governing bodies of affected local units of government." SDCL 49-41B-22 (emphasis added). The statute clearly does *not* require that the local unit of government be "within the State of South Dakota's government structure," as the Circuit Court erroneously found. *Cir. Ct. Decision* at 36. Had the South Dakota legislature intended that only the views of local units of government within South Dakota's government structure must be considered, it would have included such language in the statute. The fact that the Tribe is not part of the State's government structure has no bearing on this proceeding.

Several rules of statutory construction and interpretation support this point. One such rule is *expressium facit cessare tacitum*, roughly translating to what is expressed renders what may be implied as silent. *See e.g., Taylor v. Michigan Public Utilities Commission*, 217 Mich. 400, 186 N.W. 485 (1922). In this instance, the Circuit Court implied, from the clear and express language of SDCL 49-41B-22(4), that "local units of government" only refers to local units of government within the governmental structure of South Dakota. Such an interpretation is in conflict with the rule of *expressium facit cessare tacitum* because the interpretation relies on the implication that "local units of government" was only intended to apply to South Dakota units of government, rather

than interpreting the language as it is expressly written to include all types of units of local government without limitation.

Another such rule is the plain meaning rule. The Supreme Court briefly summarized this rule in *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917), noting that "…the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, the sole function of the courts is to enforce it according to its terms." Other courts have also interpreted this rule, stating that "[t]here is no safer nor better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses…" *Swarts v. Siegel*, 117 F. 13, 19 (8th Cir. 1902). Although the language of SDCL 49-41B-22(4) is clear and unambiguous, the Circuit Court went beyond the language to draw out the erroneous conclusion that the intention and purpose of the language was meant to apply only to local units of South Dakota state government. This interpretation disregards the plain language and meaning of the statute, and, in doing so, violates the well-established plain meaning rule of statutory interpretation.

Because SDCL 49-41B-22 required TransCanada to confer with the Tribe, as a local unit of government, and take its views into consideration, the Circuit Court committed reversible error by upholding the Commission's decision to the contrary.

CONCLUSION

Wherefore, the Tribe requests that the Court reverse the decision of the Circuit Court upholding the Commission's *2016 Final Decision* and remand the matter to the Commission with instructions to vacate the certification and dismiss the *2016 Petition*.

Respectfully submitted this 12th day of October, 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 the appendix, contains 9,686 words as determined by reliance on Microsoft Word.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF PUC DOCKET HP14-001, ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE	FILE NO. 28331 **APPELLANT YANKTON SIOUX TRIBE'S APPENDIX TO ITS OPENING BRIEF**

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

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

PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FINDINGS OF FACT

Parties

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

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

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

Procedural Findings

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

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

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

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

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

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

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

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

A. Applicant's March 12, 2009, Direct Testimony.
- Robert Jones
- John Phillips
- Richard Gale
- Jon Schmidt
- Meera Kothari
- John Hayes
- Donald Scott
- Heidi Tillquist
- Tom Oster

B. Supplemental Direct Testimony of August 31, 2009.
- John Phillips

C. Intervenors' Direct Testimony of September 11, 2009.
- David Niemi
- Debra Niemi

D. Staff's September 25, 2009, Direct Testimony.
- Kim McIntosh
- Brian Walsh
- Derric Iles
- Tom Kirschenmann
- Paige Hoskinson Olson
- Michael Kenyon
- Ross Hargove
- Patrick Robblee
- James Arndt
- William Walsh
- Jenny Hudson
- David Schramm
- William Mampre
- Michael K. Madden
- Tim Binder

E. Applicant's Updated Direct and Rebuttal Testimony.
- Robert Jones Updated Direct (10/23/09)
- Jon Schmidt Updated Direct and Rebuttal (10/19/09)
- Meera Kothari Updated Direct and Rebuttal (10/19/09)
- Donald M. Scott Updated Direct (10/19/09)
- John W. Hayes Updated Direct (10/19/09)
- Heidi Tillquist Updated Direct (10/20/09)
- Steve Hicks Direct and Rebuttal (10/19/09)

F. Staff's Supplemental Testimony of October 29, 2009.
- William Walsh
- William Mampre
- Ross Hargrove

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

Applicable Statutes and Regulations

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

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

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

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

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

The Project

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

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

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

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

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

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

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

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

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

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

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

Demand for the Facility

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

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

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

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

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

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

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

Environmental

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Design and Construction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ex TC-1, Exhibit B.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Operation and Maintenance

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

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

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

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

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

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

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

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

97. As required by US DOT regulations, Keystone will prepare an emergency response plan ("ERP") for the system. Ex TC-11, ¶ 13. The ERP will be submitted to PHMSA for review prior to commencement of pipeline operations. Ex TC-11, ¶ 13. The Commission finds that the ERP and manual of written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies as required under 49 CFR195.402 should also be submitted to the Commission at the time it is submitted to PHMSA to apprise the Commission of its details. Keystone has agreed to do this. The Commission has so specified in Condition 36.

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

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

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

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

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

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

Rural Water Crossings

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

Alternative Routes

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

106. SDCL 49-41B-36 explicitly states that Chapter 49-41B "shall not be construed as a delegation to the Public Utilities Commission of the authority to route a facility." The Commission accordingly finds and concludes that it lacks authority to compel the Applicant to select an alternative route or to base its decision on whether to grant or deny a permit for a proposed facility on whether the selected route is the route the Commission itself might select.

Socio-Economic Factors

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

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

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

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

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

General

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Commission accordingly concludes that it lacks authority (i) to compel the Applicant to select an alternative route or (ii) to base its decision on whether to grant or deny a permit for a proposed facility on whether the selected route is the route the Commission might itself select.

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

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

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

It is therefore

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

NOTICE OF ENTRY AND OF RIGHT TO APPEAL

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

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

CERTIFICATE OF SERVICE

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

By: _____

Date: 06/29/10

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

DUSTIN M. JOHNSON, Chairman

STEVE KOLBECK, Commissioner

GARY HANSON, Commissioner

Exhibit A

AMENDED PERMIT CONDITIONS

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

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

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

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

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

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

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

II. Reporting and Relationships

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

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

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

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

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

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

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

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

III. Construction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20. Keystone shall implement the following sediment control practices:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b) Keystone shall maintain access to all residences at all times, except for periods when it is infeasible to do so or except as otherwise agreed between Keystone and the occupant. Such periods shall be restricted to the minimum duration possible and shall be coordinated with affected residential landowners and occupants, to the extent possible.

c) Keystone shall install temporary safety fencing, when reasonably requested by the landowner or occupant, to control access and minimize hazards associated with an open trench and heavy equipment in a residential area.

d) Keystone shall notify affected residents in advance of any scheduled disruption of utilities and limit the duration of such disruption.

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

f) Keystone shall separate topsoil from subsoil and restore all areas disturbed by construction to at least their preconstruction condition.

g) Except where practicably infeasible, final grading and topsoil replacement, installation of permanent erosion control structures and repair of fencing and other structures shall be completed in residential areas within 10 days after backfilling the trench. In the event that seasonal or other weather conditions, extenuating circumstances, or unforeseen developments beyond Keystone's control prevent compliance with this time frame, temporary erosion controls and appropriate mitigative measures shall be maintained until conditions allow completion of cleanup and reclamation.

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

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

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

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

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

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

IV. Pipeline Operations, Detection and Emergency Response

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

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

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

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

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

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

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

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

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

V. Environmental

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

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

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

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

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

VI. Cultural and Paleontological Resources

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

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

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

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

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

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

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

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

VII. Enforcement and Liability for Damage

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

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

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

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

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

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

Exhibit B

RULINGS ON PROPOSED FINDINGS OF FACT

Rulings on Applicants' Proposed Findings of Fact

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

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE PETITION OF TRANSCANADA KEYSTONE PIPELINE, LP FOR ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE	**FINAL DECISION AND ORDER FINDING CERTIFICATION VALID AND ACCEPTING CERTIFICATION; NOTICE OF ENTRY** **HP14-001**

PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

An evidentiary hearing was held beginning on Monday, July 27, 2015, in Room 414 of the State Capitol Building. On July 30, 2015, the Commission issued a Notice of Additional Hearing dates extending the hearing to include Saturday, August 1, 2015, and then continuing from August 3-5 and 6-7, 2015, if necessary. The hearing concluded near the end of the business day on August 5, 2015. The evidentiary hearing was conducted by Commission General Counsel John J. Smith, who acted as Hearing Examiner. Commissioners Chris Nelson and Gary Hanson attended the hearing in person. Due to medical treatment, Commissioner Kristie Fiegen elected to participate by reviewing the hearing transcript as allowed under SDCL § 1-26-24. TR 46-50.[3] On October 5, 2015, Commissioner Fiegen filed a Certification attesting to the fact that she had read the entirety of the hearing transcripts.

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

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

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

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

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

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

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

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

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

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

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

FINDINGS OF FACT

Parties

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

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

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

Procedural Findings

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

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

Pre-filed Direct Testimony and Exhibits

Keystone

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

Staff

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

Intervenors

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

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

Sue Sibson's Testimony

Cheyenne River Sioux Tribe's Testimony

Carlyle Ducheneaux's Testimony

Steve Vance's Testimony

Yankton Sioux Tribe's Testimony

Faith Spotted Eagle's Testimony

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

Standing Rock Sioux Tribe's Testimony

Waste Win Young's Testimony

Phyllis Young's Testimony

Doug Crow Ghost's Testimony

Linda Black Elk's Testimony

Rosebud Sioux Tribe's Testimony

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Pre-Filed Rebuttal Testimony and Exhibits

Staff

Darren Kearney's Rebuttal Testimony

Standing Rock Sioux Tribe

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

Rosebud Sioux Tribe

Jennifer Galindo's Rebuttal Testimony
- Exhibit 11 - Curriculum Vitae Jennifer Galindo Archeologist
- Exhibit 12 - Map from Programmatic Agreement
- Exhibit 13 - RST Email and Letter to Paige Olson
- Exhibit 14 - TransCanada's Policy regarding Native American Relations

Ian Goodman and Brigid Rowan's Rebuttal Testimony Confidential (removed at the request of the party)
- Exhibit 15 - Changes to the Economic Costs and Benefits of the Keystone XL Pipeline for South Dakota Confidential (removed at the request of the party)

Paula Antoine's Rebuttal Testimony
- Exhibit 16 - Rosebud Sioux Tribe's Resolution No. 2014-42 - Amended: Petition
- Exhibit 17 - South Dakota Codified Laws 49-41B-1, 49-41B-11 and 49-41B-22

Amended Rebuttal Testimony of Paula Antoine

Chief Leonard Crow Dog's Rebuttal Testimony

Keystone

Corey Goulet's Rebuttal Testimony

Dan King's Rebuttal Testimony and Resume

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

Meera Kothari's Rebuttal Testimony

Jon Schmidt's Rebuttal Testimony

Heidi Tillquist's Rebuttal Testimony
- Exhibit List
- Exhibit 1: Diluted Bitumen-Derived Crude Oil: Relative Pipeline Impacts (Battelle 2012)
- Exhibit 2: Comparison of the Corrosivity to Dilbit and Conventional Crude (Been 2011) Confidential (not available to the public)
- Exhibit 3: Effects of Diluted Bitumen on Crude Oil Pipelines (National Academy of Sciences 2013)
- Exhibit 4: Crude Oil at the Bemidji Site: 25 Years of Monitoring, Modeling, and Understanding (Essaid et al. 2011)
- Exhibit 5: Use of Long-Term Monitoring Data to Evaluate Benzene, MTBE and TBA Plume Behavior in Groundwater at Retail Gasoline Sites (Kamath et al. 2012)

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

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

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

Amended Rebuttal Testimony of Meera Kothari

Dakota Rural Action

Evan Vokes' Rebuttal Testimony
John Harter's Rebuttal Testimony

Yankton Sioux Tribe

Member of the Yankton Sioux Tribe Business & Claims Committee Consisting of Elected Members: Robert Flying Hawk, Quentin JB Brugier, Jr., Mona Wright, Justin Songhawk, Leo O'Conner, Jean Archambeau, Glenford Sam Sully, Jason Cooke, and Everdale Song Hawk's Rebuttal Testimony
Exhibit A - Keystone's Responses to Yankton Sioux Tribe's First Interrogatories and Request for Production of Documents
Exhibit B - Appendix S - Programmatic Agreement and Record of Tribal Contact

Exhibit C - Appendix E - Amended Programmatic Agreement and Record of Consultation
Faith Spotted Eagle's Rebuttal Testimony
Exhibit A - Appendix S - Programmatic Agreement and Record of Tribal Contact
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Intertribal Council On Utility Policy

Prefiled Testimony of Dr. Robert Oglesby
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Appendix: James E. Hansen Comments Charts
Exhibit 1 - James E. Hansen's Resume
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Surrebuttal Testimony

Cindy Myers' Surrebuttal Testimony

Keystone

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

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

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

Applicable Statute

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

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

Updates to the Project since June 29, 2010

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Keystone's Ability to Meet the Permit Conditions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It is therefore

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

NOTICE OF ENTRY AND OF RIGHT TO APPEAL

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

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

CERTIFICATE OF SERVICE

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

By: Karen E. Cremer

Date: 1-21-16

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

CHRIS NELSON, Chairman

KRISTIE FIEGEN, Commissioner

GARY HANSON, Commissioner

CIRCUIT COURT OF SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT

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June 16, 2017

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

MEMORANDUM DECISION

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

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

JUDICIAL NOTICE

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

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

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

QUESTIONS PRESENTED

Appellants join in these three substantive issues:

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

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

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

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

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

V. Whether the PUC committed clear error by ordering that pre-filed testimony be submitted

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

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

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

VII. Whether the PUC erroneously excluded DRA exhibits for untimely disclosure?

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

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

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

Next, Yankton Sioux Tribe appeals certain tribal rights issues:

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

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

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

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

STANDARD OF REVIEW

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

> The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> > (1) In violation of constitutional or statutory provisions;
> >
> > (2) In excess of the statutory authority of the agency;
> >
> > (3) Made upon unlawful procedure;
> >
> > (4) Affected by other error of law;
> >
> > (5) Clearly erroneous in light of the entire evidence in the record; or
> >
> > (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
>
> A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment."

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

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

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

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

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

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

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

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

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

ANALYSIS AND DECISION

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

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

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

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

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

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

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

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

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

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

II.

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

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

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

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

Cheyenne River Sioux Tribe Brief at 6.

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

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

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

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

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

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

DRA also joins in this issue,

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

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

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

> "The Commission's final decision does not indicate that it shifted any burden to the Appellants other than the

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

Id. at 10-11.

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

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

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

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

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

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

III.

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SDCL § 15-6-26(b)(1).

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

> "Upon motion by a party or by the person from whom discovery is sought or has been taken, or other person who would be adversely affected, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending, on matters relating to deposition, interrogatories, or other discovery, or alternatively, the court in the circuit where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> (4) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters."

SDCL § 15-6-26(c)(4).

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

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

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

Id. at 10 (internal citations omitted).

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

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

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

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

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

PUC Reply Brief to Yankton Sioux Tribe at 14.

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

V.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII.
Whether the PUC erroneously excluded DRA exhibits for untimely disclosure?

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

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

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

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

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

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

VIII.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 30 (internal citations omitted).

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

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

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

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

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

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

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

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

In response, PUC asserts the following,

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

> National Historic Preservation Act. AR 020144. On page 11 of the Record of Consultation, all of the meetings, e-mails, telephone calls, and letters between the Department of State and the Standing Rock Sioux Tribe are listed. The record of consultation establishes that the Standing Rock Sioux Tribe was consulted by the Department of State.
>
> Furthermore, multiple witnesses testified that the Tribes in South Dakota passed resolutions opposing the Project and that [TransCanada's] representatives were not welcome on Tribal land. TR 1745-1746, 1873, 2084, 2096-2097, 2104-2105 (AR 026353-02635[4], 026481, 026888, 026900-02690[]1, 026908-026909)."

PUC Reply Brief to Yankton Sioux Tribe at 29.

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

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

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

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

Id.

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

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

SDCL § 49-41B-1.

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

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

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

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

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

SDCL § 49-41B-4.2 reads, in part,

> "The South Dakota Legislature before approving a proposed trans-state transmission line shall find that each of the following criteria has been met:
> . . .
> (4) That the proposed trans-state transmission line and route will not unduly

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

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

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

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

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

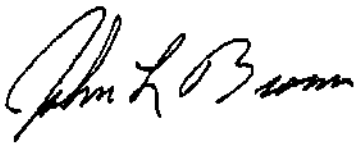
TransCanada and the Yankton Sioux Tribe when the land for which they claim knowledge is not Tribal land.

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

CONCLUSION

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

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



Honorable John L. Brown
Presiding Sixth Circuit Court Judge

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) :SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT

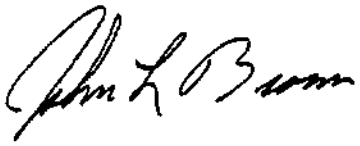
	)	
IN THE MATTER OF PUC DOCKET HP 14-0001, ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP 09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE	)	CIV NO. 16-33
	)	ORDER

WHEREAS, the Court enters its Memorandum Decision on June 19, 2017, and that Memorandum Decision constitutes the Court's findings of fact and conclusions of law, and expressly incorporates by reference the same herein, it shall be and hereby is

ORDERED that the decision of the PUC is AFFIRMED.

Dated this 19th day of June, 2017.

BY THE COURT:



The Honorable John L. Brown
Circuit Court Judge

ATTEST:

Clerk of Courts
(SEAL)

2 KAPP 594; 11 Stat. 749

September 17, 1851

TREATY OF FORT LARAMIE WITH SIOUX, ETC., 1851

Articles of a treaty made and concluded at Fort Laramie, in the Indian Territory, between D. D. Mitchell, superintendent of Indian affairs, and Thomas Fitzpatrick, Indian agent, commissioners specially appointed and authorized by the President of the United States, of the first part, and the chiefs, headmen, and braves of the following Indian nations, residing south of the Missouri River, east of the Rocky Mountains, and north of the lines of Texas and New Mexico, viz, the Sioux or Dahcotahs, Cheyennes, Arrapahoes, Crows, Assinaboines, Gros-Ventre Mandans, and Arrickaras, parties of the second part, on the seventeenth day of September, A.D. one thousand eight hundred and fifty-one. nA.

nA. This treaty as signed was ratified by the Senate with an amendment changing the annuity in Article 7 from fifty to ten years, subject to acceptance by the tribes. Assent of all tribes except the Crows was procured (see Upper Platte C., 570, 1853, Indian Office) and in subsequent agreements this treaty has been recognized as in force (see post p. 776).

ARTICLE 1. The aforesaid nations, parties to this treaty, having assembled for the purpose of establishing and confirming peaceful relations amongst themselves, do hereby covenant and agree to abstain in future from all hostilities whatever against each other, to maintain good faith and friendship in all their mutual intercourse, and to make an effective and lasting peace. nB.

nB. Peace to be observed.

ARTICLE 2. The aforesaid nations do hereby recognize the right of the United States Government to establish roads, military and other posts, within their respective territories. nC.

nC. Roads may be established.

ARTICLE 3. In consideration of the rights and privileges acknowledged in the preceding article, the United States bind themselves to protect the aforesaid Indian nations against the commission of all depredations by the people of the said United States, after the ratification of this treaty. nD.

nD. Indians to be protected.

ARTICLE 4. The aforesaid Indian nations do hereby agree and bind themselves to make restitution or satisfaction for any wrongs committed, after the ratification of this treaty, by any band or individual of their people, on the people of the United States, whilst lawfully residing in or passing through their respective territories. nE.

nE. Depredations on whites to be satisfied.

ARTICLE 5. The aforesaid Indian nations do hereby recognize and acknowledge the following tracts of country, included within the metes and boundaries hereinafter designated, as their respective territories, viz: nF.

nF. Boundaries of lands.

The territory of the Sioux or Dahcotah Nation, commencing the mouth of the White Earth River, on the Missouri River; thence in a southwesterly direction to the forks of the Platte River; thence up the north fork of the Platte River to a point known as the Red Bute, or where the road leaves the river; thence along the range of mountains known as the Black Hills, to the head-waters of Heart River; thence down Heart River to its mouth; and thence down the Missouri River to the place of beginning. nG.

nG. Sioux.

The territory of the Gros Ventre, Mandans, and Arrickaras Nations, commencing at the mouth of Heart River; thence up the Missouri River to the mouth of the Yellowstone River; thence up the Yellowstone River to the mouth of Powder River in a southeasterly direction, to the head-waters of the Little Missouri River; thence along the Black Hills to the head of Heart River, and thence down Heart River to the place of beginning. nH.

nH. Grosventre, etc.

The territory of the Assinaboin Nation, commencing at the mouth of Yellowstone River; thence up the Missouri River to the mouth of the Muscle-shell River; thence from the mouth of the Muscle-shell River in a southeasterly direction until it strikes the head-waters of nI.

nI. Assiniboin.

Big Dry Creek; thence down that creek to where it empties into the Yellowstone River, nearly opposite the mouth of Powder River, and thence down the Yellowstone River to the place of beginning.

The territory of the Blackfoot Nation, commencing at the mouth of Muscle-shell River; thence up the Missouri River to its source; thence along the main range of the Rocky Mountains, in a southerly direction, to the head-waters of the northern source of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence across to the head-waters of the Muscle-shell River, and thence down the Muscle-shell River to the place of beginning. nJ.

nJ. Blackfoot.

The territory of the Crow Nation, commencing at the mouth of Powder River on the Yellowstone; thence up Powder River to its source; thence along the main range of the Black Hills and Wind River Mountains to the head-waters of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence to the head waters of the Muscle-shell River; thence down the Muscle-shell River to its mouth; thence to the head-waters of Big Dry Creek, and thence to its mouth. nK.

nK. Crow.

The territory of the Cheyennes and Arrapahoes, commencing at the Red Bute, or the place where the road leaves the north fork of the Platte River; thence up the north fork of the Platte River to its source; thence along the main range of the Rocky Mountains to the head-waters of the Arkansas River; thence down the Arkansas River to the crossing of the Santa Fe road; thence in a northwesterly direction to the forks of the Platte River, and thence up the Platte River to the place of beginning. nL.

nL. Cheyenne and Arapaho.

It is, however, understood that, in making this recognition and acknowledgement, the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described. nM.

nM. Rights in other lands.

ARTICLE 6. The parties to the second part of this treaty having selected principals or head-chiefs for their respective nations, through whom all national business will hereafter be conducted, do hereby bind themselves to sustain said chiefs and their successors during good behavior. nN.

nN. Head chiefs of said tribes.

ARTICLE 7. In consideration of the treaty stipulations, and for the damages which have or may occur by reason thereof to the Indian nations, parties hereto, and for their maintenance and the improvement of their moral and social customs, the United States bind themselves to deliver to the said Indian nations the sum of fifty thousand dollars per annum for the term of ten years, with the right to continue the same at the discretion of the President of the United States for a period not exceeding five years thereafter, in provisions, merchandise, domestic animals, and agricultural implements, in such proportions as may be deemed best adapted to their condition by the President of the United States, to be distributed in proportion to the population of the aforesaid Indian nations. nO.

nO. Annuities.

ARTICLE 8. It is understood and agreed that should any of the Indian nations, parties to this treaty, violate any of the provisions thereof, the United States may with hold the whole or a portion of the annuities mentioned in the preceding article from the nation so offending, until, in the opinion of the President of the United States, proper satisfaction shall have been made. nP.

nP. Annuities suspended by violation of treaty.

In testimony whereof the said D. D. Mitchell and Thomas Fitzpatrick commissioners as aforesaid, and the chiefs, headmen, and braves, parties hereto, have set their hands and affixed their marks, on the day and at the place first above written.

D. D. Mitchell

Thomas Fitzpatrick

Commissioners.

Sioux:

Mah-toe-wha-you-whey, his x mark.

Mah-kah-toe-zah-zah, his x mark.

Bel-o-ton-kah-tan-ga, his x mark.

Nah-ka-pah-gi-gi, his x mark.

Meh-wha-tah-ni-hans-kah, his x mark.

Cheyennes:

Wah-ha-nis-satta, his x mark.

Voist-ti-toe-vetz, his x mark.

Nahk-ko-me-ien, his x mark.

Koh-kah-y-wh-cum-est, his x mark.

Arrapahoes:

Be-ah-te-a-qui-sah, his x mark.

Neb-ni-bah-seh-it, his x mark.

Beh-kah-jay-beth-sah-es, his x mark.

Crows:

Arra-tu-ri-sash, his x mark.

Doh-chepit-seh-chi-es, his x mark.

Assinaboines:

Mah-toe-wit-ko, his x mark.

Toe-tah-ki-eh-nan, his x mark.

Mandans and Gros Ventres:

Nochk-pit-shi-toe-pish, his x mark.

She-oh-mant-ho, his x mark.

Arickarees:

Koun-hei-ti-shan, his x mark.

Bi-atch-tah-wetch, his x mark.

In the presence of - -

A. B. Chambers, secretary.

S. Cooper, colonel, U.S. Army.

R. H. Chilton, captain, First Drags.

Thomas Duncan, captain, Mounted Riflemen.

Thos. G. Rhett, brevet captain R.M.R .

W. L. Elliott, first lieutenant R.M.R.

C. Campbell, interpreter for Sioux.

John Smith, interpreter for Cheyennes.

Robert Meldrum, interpreter for the Crows.

H. Culbertson, interpreter for Assiniboines and Gros Ventres.

Francois L'Etalie, interpreter for Arickarees.

John Pizelle, interpreter for the Arrapahoes.

B. Gratz Brown.

Robert Campbell.

Edmond F. Chouteau.

S.D. Codified Laws § 49-41B-1

Current through acts received from the 2017 Special Session of the 92nd Legislative Assembly, Supreme Court Rule 17-11, and the November 8, 2016 General Election.

LexisNexis® South Dakota Codified Laws Annotated > Title 49 Public Utilities and Carriers > Chapter 49-41B Energy Conversion and Transmission Facilities

49-41B-1. Legislative findings.

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

History

SL 1977, ch 390, § 2; SL 2005, ch 250, § 1.

Annotations

Notes

Amendments.

The 2005 amendment, in the third sentence, deleted “energy conversion facilities and transmission” preceding “facilities” and preceding “facility”; substituted “commission” for “Public Facilities Commission”; and made a related change in phraseology.

Research References & Practice Aids

Administrative Code References.

ARSD 20:10:21:12, Article 10. Public Utilities, Efforts to minimize adverse effects

ARSD 20:10:21:13, Article 10. Public Utilities, Efforts relating to load management

End of Document

S.D. Codified Laws § 49-41B-20

Current through acts received from the 2017 Special Session of the 92nd Legislative Assembly, Supreme Court Rule 17-11, and the November 8, 2016 General Election.

LexisNexis® South Dakota Codified Laws Annotated > Title 49 Public Utilities and Carriers > Chapter 49-41B Energy Conversion and Transmission Facilities

49-41B-20. Final report heard by commission at final hearing — Decision on application for permit — Adoption of local review committee report.

The final report shall be heard by the Public Utilities Commission at the final hearing wherein the commission makes its decision on the application for a permit. The local review committee report may be adopted in whole or in part, at the discretion of the commission.

History

SL 1977, ch 390, § 13.

Annotations

Case Notes

Administrative Law: Agency Rulemaking: Formal Rulemaking

Energy & Utilities Law: Electric Power Industry: State Regulation: General Overview

Administrative Law: Agency Rulemaking: Formal Rulemaking

Although there is no specific designation that the South Dakota Public Utilities Commission must make a finding concerning the general variance, S.D. Codified Laws § 49-41B-20 granted the commission the authority to approve or to disapprove permit applications, including the proposed route; if the application was disapproved, the applicant could revise the route and seek commission approval. A fair interpretation of S.D. Codified Laws § 49-41B-11(2), S.D. Codified Laws § 49-41B-22.1 and S.D. Codified Laws § 49-41B-22.2 lead to the conclusion that a permit applicant could obtain a general variance upon a proper evidentiary showing and commission approval. In re Nebraska Pub. Power Dist. etc., 354 N.W.2d 713, 1984 S.D. LEXIS 355 (S.D. 1984).

Energy & Utilities Law: Electric Power Industry: State Regulation: General Overview

Although there is no specific designation that the South Dakota Public Utilities Commission must make a finding concerning the general variance, S.D. Codified Laws § 49-41B-20 granted the commission the authority to approve or to disapprove permit applications, including the proposed route; if the application was disapproved, the applicant could revise the route and seek commission approval. A fair interpretation of S.D. Codified Laws § 49-41B-11(2), S.D. Codified Laws § 49-41B-22.1 and S.D. Codified Laws § 49-41B-22.2 lead to the conclusion that a permit

applicant could obtain a general variance upon a proper evidentiary showing and commission approval. *In re Nebraska Pub. Power Dist. etc., 354 N.W.2d 713, 1984 S.D. LEXIS 355 (S.D. 1984)*.

End of Document

S.D. Codified Laws § 49-41B-27

Current through acts received from the 2017 Special Session of the 92nd Legislative Assembly, Supreme Court Rule 17-11, and the November 8, 2016 General Election.

LexisNexis® South Dakota Codified Laws Annotated > Title 49 Public Utilities and Carriers > Chapter 49-41B Energy Conversion and Transmission Facilities

49-41B-27. Construction, expansion and improvement of facilities — Certification to commission.

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.

History

SL 1977, ch 390, § 29.

End of Document

S.D. Codified Laws § 49-41B-36

Current through acts received from the 2017 Special Session of the 92nd Legislative Assembly, Supreme Court Rule 17-11, and the November 8, 2016 General Election.

LexisNexis® South Dakota Codified Laws Annotated > Title 49 Public Utilities and Carriers > Chapter 49-41B Energy Conversion and Transmission Facilities

49-41B-36. Authority to route or locate facilities not delegated to commission.

Nothing in this chapter is a delegation to the commission of the authority to route a transmission facility, or to designate or mandate location of an energy conversion facility, AC/DC conversion facility, or wind energy facility.

History

SL 1977, ch 390, § 2; SL 2005, ch 250, § 5; SL 2006, ch 242, § 6.

Annotations

Notes

Amendments.

The 2005 amendment substituted “Nothing in this chapter may” for “This chapter shall not”; substituted “commission” for “Public Utilities Commission”; and added “or wind energy facility.”

The 2006 amendment substituted “is a delegation” for “may be construed as a delegation”; inserted “AC/DC conversion facility”; and made related changes in punctuation.

End of Document

S.D. Codified Laws § 49-41B-22

Current through acts received from the 2017 Special Session of the 92nd Legislative Assembly, Supreme Court Rule 17-11, and the November 8, 2016 General Election.

LexisNexis® South Dakota Codified Laws Annotated > Title 49 Public Utilities and Carriers > Chapter 49-41B Energy Conversion and Transmission Facilities

49-41B-22. Burden of proof of applicant.

The applicant has the burden of proof to establish that:

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

(2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area;

(3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and

(4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.

History

SL 1977, ch 390, § 17; SL 1981, ch 340, § 3; SL 1991, ch 386, § 6.

Annotations

Case Notes

Energy & Utilities Law: Administrative Proceedings: General Overview

Energy & Utilities Law: Electric Power Industry: State Regulation: General Overview

Transportation Law: Interstate Commerce: Restraints of Trade

Transportation Law: Interstate Commerce: State Powers

Energy & Utilities Law: Administrative Proceedings: General Overview

Trial court properly upheld an order from the South Dakota Public Utilities Commission (PUC) granting an applicant a permit to construct a coal-fired energy conversion facility where the PUC entered a well-reasoned and informed decision when it concluded that the facility would not pose a threat of serious injury to the environment; the PUC addressed the parties' contentions regarding global warming and carbon dioxide emissions and also provided a detailed explanation of why it rejected the findings proposed by the intervenors. *In re Otter Tail Power Co., 2008 SD 5, 744 N.W.2d 594, 2008 S.D. LEXIS 5 (S.D. 2008)*.

Energy & Utilities Law: Electric Power Industry: State Regulation: General Overview

Trial court properly upheld an order from the South Dakota Public Utilities Commission (PUC) granting an applicant a permit to construct a coal-fired energy conversion facility where the PUC entered a well-reasoned and informed decision when it concluded that the facility would not pose a threat of serious injury to the environment; the PUC addressed the parties' contentions regarding global warming and carbon dioxide emissions and also provided a detailed explanation of why it rejected the findings proposed by the intervenors. *In re Otter Tail Power Co., 2008 SD 5, 744 N.W.2d 594, 2008 S.D. LEXIS 5 (S.D. 2008)*.

Transportation Law: Interstate Commerce: Restraints of Trade

Former subsection (5) of S.D. Codified Laws § *49-41B-22*, which required a transmission facility originating and ending outside South Dakota, crossing the state and delivering 25 percent or less of its design capacity to this state, to satisfy an additional condition of public necessity and convenience, regardless of the state where the area was located, violated the commerce clause of the United States Constitution and, therefore, was unconstitutional. *In re Nebraska Pub. Power Dist. etc., 354 N.W.2d 713, 1984 S.D. LEXIS 355 (S.D. 1984)*.

Former subsection (5) of S.D. Codified Laws § *49-41B-22* added nothing to the protection of public health, safety and welfare that was not provided by the first four requirements; instead, its practical effect significantly obstructed interstate electrical exchanges by requiring certain applicants to satisfy an additional burden, and was found unconstitutional. *In re Nebraska Pub. Power Dist. etc., 354 N.W.2d 713, 1984 S.D. LEXIS 355 (S.D. 1984)*.

Transportation Law: Interstate Commerce: State Powers

Former subsection (5) of S.D. Codified Laws § *49-41B-22*, which required a transmission facility originating and ending outside South Dakota, crossing the state and delivering 25 percent or less of its design capacity to this state, to satisfy an additional condition of public necessity and convenience, regardless of the state where the area was located, violated the commerce clause of the United States Constitution and, therefore, was unconstitutional. *In re Nebraska Pub. Power Dist. etc., 354 N.W.2d 713, 1984 S.D. LEXIS 355 (S.D. 1984)*.

Former subsection (5) of S.D. Codified Laws § *49-41B-22* added nothing to the protection of public health, safety and welfare that was not provided by the first four requirements; instead, its practical effect significantly obstructed interstate electrical exchanges by requiring certain applicants to satisfy an additional burden, and was found unconstitutional. *In re Nebraska Pub. Power Dist. etc., 354 N.W.2d 713, 1984 S.D. LEXIS 355 (S.D. 1984)*.

Research References & Practice Aids

Administrative Code References.

ARSD 20:10:21:12, Article 10. Public Utilities, Efforts to minimize adverse effects

ARSD 20:10:22:13, Article 10. Public Utilities, Environmental information

ARSD 20:10:22:14, Article 10. Public Utilities, Effect on physical environment

ARSD 20:10:22:15, Article 10. Public Utilities, Hydrology

ARSD 20:10:22:16, Article 10. Public Utilities, Effect on terrestrial ecosystems

ARSD 20:10:22:17, Article 10. Public Utilities, Effect of aquatic ecosystems

ARSD 20:10:22:18, Article 10. Public Utilities, Land use

ARSD 20:10:22:21, Article 10. Public Utilities, Air quality

ARSD 20:10:22:23, Article 10. Public Utilities, Community impact

ARSD 20:10:22:26, Article 10. Public Utilities, Nature of proposed energy conversion facility

ARSD 20:10:22:33, Article 10. Public Utilities, Decommissioning

ARSD 20:10:22:36, Article 10. Public Utilities, Additional information in application

ARSD 20:10:22:37, Article 10. Public Utilities, Statement required describing gas or liquid transmission line standards of construction

ARSD 20:10:22:38, Article 10. Public Utilities, Gas or liquid transmission line description

End of Document

S.D. Codified Laws § 49-41B-4

Current through acts received from the 2017 Special Session of the 92nd Legislative Assembly, Supreme Court Rule 17-11, and the November 8, 2016 General Election.

LexisNexis® South Dakota Codified Laws Annotated > Title 49 Public Utilities and Carriers > Chapter 49-41B Energy Conversion and Transmission Facilities

49-41B-4. Permit required for construction of facility.

No utility may begin construction of a facility in the state on or after July 1, 1979, without first having obtained a permit issued with respect to such facility by the public utilities commission pursuant to this chapter. No such permit is required for an associated facility to be constructed for the purpose of transporting water if the water management board has issued a permit to appropriate water for the use to be made by that facility. Any facility, with respect to which a permit is required, shall thereafter be constructed, operated, and maintained in conformity with such permit including any terms, conditions, or modifications contained therein.

History

SL 1977, ch 390, § 4; SL 1983, ch 349.

End of Document

S.D. Codified Laws § 49-41B-24

Current through acts received from the 2017 Special Session of the 92nd Legislative Assembly, Supreme Court Rule 17-11, and the November 8, 2016 General Election.

LexisNexis® South Dakota Codified Laws Annotated > Title 49 Public Utilities and Carriers > Chapter 49-41B Energy Conversion and Transmission Facilities

49-41B-24. Large facility or pipeline permit — Complete findings required by commission within year of receipt of initial application.

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

History

SL 1977, ch 390, § 18; SL 1980, ch 328, § 2; SL 1981, ch 341; SL 2006, ch 242, § 5; SL 2009, ch 243, § 3; 2015, ch 235, § 2, eff. July 1, 2015.

Annotations

Notes

Amendments.

The 2006 amendment inserted “AC/DC conversion facilities”; and made a related change in punctuation.

The 2009 amendment substituted “transmission lines for coal” for “of coal”; added “or carbon dioxide”; substituted “the commission” for “the Public Utilities Commission”; substituted “deems appropriate” for “may deem appropriate”; and made related and stylistic changes.

The 2015 amendment substituted “or transmission facilities” for “substations of two hundred fifty kilovolts or more, transmission lines of two hundred fifty kilovolts or more, or transmission lines for coal, gas, liquid hydrocarbons, liquid hydrocarbon products, or carbon dioxide.”

Case Notes

Administrative Law: Agency Rulemaking: Formal Rulemaking

Energy & Utilities Law: Administrative Proceedings: Public Utility Commissions: Authority

Administrative Law: Agency Rulemaking: Formal Rulemaking

S.D. Codified Laws § *49-41B-24* dictates that the South Dakota Public Utilities Commission is the only body which can impose terms and conditions. *In re Nebraska Pub. Power Dist. etc., 354 N.W.2d 713, 1984 S.D. LEXIS 355 (S.D. 1984)*.

Energy & Utilities Law: Administrative Proceedings: Public Utility Commissions: Authority

Public Utilities Commission (PUC) chose to grant the permit subject to SCN mitigation conditions and the Legislature expressly authorized the PUC's choice, and the South Dakota Supreme Court gave deference to PUC's expertise and special knowledge in the field of electric utilities; the landowner did not demonstrated an error of law or an abuse of discretion in the PUC's decision to grant a conditional permit rather than requiring reapplication. *Pesall v. Mont. Dakota Utils., Co., 2015 SD 81, 871 N.W.2d 649, 2015 S.D. LEXIS 151 (S.D. 2015)*.

Condition 17 was modified to provide clarity, and did not delegate the Public Utilities Commission's (PUC) authority to the applicants; the future action involved PUC enforcement of modified Condition 17, and the fact that the PUC retained jurisdiction to enforce its conditions did not mean they failed to render complete findings on the permit. *Pesall v. Mont. Dakota Utils., Co., 2015 SD 81, 871 N.W.2d 649, 2015 S.D. LEXIS 151 (S.D. 2015)*.

End of Document

S.D. Codified Laws § 15-6-12(b)

Current through acts received from the 2017 Special Session of the 92nd Legislative Assembly, Supreme Court Rule 17-11, and the November 8, 2016 General Election.

LexisNexis® South Dakota Codified Laws Annotated > Title 15 Civil Procedure > Chapter 15-6 Circuit Court Rules of Procedure > III. Pleadings and Motions > 15-6-12- Defenses and Objections

15-6-12(b). Presentation of defenses and objections — Manner.

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter;

(2) Lack of jurisdiction over the person;

(3) Insufficiency of process;

(4) Insufficiency of service of process;

(5) Failure to state a claim upon which relief can be granted;

(6) Failure to join a party under § 15-6-19.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in § 15-6-56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by § 15-6-56.

History

SDC 1939 & Supp 1960, § 33.1002; SD RCP, Rule 12 (b), as adopted by Sup. Ct. Order March 29, 1966, effective July 1, 1966; as amended by Sup. Ct. Order No. 2, March 31, 1969, effective July 1, 1969; 2006, ch 285 (Supreme Court Rule 06-11).

Annotations

Notes

Amendments.

The 2006 amendment, in the concluding paragraph, in the third sentence, substituted “the party” for “he.”

Case Notes

Business & Corporate Law: Corporations: Dissolution & Receivership: Termination & Winding Up: General Overview

Civil Procedure: Jurisdiction: Personal Jurisdiction & In Rem Actions: In Personam Actions: General Overview

Civil Procedure: Jurisdiction: Personal Jurisdiction & In Rem Actions: In Personam Actions: Minimum Contacts

Civil Procedure: Pleading & Practice: Defenses, Demurrers & Objections: Failures to State Claims

Civil Procedure: Pleading & Practice: Defenses, Demurrers & Objections: Motions to Dismiss

Civil Procedure: Pleading & Practice: Motion Practice: Content & Form

Civil Procedure: Discovery: Disclosures: Mandatory Disclosures

Civil Procedure: Dismissals: Involuntary Dismissals: General Overview

Civil Procedure: Summary Judgment: General Overview

Civil Procedure: Summary Judgment: Burdens of Production & Proof: General Overview

Civil Procedure: Summary Judgment: Standards: General Overview

Civil Procedure: Summary Judgment: Supporting Materials: General Overview

Civil Procedure: Trials: Judgment as Matter of Law: General Overview

Civil Procedure: Appeals: Standards of Review: General Overview

Civil Rights Law: Prisoner Rights: Freedom of Religion

Civil Rights Law: Private Discrimination

Constitutional Law: Supremacy Clause: General Overview

Contracts Law: Performance: Accord & Satisfaction

Contracts Law: Performance: Discharges & Terminations

Criminal Law & Procedure: Trials: Defendant's Rights: Right to Public Trial

Criminal Law & Procedure: Habeas Corpus: Procedure: General Overview

Criminal Law & Procedure: Habeas Corpus: Procedure: Pretrial Dismissals

Family Law: Adoption: Indian Child Welfare Act

Family Law: Child Custody: Visitation: General Overview

Governments: Legislation: Statutes of Limitations: General Overview

Labor & Employment Law: Equal Pay: Equal Pay Act: General Overview

Labor & Employment Law: Wrongful Termination: Public Policy

Torts: Intentional Torts: Defamation: Defenses: Privileges: Qualified Privileges

Business & Corporate Law: Corporations: Dissolution & Receivership: Termination & Winding Up: General Overview

Where a corporation had contracted to purchase an ethanol plant, the trial court erred in granting the plant's motion under S.D. Codified Laws § *15-6-12(b)* to dismiss the corporation's counterclaim against the plant for fraud in the inducement of a contract on the grounds that the action was barred by the statute of limitations. *Yankton Ethanol, Inc. v. Vironment, Inc., 1999 SD 42, 592 N.W.2d 596, 1999 S.D. LEXIS 57 (S.D. 1999)*.

Civil Procedure: Jurisdiction: Personal Jurisdiction & In Rem Actions: In Personam Actions: General Overview

Where a father's first objection to the sufficiency of process in a termination proceeding was at the dispositional phase of the dependency and neglect hearing, the objection came too late and it was properly deemed waived *In re R.P., 498 N.W.2d 364, 1993 S.D. LEXIS 27 (S.D. 1993)*.

Under S.D. Codified Laws § *15-6-12(b)*, defenses to personal jurisdiction must be raised by motion or answer, and if objections to personal jurisdiction are not made at the appropriate time, either by motion or answer, they are deemed waived. *Williams Ins. v. Bear Butte Farms Partnership, 392 N.W.2d 831, 1986 S.D. LEXIS 309 (S.D. 1986)*.

Under S.D. Codified Laws § *15-6-12(b)*, there is no longer any distinction between special and general appearances, and no defense or objection concerning lack of jurisdiction or insufficiency of service of process is waived by being joined with one or more other defenses or objections in a responsive pleading or motion, subject to certain exceptions. The emphasis no longer is on the nature of the appearance but rather upon the precise character of the objection or defense interposed. *Crossman v. Contractors Rigging & Erection, 86 S.D. 448, 198 N.W.2d 51, 1972 S.D. LEXIS 131 (S.D. 1972)*.

Civil Procedure: Jurisdiction: Personal Jurisdiction & In Rem Actions: In Personam Actions: Minimum Contacts

Trial court properly granted an automobile seller's motion to dismiss a purchaser's action for lack of personal jurisdiction under S.D. Codified Laws § *15-6-12(b)* where the sum total of the seller's transactions in South Dakota could be characterized as a "one shot deal"; analysis of the alleged contacts between the seller and South Dakota, including the seller's use of the Internet, did not support any contention of the existence of sufficient minimum contacts to support personal jurisdiction. *Marschke v. Wratislaw, 2007 SD 125, 743 N.W.2d 402, 2007 S.D. LEXIS 190 (S.D. 2007)*.

Civil Procedure: Pleading & Practice: Defenses, Demurrers & Objections: Failures to State Claims

Plaintiff and defendant entered into a contract for textbooks, and subsequently defendant informed plaintiff the textbooks were to be shipped to the third company which paid $ 77,268 of the amount due, but the third company then filed for Chapter 11 bankruptcy, thus, plaintiff sued defendant for the unpaid balance, resulting in a mutual release wherein defendant paid the outstanding $25,000 and the matter was dismissed with prejudice. *Fenske Media Corp. v. Banta Corp., 2004 SD 23, 676 N.W.2d 390, 2004 S.D. LEXIS 22 (S.D. 2004)*.

Insurer's motion to dismiss a homeowner's first party bad faith action was improperly granted because a motion to dismiss under S.D. Codified Laws § *15-6-12(b)(5)* tested the law of a plaintiff's claim, not the facts which supported it. *Brooks v. Milbank Ins. Co., 2000 SD 16, 605 N.W.2d 173, 2000 S.D. LEXIS 16 (S.D. 2000)*.

Trial court erred when it converted a herbicide manufacturer's motion to a dismiss a complaint filed by a farmer to recover damages to one for summary judgment without providing notice to the parties as was required by S.D. Codified Laws § *15-6-12(b)*; the farmer should have been given a reasonable opportunity to present all material

pertinent to a motion for summary judgment pursuant to S.D. Codified Laws § 15-6-56(c). Eide v. E.I. Du Pont de Nemours & Co., CCH Prod. Liab. Rep. ¶4486, 1996 SD 11, 542 N.W.2d 769, 1996 S.D. LEXIS 9 (S.D. 1996).

Where plaintiff purchasers challenged a decision that granted the motion for dismissal brought under S.D. Codified Laws § 15-6-12(b) by defendants, trustees and executors of sellers' estates, in the purchasers' action seeking a reduction in the purchase price of real property purchased from the sellers, the pleadings should not have been dismissed because there was an issue as to whether or not a purchase agreement obligated one of the sellers to maintain insurance and whether there was a breach of that obligation. Schlosser v. Norwest Bank S.D., N.A., 506 N.W.2d 416, 1993 S.D. LEXIS 117 (S.D. 1993), overruled in part, Gruhlke v. Sioux Empire Fed. Credit Union, Inc., 2008 SD 89, 756 N.W.2d 399, 2008 S.D. LEXIS 127 (S.D. 2008).

Motions under S.D. Codified Laws § 15-6-12(b)(5) is identical to motions under Fed. R. Civ. P. 12(b)(6). Schlosser v. Norwest Bank S.D., N.A., 506 N.W.2d 416, 1993 S.D. LEXIS 117 (S.D. 1993), overruled in part, Gruhlke v. Sioux Empire Fed. Credit Union, Inc., 2008 SD 89, 756 N.W.2d 399, 2008 S.D. LEXIS 127 (S.D. 2008).

S.D. Codified Laws § 15-6-12(b)(5) only allows matters outside the pleadings to be considered when the court has notified the parties of its intention to treat the motion as one for summary judgment under S.D. Codified Laws § 15-6-56 and, where the record did not indicate such an intention on the part of the trial court, the appeal was limited to a ruling only on the sufficiency of the facts pleaded. Weller v. Spring Creek Resort, 477 N.W.2d 839, 1991 S.D. LEXIS 178 (S.D. 1991).

In an action by houseboat owners alleging discrimination, breach of express contract, and breach of implied contract against marina owners where the marina owners filed a motion for failure to state a claim under S.D. Codified Laws § 15-6-12(b)(5), trial court did not err in granting dismissal of the discrimination claim because the houseboat owners failed to establish membership in a protected class as required by S.D. Codified Laws § 20-13-23. Weller v. Spring Creek Resort, 477 N.W.2d 839, 1991 S.D. LEXIS 178 (S.D. 1991).

In dismissing a nonparent's motion for visitation under S.D. Codified Laws § 15-6-12(b)(5) for failure to state a claim on which relief could be granted, where extraneous matters presented by the mother in her brief were not relevant to the trial court's ultimate legal determination that nonparents had no visitation rights with minor children and the key facts were contained in the pleadings, it was not error to fail to convert the proceeding to one for summary judgment. Cooper v. Merkel, 470 N.W.2d 253, 1991 S.D. LEXIS 78 (S.D. 1991).

Where the trial court did not advise the parties that it intended to treat the defendants' motion to dismiss under S.D. Codified Laws § 15-6-12(b)(5) as one for summary judgment, the parties were not afforded an occasion to file affidavits or other evidence as provided by S.D. Codified Laws § 15-6-56(a) et seq. that might have controverted the trial court's conclusion that no genuine issue of material fact existed, which constituted reversible error. Summary judgment is only authorized where there has been a summary judgment motion or an equivalent motion. Jensen Ranch, Inc. v. Marsden, 440 N.W.2d 762, 1989 S.D. LEXIS 82 (S.D. 1989).

Questions concerning the propriety of a summary judgment are governed according to S.D. Codified Laws § 15-6-56(a) et seq. However, the court may treat a motion to dismiss for failure to state a claim under S.D. Codified Laws § 15-6-12(b) as a motion for summary judgment. Jensen Ranch, Inc. v. Marsden, 440 N.W.2d 762, 1989 S.D. LEXIS 82 (S.D. 1989).

Trial court erred in granting an employer's motion to dismiss for failure to state a claim pursuant to S.D. Codified Laws § 15-6-12(b)(5), because employee's wrongful termination action fell under the public policy exception to the at-will doctrine where his complaint alleged that the employer discharged him in retaliation for his refusal to commit a criminal or unlawful act. Johnson v. Kreiser's, Inc., 433 N.W.2d 225, 1988 S.D. LEXIS 172 (S.D. 1988).

In a libel action brought by the governor against the author and publisher of a book, the trial court erred in granting defendants' motion to dismiss under S.D. Codified Laws § 15-6-12(b)(5), as the First Amendment protection afforded the press was a qualified privilege that would fall before proof of malice; further, under S.D. Codified Laws

§ 20-11-5(4), a privileged communication was defined as one made without malice. Janklow v. Viking Press, 378 N.W.2d 875, 1985 S.D. LEXIS 387 (S.D. 1985).

Civil Procedure: Pleading & Practice: Defenses, Demurrers & Objections: Motions to Dismiss

Trial court properly granted an automobile seller's motion to dismiss a purchaser's action for lack of personal jurisdiction under S.D. Codified Laws § 15-6-12(b) where the sum total of the seller's transactions in South Dakota could be characterized as a "one shot deal"; analysis of the alleged contacts between the seller and South Dakota, including the seller's use of the Internet, did not support any contention of the existence of sufficient minimum contacts to support personal jurisdiction. Marschke v. Wratislaw, 2007 SD 125, 743 N.W.2d 402, 2007 S.D. LEXIS 190 (S.D. 2007).

Motion to dismiss under S.D. Codified Laws § 15-6-12(b) tests the legal sufficiency of the pleading, not the facts which support it; for purposes of the pleading, a court must treat as true all facts properly pled in the complaint and resolve all doubts in favor of the pleader. Steiner v. County of Marshall, 1997 SD 109, 568 N.W.2d 627, 1997 S.D. LEXIS 109 (S.D. 1997).

In deciding a motion to dismiss under S.D. Codified Laws § 15-6-12(b)(5), the trial court should consider the complaint's allegations and any exhibits which are attached; the court accepts the pleader's description of what happened along with any conclusions reasonably drawn therefrom; the motion may be directed to the whole complaint or only specified counts contained in it. Thompson v. Summers, 1997 SD 103, 567 N.W.2d 387, 1997 S.D. LEXIS 103 (S.D. 1997).

Motion to dismiss under S.D. Codified Laws § 15-6-12(b)(5) tests the law of a plaintiff's claim, not the facts which support it; the motion is viewed with disfavor and is rarely granted. Thompson v. Summers, 1997 SD 103, 567 N.W.2d 387, 1997 S.D. LEXIS 103 (S.D. 1997).

Because a victim adequately outlined his claim in a personal injury action even if he did not include the term "rescue doctrine" and where the "rescue doctrine" was part of the common law of negligence, it was improper to dismiss his action under S.D. Codified Laws § 15-6-12(b)(5) for failure to state a cause of action. Thompson v. Summers, 1997 SD 103, 567 N.W.2d 387, 1997 S.D. LEXIS 103 (S.D. 1997).

Civil Procedure: Pleading & Practice: Motion Practice: Content & Form

S.D. Codified Laws § 15-6-56(a) and S.D. Codified Laws § 15-6-56(b), which authorize summary judgment, require that a motion for summary judgment, or an equivalent motion under S.D. Codified Laws § 15-6-12(b) and S.D. Codified Laws § 15-6-12(c), be made before summary judgment may be granted. Thus, in a suit by an insured, where an insurer brought a motion against the insured for repayment moneys advanced by the insurer, the trial court erred by construing the motion as one for summary judgment because no proper motion was made. Schuldt v. State Farm Mut. Auto. Ins. Co., 272 N.W.2d 94, 1978 S.D. LEXIS 341 (S.D. 1978).

Civil Procedure: Discovery: Disclosures: Mandatory Disclosures

Trial court did not convert motion to dismiss into summary judgment, and so suit was not reinstated; malpractice plaintiff showed sufficient willful disobedience of court orders and a statute to support dismissal. Storm v. Durr, 2003 SD 6, 657 N.W.2d 34, 2003 S.D. LEXIS 8 (S.D. 2003).

Civil Procedure: Dismissals: Involuntary Dismissals: General Overview

In dismissing a nonparent's motion for visitation under S.D. Codified Laws § 15-6-12(b)(5) for failure to state a claim on which relief could be granted, where extraneous matters presented by the mother in her brief were not relevant to the trial court's ultimate legal determination that nonparents had no visitation rights with minor children and the key facts were contained in the pleadings, it was not error to fail to convert the proceeding to one for summary judgment. Cooper v. Merkel, 470 N.W.2d 253, 1991 S.D. LEXIS 78 (S.D. 1991).

Trial court was found to have improperly dismissed a declaratory judgment action on the grounds of res judicata and a failure to state a claim upon which relief could be granted under S.D. Codified Laws § 15-6-12(b)(5), which had been filed against sellers by the purchasers of real property that was subject to the sellers' retention of mineral rights; the purchasers were entitled to file the declaratory action under the authority of S.D. Codified Laws § 21-24-1 and S.D. Codified Laws § 21-24-3, even though a trial court had already declared the parties' rights as to damages by a lessees' operations, because the exact issue at the center of the declaratory judgment action had not been previously determined. Carver v. Heikkila, 465 N.W.2d 183, 1991 S.D. LEXIS 11 (S.D. 1991).

Civil Procedure: Summary Judgment: General Overview

Under S.D. Codified Laws § 15-6-12(b)(5), where one moves to dismiss for failure to state a claim and matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in S.D. Codified Laws § 15-6-56(c), and all parties shall be given the reasonable opportunity to present all material made pertinent to such a motion by S.D. Codified Laws § 15-6-56(c). Richards v. Lenz, 539 N.W.2d 80, 1995 S.D. LEXIS 127 (S.D. 1995).

Civil Procedure: Summary Judgment: Burdens of Production & Proof: General Overview

Where a bank alleged that a credit union had knowingly participated in a check-kiting scheme and was negligent in the supervision, management, and control of its manager, and the credit union filed a motion to dismiss, the trial court, under S.D. Codified Laws § 15-6-12(b)(5), improperly converted the motion to dismiss to one for summary judgment because it did not advise or notify the parties of its intent to convert and did not give the parties the reasonable opportunity to present all material made pertinent to such a motion as required by S.D. Codified Laws § 15-6-56. Norwest Bank Black Hills, N.A. v. Rapid City Teachers Federal Credit Union (No. 4122), 433 N.W.2d 560, 1988 S.D. LEXIS 182 (S.D. 1988).

Civil Procedure: Summary Judgment: Standards: General Overview

S.D. Codified Laws § 15-6-12(b)(5) only allows matters outside the pleadings to be considered when the court has notified the parties of its intention to treat the motion as one for summary judgment under S.D. Codified Laws § 15-6-56 and, where the record did not indicate such an intention on the part of the trial court, the appeal was limited to a ruling only on the sufficiency of the facts pleaded. Weller v. Spring Creek Resort, 477 N.W.2d 839, 1991 S.D. LEXIS 178 (S.D. 1991).

Where the trial court did not advise the parties that it intended to treat the defendants' motion to dismiss under S.D. Codified Laws § 15-6-12(b)(5) as one for summary judgment, the parties were not afforded an occasion to file affidavits or other evidence as provided by S.D. Codified Laws § 15-6-56(a) et seq. that might have controverted the trial court's conclusion that no genuine issue of material fact existed, which constituted reversible error. Summary judgment is only authorized where there has been a summary judgment motion or an equivalent motion. Jensen Ranch, Inc. v. Marsden, 440 N.W.2d 762, 1989 S.D. LEXIS 82 (S.D. 1989).

In a garnishment action, plaintiff's act of garnishment was predicated upon a showing that the judgment debtor's vehicle was insured by defendants, and plaintiff failed to show a non-contingent duty to provide monetary restitution for the debtor, so that an order granting summary adjudication in favor of defendant was proper. Sigler v. St. Paul Fire & Marine Ins. Co., 298 N.W.2d 792, 1980 S.D. LEXIS 447 (S.D. 1980).

Civil Procedure: Summary Judgment: Supporting Materials: General Overview

In an action brought by parents on behalf of their sons for damages sustained as a result of a collision between a city fire truck, operated by a city employee, and a vehicle occupied by the sons, the trial court failed to comply with S.D. Codified Laws § 15-6-12(b) when it treated the employee's motion to dismiss as a motion for summary judgment under S.D. Codified Laws § 15-6-56(c) and granted it on the basis of sovereign immunity. The parents should have had a reasonable opportunity to present material on the issue of whether the employee's operation of

the fire truck was ministerial or discretionary. *Schaub v. Moerke, 338 N.W.2d 109, 1983 S.D. LEXIS 396 (S.D. 1983)*.

S.D. Codified Laws § *15-6-56(a)* and S.D. Codified Laws § *15-6-56(b)*, which authorize summary judgment, require that a motion for summary judgment, or an equivalent motion under S.D. Codified Laws § *15-6-12(b)* and S.D. Codified Laws § *15-6-12(c)*, be made before summary judgment may be granted. Thus, in a suit by an insured, where an insurer brought a motion against the insured for repayment moneys advanced by the insurer, the trial court erred by construing the motion as one for summary judgment because no proper motion was made. *Schuldt v. State Farm Mut. Auto. Ins. Co., 272 N.W.2d 94, 1978 S.D. LEXIS 341 (S.D. 1978)*.

Civil Procedure: Trials: Judgment as Matter of Law: General Overview

Husband's motion to dismiss wife's petition for modification of alimony was denied pursuant to S.D. Codified Laws § *15-6-12(b)*;although the parties entered into a Marital Settlement Agreement in California, the agreement stipulated that it would become part of the final judgment; since the divorce was obtained in South Dakota the alimony determination was part of the divorce decree and jurisdiction was proper in South Dakota. *Weekley v. Weekley, 1999 SD 162, 604 N.W.2d 19, 1999 S.D. LEXIS 184 (S.D. 1999)*.

Civil Procedure: Appeals: Standards of Review: General Overview

Appellate court's standard of review of a trial court's grant or denial of a motion to dismiss under S.D. Codified Laws § *15-6-12(b)(6)* is the same as its review of a motion for summary judgment, whether the pleader is entitled to judgment as a matter of law. *Estate of Billings v. Deadwood Congregation of Jehovah Witnesses, 506 N.W.2d 138, 1993 S.D. LEXIS 127 (S.D. 1993)*.

Civil Rights Law: Prisoner Rights: Freedom of Religion

Trial court properly dismissed an inmate's federal civil rights claims because the inmate failed to allege any facts necessary to even infer a meeting of minds or mutual understanding among a food supply corporation, a food contractor, and a food services director to serve the inmate non-kosher food. *Sisney v. Best Inc., 2008 SD 70, 754 N.W.2d 804, 2008 S.D. LEXIS 111 (S.D. 2008)*.

Civil Rights Law: Private Discrimination

In an action by houseboat owners alleging discrimination, breach of express contract, and breach of implied contract against marina owners where the marina owners filed a motion for failure to state a claim under S.D. Codified Laws § *15-6-12(b)(5)*, trial court did not err in granting dismissal of the discrimination claim because the houseboat owners failed to establish membership in a protected class as required by S.D. Codified Laws § *20-13-23*. *Weller v. Spring Creek Resort, 477 N.W.2d 839, 1991 S.D. LEXIS 178 (S.D. 1991)*.

Constitutional Law: Supremacy Clause: General Overview

In reversing the trial court's grant of a school district's motion to dismiss a teacher's action for failure to state a claim under S.D. R. Civ. P. 12(b)(5), S.D. Codified Laws § *15-6-12(b)(5)*, the Supreme Court of South Dakota took direction from an Eighth Circuit case that held that the administrative exhaustion requirement under Title VII of the Civil Rights Act of 1964 did not apply to claims under the Equal Pay Act; moreover, to the extent that the South Dakota Human Rights Act exhaustion requirement under S.D. Codified Laws § *20-13-29* conflicted with federal law, the Supremacy Clause, *USCS Const. Art. VI, Cl 2*, prohibited the state law's application. *O'Brien v. W. Dakota Tech. Inst., 84 Empl. Prac. Dec. (CCH) ¶1523, 2003 SD 127, 670 N.W.2d 924, 2003 S.D. LEXIS 156 (S.D. 2003)*.

Contracts Law: Performance: Accord & Satisfaction

Plaintiff and defendant entered into a contract for textbooks, and subsequently defendant informed plaintiff the textbooks were to be shipped to the third company which paid $77,268 of the amount due, but the third company

then filed for Chapter 11 bankruptcy, thus, plaintiff sued defendant for the unpaid balance, resulting in a mutual release wherein defendant paid the outstanding $25,000 and the matter was dismissed with prejudice. *Fenske Media Corp. v. Banta Corp., 2004 SD 23, 676 N.W.2d 390, 2004 S.D. LEXIS 22 (S.D. 2004)*.

Contracts Law: Performance: Discharges & Terminations

Plaintiff and defendant entered into a contract for textbooks, and subsequently defendant informed plaintiff the textbooks were to be shipped to the third company which paid $77,268 of the amount due, but the third company then filed for Chapter 11 bankruptcy, thus, plaintiff sued defendant for the unpaid balance, resulting in a mutual release wherein defendant paid the outstanding $25,000 and the matter was dismissed with prejudice. *Fenske Media Corp. v. Banta Corp., 2004 SD 23, 676 N.W.2d 390, 2004 S.D. LEXIS 22 (S.D. 2004)*.

Criminal Law & Procedure: Trials: Defendant's Rights: Right to Public Trial

Habeas application based on the alleged closing of the courtroom was properly dismissed for failure to state a claim under *S.D. Codified Laws § 15-6-12(b)(5)* because, although the State moved to close the courtroom before it played a video that contained child pornography, the trial court declined to rule because there was no member of the public present. *Riley v. Young, 2016 SD 39, 879 N.W.2d 108, 2016 S.D. LEXIS 63 (S.D. 2016)*.

Criminal Law & Procedure: Habeas Corpus: Procedure: General Overview

Pursuant to S.D. Codified Laws § *15-6-81(a)*, as habeas proceedings are civil in nature, the rules of civil procedure apply to the extent they are not inconsistent with S.D. Codified Laws ch. 21-27; motions to dismiss, therefore, are appropriate to dispose of nonmeritorious applications; a court may dismiss a habeas corpus petition for failure to state a claim under S.D. Codified Laws § *15-6-12(b)(5)* only if it appears beyond doubt that the petition sets forth no facts to support a claim for relief. *Jenner v. Dooley, 1999 SD 20, 590 N.W.2d 463, 1999 S.D. LEXIS 26 (S.D. 1999)*.

Criminal Law & Procedure: Habeas Corpus: Procedure: Pretrial Dismissals

Habeas application based on the alleged closing of the courtroom was properly dismissed for failure to state a claim under *S.D. Codified Laws § 15-6-12(b)(5)* because, although the State moved to close the courtroom before it played a video that contained child pornography, the trial court declined to rule because there was no member of the public present. *Riley v. Young, 2016 SD 39, 879 N.W.2d 108, 2016 S.D. LEXIS 63 (S.D. 2016)*.

Family Law: Adoption: Indian Child Welfare Act

Where the mother was domiciled on the reservation at the time a child custody petition was filed, the tribal court had exclusive jurisdiction over the matter under the Indian Child Welfare Act, 25 U.S.C.S. § *1911(a)* *People in the Interest of G. R. F., 1997 SD 112, 569 N.W.2d 29, 1997 S.D. LEXIS 111 (S.D. 1997)*.

Family Law: Child Custody: Visitation: General Overview

In dismissing a nonparent's motion for visitation under S.D. Codified Laws § *15-6-12(b)(5)* for failure to state a claim on which relief could be granted, where extraneous matters presented by the mother in her brief were not relevant to the trial court's ultimate legal determination that nonparents had no visitation rights with minor children and the key facts were contained in the pleadings, it was not error to fail to convert the proceeding to one for summary judgment. *Cooper v. Merkel, 470 N.W.2d 253, 1991 S.D. LEXIS 78 (S.D. 1991)*.

Governments: Legislation: Statutes of Limitations: General Overview

Where a corporation had contracted to purchase an ethanol plant, the trial court erred in granting the plant's motion under S.D. Codified Laws § *15-6-12(b)* to dismiss the corporation's counterclaim against the plant for fraud in the

inducement of a contract on the grounds that the action was barred by the statute of limitations. *Yankton Ethanol, Inc. v. Vironment, Inc., 1999 SD 42, 592 N.W.2d 596, 1999 S.D. LEXIS 57 (S.D. 1999)*.

Labor & Employment Law: Equal Pay: Equal Pay Act: General Overview

In reversing the trial court's grant of a school district's motion to dismiss a teacher's action for failure to state a claim under S.D. R. Civ. P. 12(b)(5), S.D. Codified Laws § *15-6-12(b)(5)*, the Supreme Court of South Dakota took direction from an Eighth Circuit case that held that the administrative exhaustion requirement under Title VII of the Civil Rights Act of 1964 did not apply to claims under the Equal Pay Act; moreover, to the extent that the South Dakota Human Rights Act exhaustion requirement under S.D. Codified Laws § *20-13-29* conflicted with federal law, the Supremacy Clause, *USCS Const. Art. VI, Cl 2*, prohibited the state law's application. *O'Brien v. W. Dakota Tech. Inst., 84 Empl. Prac. Dec. (CCH) ¶1523, 2003 SD 127, 670 N.W.2d 924, 2003 S.D. LEXIS 156 (S.D. 2003)*.

Labor & Employment Law: Wrongful Termination: Public Policy

Trial court erred in granting an employer's motion to dismiss for failure to state a claim pursuant to S.D. Codified Laws § *15-6-12(b)(5)*, because employee's wrongful termination action fell under the public policy exception to the at-will doctrine where his complaint alleged that the employer discharged him in retaliation for his refusal to commit a criminal or unlawful act. *Johnson v. Kreiser's, Inc., 433 N.W.2d 225, 1988 S.D. LEXIS 172 (S.D. 1988)*.

Torts: Intentional Torts: Defamation: Defenses: Privileges: Qualified Privileges

In a libel action brought by the governor against the author and publisher of a book, the trial court erred in granting defendants' motion to dismiss under S.D. Codified Laws § *15-6-12(b)(5)*, as the First Amendment protection afforded the press was a qualified privilege that would fall before proof of malice; further, under S.D. Codified Laws § *20-11-5(4)*, a privileged communication was defined as one made without malice. *Janklow v. Viking Press, 378 N.W.2d 875, 1985 S.D. LEXIS 387 (S.D. 1985)*.

End of Document

S.D. Codified Laws § 15-6-26(b)

Current through acts received from the 2017 Special Session of the 92nd Legislative Assembly, Supreme Court Rule 17-11, and the November 8, 2016 General Election.

LexisNexis® South Dakota Codified Laws Annotated > Title 15 Civil Procedure > Chapter 15-6 Circuit Court Rules of Procedure > V. Discovery > 15-6-26- Discovery Pending Action

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

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

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

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

(A)

(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

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

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

(2) Insurance agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) Trial preparation: materials. Subject to the provisions of subdivision (4) of this section, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (1) of this section and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including such other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the

substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of subdivision 15-6-37(a)(4) apply to award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial preparation: experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (1) of this rule and acquired or developed in anticipation of litigation or for trial may be obtained only as follows:

(A)

(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (4)(C) of this section, concerning fees and expenses as the court may deem appropriate.

(B) Trial-preparation for draft reports or disclosures. *SDCL § 15-6-26(b)(3)* protects drafts of any report prepared by any witness who is retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involves giving expert testimony, regardless of the form in which the draft is recorded.

(C) Trial preparation protection for communication between a party's attorney and expert witnesses. *SDCL § 15-6-26(b)(3)* protects communications between the party's attorney and any witness who is retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony, regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinion to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in § 15-6-35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(E) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (4)(A)(ii) and (4)(B) of this section; and (ii) with respect to discovery obtained under subdivision (4)(A)(ii) of this section the court may require, and with respect to discovery obtained under

subdivision (4)(B) of this section the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

History

SDC 1939 & Supp 1960, § 36.0505; SD RCP, Rule 26 (b), as adopted by Sup. Ct. Order March 29, 1966, effective July 1, 1966; Supreme Court Rule 76-3, § 2; SL 1993, ch 385 (Supreme Court Rule 93-2); 2006, ch 288 (Supreme Court Rule 06-14); SL (Supreme Court Rule 11-1), eff. July 1, 2011.

Annotations

Notes

Amendments.

The 2006 amendment, throughout subdivision (3), made gender-neutral changes; and added subdivision (5).

Case Notes

Civil Procedure: Discovery: Disclosures: General Overview

Civil Procedure: Discovery: Disclosures: Mandatory Disclosures

Civil Procedure: Discovery: Methods: Expert Witness Discovery

Civil Procedure: Discovery: Privileged Matters: Work Product: General Overview

Civil Procedure: Discovery: Privileged Matters: Work Product: Scope

Criminal Law & Procedure: Discovery & Inspection: Discovery by Defendant: Tangible Objects: General Overview

Evidence: Testimony: Experts: General Overview

Civil Procedure: Discovery: Disclosures: General Overview

Trial court did not abuse its discretion in limiting a counselor's opinions in a former suspect's tort action against the police officers where her disclosed opinions were limited to those contained in her reports. *Tosh v. Schwab, 2007 SD 132, 743 N.W.2d 422, 2007 S.D. LEXIS 197 (S.D. 2007)*.

Civil Procedure: Discovery: Disclosures: Mandatory Disclosures

In a personal injury matter, a circuit court erred in imposing sanctions, pursuant to S.D. Codified Laws § *15-6-37(d)*, against an allegedly injured party's attorney because discovery requests of a driver and an employer were not

specific enough to require disclosure of a physician's opinion as to the injuries that were allegedly suffered. *Pearson v. O'Neal-Letcher, 2007 SD 92, 738 N.W.2d 914, 2007 S.D. LEXIS 158 (S.D. 2007)*.

Civil Procedure: Discovery: Methods: Expert Witness Discovery

Trial court improperly excluded testimony and complete discovery, under S. D. Codified Laws § *15-6-26(b)(4)(B)*, of a witness who conducted tests on behalf of plaintiff and prepared a report which was favorable to defendant where the testing was done prior to the time plaintiff had consulted with or hired an attorney, the witness was contacted at the suggestion of defendant, not at the request of plaintiff's counsel, and the witness mailed a copy of his report directly to defendant, as well as to plaintiff. *Kuper v. Lincoln-Union Elec. Co., 1996 SD 145, 557 N.W.2d 748, 1996 S.D. LEXIS 153 (S.D. 1996)*.

Civil Procedure: Discovery: Privileged Matters: Work Product: General Overview

Attorney's advice regarding foreclosure of a mortgage was properly denominated work product within S.D. Codified Laws § *15-6-26(b)(3)* because the advice was given in prospect of possible litigation to foreclose the mortgage. Even though the protection afforded by the work product doctrine is broader than that created by the attorney-client privilege, a party cannot affirmatively assert reliance upon an attorney's advice and then refuse to disclose such advice, and as a result an insurer's reliance upon the defense of counsel waived its nearly absolute protection afforded its attorney's opinion work product. *Kaarup v. St. Paul Fire & Marine Ins. Co., 436 N.W.2d 17, 1989 S.D. LEXIS 23 (S.D. 1989)*.

Civil Procedure: Discovery: Privileged Matters: Work Product: Scope

Even if some attorney-client communications might have been subject to waiver or not privileged, the circuit court erred in allowing the attorney to be deposed and required to answer requests for admissions without a finding of necessity or consideration of reasonable alternative sources. *Voorhees Cattle Co., LLP v. Dakota Feeding Co., LLC, 2015 SD 68, 868 N.W.2d 399, 2015 S.D. LEXIS 115 (S.D. 2015)*.

Criminal Law & Procedure: Discovery & Inspection: Discovery by Defendant: Tangible Objects: General Overview

Even though S.D. Codified Laws § *23A-35-4.1* permitted defendant to discover the contents of an affidavit that supported a search warrant, the trial court did not err in deciding that defendant was not entitled to the information she sought because the information was not relevant to the subject matter involved in the action, as provided by S.D. Codified Laws § *15-6-26(b)(1)*. *State v. Buchholz, 1999 SD 110, 598 N.W.2d 899, 1999 S.D. LEXIS 128 (S.D. 1999)*.

Evidence: Testimony: Experts: General Overview

In a personal injury matter, a circuit court erred in imposing sanctions, pursuant to S.D. Codified Laws § *15-6-37(d)*, against an allegedly injured party's attorney because discovery requests of a driver and an employer were not specific enough to require disclosure of a physician's opinion as to the injuries that were allegedly suffered. *Pearson v. O'Neal-Letcher, 2007 SD 92, 738 N.W.2d 914, 2007 S.D. LEXIS 158 (S.D. 2007)*.

S.D. Codified Laws § 15-6-26(c)

Current through acts received from the 2017 Special Session of the 92nd Legislative Assembly, Supreme Court Rule 17-11, and the November 8, 2016 General Election.

LexisNexis® South Dakota Codified Laws Annotated > Title 15 Civil Procedure > Chapter 15-6 Circuit Court Rules of Procedure > V. Discovery > 15-6-26- Discovery Pending Action

15-6-26(c). Protective orders restricting discovery.

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

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time and place;

(3) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

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

(5) That discovery be conducted with no one present except persons designated by the court;

(6) That a deposition after being sealed be opened only by order of the court;

(7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(8) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court;

(9) That depositions, interrogatories, admissions, other discovery, documents, and exhibits attached to motions, or portions of such documents, be sealed unless and until opened at the direction of the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of subdivision 15-6-37(a)(4) apply to the award of expenses incurred in relation to the motion.

History

SDC 1939 & Supp 1960, § 36.0516; SD RCP, Rule 30 (b), as adopted by Sup. Ct. Order March 29, 1966, effective July 1, 1966; SDCL, § 15-6-30(b); Supreme Court Rule 76-3, § 2; SL 2001, ch 298 (Supreme Court Rule 01-06); 2006, ch 289 (Supreme Court Rule 06-15).

Annotations

Notes

Amendments.

The 2006 amendment, in the introductory paragraph, inserted “accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action”; and made related changes in punctuation.

S.D. Codified Laws § 1-26-36

Current through acts received from the 2017 Special Session of the 92nd Legislative Assembly, Supreme Court Rule 17-11, and the November 8, 2016 General Election.

LexisNexis® South Dakota Codified Laws Annotated > Title 1 State Affairs and Government > Chapter 1-26 Administrative Procedures

1-26-36. Standards of review — Disposition of case.

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

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Clearly erroneous in light of the entire evidence in the record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

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

History

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

Annotations

Case Notes

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Administrative Law: Agency Rulemaking: Formal Rulemaking

Administrative Law: Agency Rulemaking: Rule Application & Interpretation: General Overview

Administrative Law: Judicial Review

Administrative Law: Judicial Review: General Overview

Administrative Law: Judicial Review: Remands & Remittiturs

Administrative Law: Judicial Review: Reviewability: Jurisdiction & Venue

Administrative Law: Judicial Review: Standards of Review

Administrative Law: Judicial Review: Standards of Review: General Overview

Administrative Law: Judicial Review: Standards of Review: Arbitrary & Capricious Review

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Banking Law: Bank Expansion: Bank Creations & Reorganizations

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Civil Procedure: Remedies: Costs & Attorney Fees: Costs: General Overview

Civil Procedure: Appeals: Standards of Review: General Overview

Civil Procedure: Appeals: Standards of Review: Clearly Erroneous Review

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Criminal Law & Procedure: Sentencing: Alternatives: Probation: General Overview

Criminal Law & Procedure: Sentencing: Alternatives: Probation: Revocation: Proceedings

Criminal Law & Procedure: Postconviction Proceedings: Parole

Education Law: Administration & Operation: Boards of Elementary & Secondary Schools: General Overview

Education Law: Administration & Operation: School Districts: Alteration

Education Law: Faculty & Staff: Discipline & Dismissal: Administrative Proceedings: Appeals & Reviews

Education Law: Faculty & Staff: Discipline & Dismissal: Administrative Proceedings: Contract Requirements

Education Law: Faculty & Staff: Discipline & Dismissal: Administrative Proceedings: Statutory Procedures

Education Law: Faculty & Staff: Employment Contracts

Education Law: Faculty & Staff: Misconduct & Performance: Dishonesty

Energy & Utilities Law: Administrative Proceedings: Judicial Review: General Overview

Energy & Utilities Law: Administrative Proceedings: Judicial Review: Scope & Standards of Review

Energy & Utilities Law: Administrative Proceedings: Public Utility Commissions: General Overview

Energy & Utilities Law: Administrative Proceedings: Ratemaking

Energy & Utilities Law: Utility Companies: Rates: General Overview

Environmental Law: Air Quality: General Overview

Environmental Law: Solid Wastes: Permits: General Overview

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Labor & Employment Law: Collective Bargaining & Labor Relations: Bargaining Units

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Labor & Employment Law: Collective Bargaining & Labor Relations: Unfair Labor Practices: General Overview

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Workers' Compensation & SSDI: Coverage: Actions Against Employers: Statutory Requirements

Administrative Law: Agency Adjudication: Hearings: General Overview

Although the haphazard compilation of the record in an appellant's contested case made it difficult for a court to determine what was intended to be included under S.D. Codified Laws § *1-26-21*, where the record fully told the appellant's story, none of the appellant's substantial rights were prejudiced, and reversal or modification of the administrative decision based on the defects in the record was not justified under S.D. Codified Laws § *1-26-36*. *Ashland v. South Dakota Dep't of Labor, Unemployment Ins. Div., 321 N.W.2d 103, 1982 S.D. LEXIS 341 (S.D. 1982)*.

Although the South Dakota Department of Labor, Unemployment Insurance Division failed to transmit the record to the circuit court within the time required by S.D. Codified Laws § *1-26-33*, any delays were not prejudicial to the appellant's substantial rights and did not justify reversal or modification under under S.D. Codified Laws § *1-26-36* for such procedural defects. *Ashland v. South Dakota Dep't of Labor, Unemployment Ins. Div., 321 N.W.2d 103, 1982 S.D. LEXIS 341 (S.D. 1982)*.

Administrative Law: Agency Rulemaking: Formal Rulemaking

S.D. Codified Laws § *1-26-36* buttresses the concept that the South Dakota Public Utilities Commission must initially make a finding of a general variance; it directs that the reviewing courts must give great weight of administrative findings on questions of fact. *In re Nebraska Pub. Power Dist. etc., 354 N.W.2d 713, 1984 S.D. LEXIS 355 (S.D. 1984)*.

Administrative Law: Agency Rulemaking: Rule Application & Interpretation: General Overview

Although S.D. Codified Laws § *61-7-8* provides that the administrative rules of the South Dakota Department of Labor, Unemployment Insurance Division, *S.D. Admin. R. 47:06:05:04*, *47:06:05:08*, which require a referee to issue a decision within 10 days after completing a hearing, to conduct the hearing in an informal manner, and to examine a party's witnesses, must be followed, procedural defects did not justify modification or reversal of the administrative decision under S.D. Codified Laws § *1-26-36* where the appellant failed to establish that such defects prejudiced his substantial rights. *Ashland v. South Dakota Dep't of Labor, Unemployment Ins. Div., 321 N.W.2d 103, 1982 S.D. LEXIS 341 (S.D. 1982)*.

Administrative Law: Judicial Review

This section provided authority for the circuit court to modify the administrative decision upon finding error in an assessment of use tax. *Midwest Railcar Repair, Inc. v. S.D. Dep't of Revenue, 2015 SD 92, 872 N.W.2d 79, 2015 S.D. LEXIS 157 (S.D. 2015)*.

Administrative Law: Judicial Review: General Overview

Although a circuit court was only supposed to enter its own findings and conclusions if it modified or reversed the decision of the South Dakota Public Utilities Commission, the circuit court's entering of its own findings and conclusions even though it affirmed the Commission's decision was harmless error. The similarity in result of the circuit court's order as compared with the Commission's decision rendered the error harmless. *In re Midwest Motor Express, 431 N.W.2d 160, 1988 S.D. LEXIS 153 (S.D. 1988)*.

Administrative Law: Judicial Review: Remands & Remittiturs

The circuit court (South Dakota) properly exercised its discretion under S.D. Codified Laws § *1-26-36* by remanding the taxpayer's protest action to the Department of Revenue (South Dakota) for an evidentiary hearing; the correct

finding that the Department, and perhaps the taxpayer, had erroneously interpreted and applied the beneficial use exemption to the assessed sales tax justified a remand for a rehearing in conformity with the decision on the exemption's proper application. *In re State & City Sales Tax Liab. of Quality Serv. Railcar Repair Corp., 437 N.W.2d 209, 1989 S.D. LEXIS 41 (S.D. 1989)*.

Administrative Law: Judicial Review: Reviewability: Jurisdiction & Venue

Circuit court exceeded the scope of its review under S.D. Codified Laws § *1-26-36* of the South Dakota Administrative Procedure Act, S.D. Codified Laws ch. 1-26, by substituting its view of the evidence submitted in an application for a permanent motor carrier license for that of the Public Utilities Commission's. *In re Jack Rabbit Lines, 283 N.W.2d 402, 1979 S.D. LEXIS 282 (S.D. 1979)*.

Administrative Law: Judicial Review: Standards of Review

Under S.D. Codified Laws § *1-26-36*, the standard of review of an agency decision will vary whether the issue is one of fact or one of law; when the issue is a question of fact, then the actions of the agency are judged by the clearly erroneous standard, and when the issue is a question of law, then the actions of the agency are fully reviewable. *Caldwell v. John Morrell & Co., 489 N.W.2d 353, 1992 S.D. LEXIS 103 (S.D. 1992)*.

Administrative Law: Judicial Review: Standards of Review: General Overview

South Dakota Real Estate Commission properly found that the buyer's broker committed unprofessional conduct, because the buyer's broker failed to execute a new written agency agreement with the new buyer he represented, in violation of S.D. Codified Laws § *36-21A-130*; the buyer's broker failed to execute a new agency agreement with the second buyer after the first buyer assigned his right to purchase the property to the second buyer. *Leonard v. State ex rel. S.D. Real Estate Comm'n, 2010 SD 97, 793 N.W.2d 19, 2010 S.D. LEXIS 169 (S.D. 2010)*.

Circuit court erred in its interpretation of S.D. Codified Laws § *10-45-12.1*, which was a question of law, and in finding that a fee charged by an association to its member cooperatives for fertilizer storage services was exempt from taxation; the association was not an "auxiliary" of the cooperatives, and none of the exemptions under § *10-45-12.1* applied to the storage service. *Coop. Agronomy Servs. v. S.D. Dep't of Revenue, 2003 SD 104, 668 N.W.2d 718, 2003 S.D. LEXIS 130 (S.D. 2003)*.

Under S.D. Codified Laws § *1-26-36*, the Supreme Court of South Dakota is required to give great weight to the findings made and the inferences drawn by the South Dakota Public Utilities Commission (PUC) on questions of fact. The court may reverse or modify a decision of the PUC only if the substantial rights of an appellant have been prejudiced because the PUC's administrative findings, inferences, conclusions, or decisions are: (1) in violation of constitutional or statutory provisions, (2) In excess of the PUC's statutory authority, (3) made upon unlawful procedure. (4) affected by other error of law, (5) clearly erroneous in light of the entire evidence in the record, or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. *US West Communs., Inc. v. AT&T Communs. of the Midwest, Inc. (In re Establishment of Switched Access Rates), 2000 SD 140, 618 N.W.2d 847, 2000 S.D. LEXIS 144 (S.D. 2000)*.

Although the general burden of proof for administrative hearings is preponderance of the evidence, in matters concerning the revocation of a professional license, the appropriate standard of proof to be utilized by an agency is clear and convincing evidence. *Foley v. State ex rel. South Dakota Real Estate Comm'n, 1999 SD 101, 598 N.W.2d 217, 1999 S.D. LEXIS 121 (S.D. 1999)*.

Standard of review of an employee's alleged disability is controlled by S.D. Codified Laws § *1-26-36*. Where the issue is a question of fact, review is by the clearly erroneous standard, and questions of law and mixed questions of law and fact are fully reviewable. *Zoss v. United Bldg. Ctrs., 1997 SD 93, 566 N.W.2d 840, 1997 S.D. LEXIS 88 (S.D. 1997)*.

Under the standard of review for administrative agency decisions, the Supreme Court of South Dakota makes the same review of the agency's decision as did the circuit court, unaided by any presumption that the circuit court's decision is correct. When the issue is a question of fact, the actions of the agency are judged by the clearly erroneous standard, but the agency's actions are fully reviewable when the issue is a question of law, and mixed questions of law and fact are also fully reviewable. *Enger v. FMC, 1997 SD 70, 565 N.W.2d 79, 1997 S.D. LEXIS 72 (S.D. 1997)*.

Under S.D. Codified Laws § *1-26-36*, the test is whether after reviewing all the evidence the appellate court is left with a definite and firm conviction that a mistake has been made. Further, the question is not whether there is substantial evidence contrary to the agency finding, but whether there is substantial evidence to support the agency finding; the court shall give great weight to findings made and inferences drawn by an agency on questions of fact. *Petersen v. Hinky Dinky, 515 N.W.2d 226, 1994 S.D. LEXIS 51 (S.D. 1994)*.

S.D. Codified Laws § *1-26-36* provides that the reviewing court will overrule an agency's factual determinations only if it finds them to be clearly erroneous in light of the entire evidence; however, conclusions of law are fully reviewable. Whether the claimant made a prima facie case that he belongs in the odd-lot total disability category is a question of fact; thus, an agency's determination that a claimant seeking benefits failed to make the required prima facie showing will not be overturned unless the reviewing court finds that the determination was clearly erroneous. *Petersen v. Hinky Dinky, 515 N.W.2d 226, 1994 S.D. LEXIS 51 (S.D. 1994)*.

On review of an administrative agency's decision, an appellate court does not substitute its judgment for an agency's on the weight of evidence pertaining to questions of fact unless the agency's decision is clearly erroneous, or is arbitrary, capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion and will not reverse an agency decision unless left with a definite and firm conviction that a mistake has been committed. *Northern States Power Co. v. Sioux Valley Empire Elec. Ass'n, 489 N.W.2d 365, 1992 S.D. LEXIS 108 (S.D. 1992)*.

Under S.D. Codified Laws § *1-26-36*, the appellate court is required to give great weight to the findings made and inferences drawn by administrative agencies on questions of fact. *Deuschle v. Bak Constr. Co., 443 N.W.2d 5, 1989 S.D. LEXIS 110 (S.D. 1989)*.

Under the standard of review pursuant to S.D. Codified Laws § *1-26-36* that applied in actions to review an administrative agency's decision, the grievant was entitled to reinstatement to his job as a police officer; the record adequately supported the administrative ruling that refusing the sergeant's order to transport a stray dog in the grievant's patrol car was not gross insubordination. *Sambo v. Mitchell, 427 N.W.2d 379, 1988 S.D. LEXIS 116 (S.D. 1988)*.

After giving great weight to the finds made and inferences drawn by South Dakota Superintendent on questions of fact as required by S.D. Codified Laws § *1-26-36*, it was clear that the Superintendent's decision reversing a school district's assignment of parents' son was not clearly erroneous, arbitrary, capricious or characterized by an abuse of discretion and thus the court could not substitute its judgment for that of the Superintendent. *Finck v. Northwest Sch. Dist., 417 N.W.2d 875, 1988 S.D. LEXIS 2 (S.D. 1988)*.

Decision of the state board of dentistry to suspend a dentist's license had to be based on expert testimony beyond the investigation of one of the board's members; the cause was remanded. *In re Appeal of Schramm, 414 N.W.2d 31, 1987 S.D. LEXIS 352 (S.D. 1987)*.

S.D. Codified Laws § *1-26-36* buttresses the concept that the South Dakota Public Utilities Commission must initially make a finding of a general variance; it directs that the reviewing courts must give great weight of administrative findings on questions of fact. *In re Nebraska Pub. Power Dist. etc., 354 N.W.2d 713, 1984 S.D. LEXIS 355 (S.D. 1984)*.

S.D. Codified Laws § 1-26-36 requires the circuit court to enter its own findings and conclusions if it modifies or reverses an agency decision. Division of Human Rights ex rel. Miller v. Miller, 349 N.W.2d 42, 1984 S.D. LEXIS 306 (S.D. 1984).

On appeal by a bus company of the South Dakota Public Utilities Commission's grant of an intrastate motor carrier permit to an applicant, which was a partnership consisting of a bus service and an individual partner, the Commission did not commit reversible error under S.D. Codified Laws § 1-26-36(1) by failing to obtain a separate financial statement of the individual partner as required under former S.D. Codified Laws § 49-28-11(6) before issuing the permit where only a corporate financial statement for the bus service was used in the application and no separate personal financial statement for the individual partner was submitted. Although for literal compliance with S.D. Codified Laws § 1-26-36(1), it would have been preferable for the Commission to obtain a personal financial statement from the individual partner, the realities of the partnership agreement, the individual's role in the bus service, and the individual's detailed statement made the disclosure sufficient for purposes of former S.D. Codified Laws § 49-28-11; furthermore, no substantial rights of the bus company were prejudiced by the Commission's decision. In re Leo's Bus Serv., 342 N.W.2d 228, 1984 S.D. LEXIS 235 (S.D. 1984).

In an unemployment compensation case, because the South Dakota Department of Labor, Unemployment Insurance Division was an administrative agency, the court had to review the record of the agency in the same manner as that of a trial court and an appellate court could not substitute its judgment for that of the agency, pursuant to S.D. Codified Laws § 1-26-36. Weber v. South Dakota Dep't of Labor, Unemployment Ins. Div., 323 N.W.2d 117, 1982 S.D. LEXIS 361 (S.D. 1982).

In reviewing on appeal a circuit court's judgment under the South Dakota Administrative Procedures Act, S.D. Codified Laws ch. 1-26, an appellate court must make the same review of the administrative agency's action as does the circuit court, unaided by a presumption that the circuit court's decision is correct. This review is limited under S.D. Codified Laws § 1-26-36(5) to determining whether the agency's findings are clearly erroneous. Driscoll v. Great Plains Mktg. Co., 322 N.W.2d 478, 1982 S.D. LEXIS 354 (S.D. 1982).

Although the haphazard compilation of the record in an appellant's contested case made it difficult for a court to determine what was intended to be included under S.D. Codified Laws § 1-26-21, where the record fully told the appellant's story, none of the appellant's substantial rights were prejudiced, and reversal or modification of the administrative decision based on the defects in the record was not justified under S.D. Codified Laws § 1-26-36. Ashland v. South Dakota Dep't of Labor, Unemployment Ins. Div., 321 N.W.2d 103, 1982 S.D. LEXIS 341 (S.D. 1982).

Although S.D. Codified Laws § 61-7-8 provides that the administrative rules of the South Dakota Department of Labor, Unemployment Insurance Division, S.D. Admin. R. 47:06:05:04, 47:06:05:08, which require a referee to issue a decision within 10 days after completing a hearing, to conduct the hearing in an informal manner, and to examine a party's witnesses, must be followed, procedural defects did not justify modification or reversal of the administrative decision under S.D. Codified Laws § 1-26-36 where the appellant failed to establish that such defects prejudiced his substantial rights. Ashland v. South Dakota Dep't of Labor, Unemployment Ins. Div., 321 N.W.2d 103, 1982 S.D. LEXIS 341 (S.D. 1982).

Burden is on an appellant to show that the procedural violations of an administrative agency prejudiced his substantial rights to justify an appellate court's reversal or modification of the agency's decision under S.D. Codified Laws § 1-26-36(3). Ashland v. South Dakota Dep't of Labor, Unemployment Ins. Div., 321 N.W.2d 103, 1982 S.D. LEXIS 341 (S.D. 1982).

Appellate court's review under S.D. Codified Laws § 1-26-37 of alleged procedural errors in an administrative proceeding is the same as a trial court's. Both are guided by the standards set out in S.D. Codified Laws § 1-26-36, and they may reverse or modify a decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are made upon unlawful procedure. Ashland v. South Dakota Dep't of Labor, Unemployment Ins. Div., 321 N.W.2d 103, 1982 S.D. LEXIS 341 (S.D. 1982).

Although the South Dakota Department of Labor, Unemployment Insurance Division failed to transmit the record to the circuit court within the time required by S.D. Codified Laws § 1-26-33, any delays were not prejudicial to the appellant's substantial rights and did not justify reversal or modification under under S.D. Codified Laws § 1-26-36 for such procedural defects. Ashland v. South Dakota Dep't of Labor, Unemployment Ins. Div., 321 N.W.2d 103, 1982 S.D. LEXIS 341 (S.D. 1982).

While the procedural requirements of the South Dakota Administrative Procedure Act (APA) do not apply to school board decisions, on appeal of a school board decision to a circuit court pursuant to S.D. Codified Laws § 13-46-6, the doctrine of separation of powers limits the scope of review to that provided in the APA at S.D. Codified Laws § 1-26-36. Dale v. Board of Educ., 316 N.W.2d 108, 1982 S.D. LEXIS 263 (S.D. 1982).

In accordance with S.D. Codified Laws § 1-26-36, a court may not substitute its judgment for that of an agency as to the weight of the evidence on a question of fact unless the agency's decision is affected by error of law or is clearly erroneous in light of the evidence in the entire record. In re Balhorn-Moyle Petroleum Co., 315 N.W.2d 481, 1982 S.D. LEXIS 260 (S.D. 1982).

Circuit court erred in reversing the Department of Labor's decision in a teacher grievance case on the ground that the Department's jurisdiction had not been invoked by a timely grievance and the decision therefore was reversible pursuant to S.D. Codified Laws § 1-26-36, because a letter mailed by the teacher to the district within 30 days of notice of her nonrenewal was an adequate grievance under the school district's rules. Schloe v. Lead-Deadwood Indep. Sch. Dist., 282 N.W.2d 610, 1979 S.D. LEXIS 271 (S.D. 1979).

Administrative Law: Judicial Review: Standards of Review: Arbitrary & Capricious Review

While school boards may be "creatures of the legislature," when they rule on the petition of a taxpayer to transfer his property to another school district, the circuit court has appellate jurisdiction over the board's decision under S.D. Codified Laws § 13-6-85, and the decision may be overturned if it is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Kellogg v. Hoven Sch. Dist. No. 53-2, 479 N.W.2d 147, 1991 S.D. LEXIS 182 (S.D. 1991).

Administrative Law: Judicial Review: Standards of Review: Clearly Erroneous Review

South Dakota Civil Service Commission was not clearly erroneous in finding that just cause existed for the termination of a law-enforcement agent of the South Dakota Division of Criminal Investigation because the agent's supervisors testified as to the agent's unbecoming conduct, ranging from allegations of domestic abuse and emotional outbursts to severe and chronic lapses in judgment, and, at least two of the agent's actions were apparent to the general public as they transpired through the Internet. Black v. Div. of Crim. Investigation, 2016 SD 82, 887 N.W.2d 731, 2016 S.D. LEXIS 136 (S.D. 2016).

Trial court properly upheld an order from the South Dakota Public Utilities Commission (PUC) granting an applicant a permit to construct a coal-fired energy conversion facility where the decision of the PUC was not clearly erroneous; the PUC addressed the parties' contentions regarding global warming and carbon dioxide emissions and also provided a detailed explanation of why it rejected the findings proposed by the intervenors. In re Otter Tail Power Co., 2008 SD 5, 744 N.W.2d 594, 2008 S.D. LEXIS 5 (S.D. 2008).

City met its self-imposed burden by showing, before a civil service board, by conclusive evidence, that an employee's demotion and suspension was for just cause; the supreme court's standard of review of the board's decision was a clearly erroneous standard, and the employee failed to show that the decision was not supported by the board's factual findings. Irvine v. City of Sioux Falls, 2006 SD 20, 711 N.W.2d 607, 2006 S.D. LEXIS 27 (S.D. 2006).

In a case involving a question over whether a corporation was properly subjected to sales tax for the price of its seminars, a reviewing court properly gave great weight to the findings and inferences made by the Department of Revenue on factual questions concerning the subject matter of the seminars offered to people in the business

world. *Graceland College Ctr. for Prof'l Dev. & Lifelong Learning, Inc. v. S.D. Dep't of Revenue, 2002 SD 145, 654 N.W.2d 779, 2002 S.D. LEXIS 162 (S.D. 2002)*.

Court's standard of review in an administrative appeal is governed by S.D. Codified Laws § *1-26-36*. The court gives deference to the agency of factual matters, applying the clearly erroneous standard of review; when factual determinations are made on the basis of documentary evidence, however, the court reviews the matter de novo, unhampered by the clearly erroneous rule. *Watertown Coop. Elevator Ass'n v. S.D. Dep't of Revenue, 2001 SD 56, 627 N.W.2d 167, 2001 S.D. LEXIS 58 (S.D. 2001)*.

When an individual's suspended sentence was revoked by the South Dakota Board of Pardons and Paroles, the trial court erred in reversing that decision when the Board's findings were not clearly erroneous or arbitrary or capricious. The trial court failed to give sufficient weight to the findings made and the inferences drawn by the Board. *Amundson v. South Dakota Bd. of Pardons & Paroles, 2000 SD 95, 614 N.W.2d 800, 2000 S.D. LEXIS 98 (S.D. 2000)*.

An appellate court's standard of review requires it to give great weight to the findings and inferences made by the Department of Social Services on factual questions. The court examines agency findings in the same manner as the circuit court to decide whether they are clearly erroneous in light of all the evidence. If after careful review of the entire record the court is definitely and firmly convinced a mistake has been committed, only then will the court reverse. S.D. Codified Laws § *1-26-36*. *Meyer v. South Dakota Dep't of Social Servs., 1998 SD 62, 581 N.W.2d 151, 1998 S.D. LEXIS 61 (S.D. 1998)*.

In an action in which an employee sought vocational rehabiliation benefits, it was determined that S.D. Codified Laws § 1-6-36, required a court to give great weight to the findings and inferences made by a department on factual questions; *Section 1-26-36* changed the standard of review for sufficiency of the evidence from "unsupported by substantial evidence on the whole record" to "clearly erroneous." erroneous. *Sutherland v. Queen of Peace Hosp., 1998 SD 26, 576 N.W.2d 21, 1998 S.D. LEXIS 27 (S.D. 1998)*.

In an action in which an employee sought vocational rehabilitation benefits, S.D. Codified Laws § *1-26-36*, required a court to give great weight to the findings and inferences made by a department on factual questions; S.D. Codified Laws § *1-26-36* changed the standard of review for sufficiency of the evidence from "unsupported by substantial evidence on the whole record" to "clearly erroneous." *Sutherland v. Queen of Peace Hosp., 1998 SD 26, 576 N.W.2d 21, 1998 S.D. LEXIS 27 (S.D. 1998)*.

In an employer's appeal from a circuit court's determination that an employee was entitled to permanent total disability payments, the clearly erroneous standard of review did not apply to the factual finding of recurrence, even though that standard of review applied to findings of fact based on the entire record, because the medical testimony that provided the sole basis for the finding of recurrence was given solely by deposition and deposition testimony received de novo review. *Enger v. FMC, 1997 SD 70, 565 N.W.2d 79, 1997 S.D. LEXIS 72 (S.D. 1997)*.

Pursuant to S.D. Codified Laws § *1-26-36* and case law, when the issue on appeal is a question of law, the decisions of an administrative agency and the circuit court are fully reviewable. When the issue is a question of fact, the clearly erroneous standard of review applies to the findings of an administrative agency. *Cox v. Sioux Falls Sch. Dist. 49-5, 514 N.W.2d 868, 1994 S.D. LEXIS 45 (S.D. 1994)*.

Trial court erred in reversing Department of Revenue's finding that accounting services obtained prior to company's move to South Dakota were not subject to use tax; the agency's decision was not clearly erroneous in light of all of the evidence. *In re Thermoset Plastics, 473 N.W.2d 136, 1991 S.D. LEXIS 108 (S.D. 1991)*.

In a labor dispute, Department of Labor's determination that the teacher did not deceive the school district was not clearly erroneous as contemplated by S.D. Codified Laws § *1-26-36*, and the teacher was entitled to reinstatement; the evidence on either side of this issue was credible and capable of supporting inferences leading to either conclusion, and the burden of proof is not sustained when the probabilities are equal. *Rininger v. Bennett County Sch. Dist., 468 N.W.2d 423, 1991 S.D. LEXIS 56 (S.D. 1991)*.

In an administrative appeal of a decision concerning contributions to South Dakota's unemployment insurance fund, the appellate court reviewed the agency record in the same light as a trial court; deference was accorded the agency's factual determination, and the record was reviewed to determine whether the agency's findings of fact were clearly erroneous. *In re Appeal of Hendrickson's Health Care Serv., 462 N.W.2d 655, 1990 S.D. LEXIS 163 (S.D. 1990)*.

Where a county employee who developed migraines and vertigo was terminated, it could not be said that a hearing examiner's findings were clearly erroneous or that his conclusions were affected by any error of law when the examiner found that there was just cause for termination under the collective bargaining agreement. *Strackbein v. Fall River County Highway Dep't, 416 N.W.2d 270, 1987 S.D. LEXIS 384 (S.D. 1987)*.

Under the clearly erroneous standard of S.D. Codified Laws § *1-26-37*, the Supreme Court of South Dakota reversed the circuit court's judgment that reversed the administrative decision of the South Dakota Law Enforcement Civil Service Commission that it could not consider the state trooper's grievance regarding the propriety of an involuntary transfer and that good cause existed for the three-day suspension that was primarily for the trooper's numerous refusals to adhere to the required standards regarding the maintenance of his appearance and his equipment; precedent established that the commission could not modify disciplinary action that was taken but could determine if good cause existed for that action, its powers under S.D. Codified Laws § *3-7-18* to make rules regarding transfers did not include the authority to review non-disciplinary transfers, such as the current one that was designed to give the trooper a "clean slate," and the standard of review under S.D. Codified Laws § *1-26-36* did not authorize the circuit court's reversal of the commission's decision because the commission acted within its authority and its decision was not clearly erroneous, arbitrary and capricious, or otherwise improper. *Stavig v. South Dakota Highway Patrol, 371 N.W.2d 166, 1985 S.D. LEXIS 302 (S.D. 1985)*.

Trial court's affirmation of a finding by the South Dakota Department of Labor that an employee's injury arose out of and in the course of his employment was not found to have been clearly erroneous under the standard's of review set forth in S.D. Codified Laws § *1-26-37* and S.D. Codified Laws § *1-26-36* because evidence had been presented to support that finding that the employee's fall and resulting concussion had been caused by carbon monoxide poisoning that the employee incurred while at work earlier that day. *Erickson v. Minnesota Gas Co., 358 N.W.2d 526, 1984 S.D. LEXIS 409 (S.D. 1984)*.

Taxpayer, a contractor, was liable for contractor's excise tax, pursuant to S.D. Codified Laws § *10-46A-1*, because the silos placed on the taxpayer's farm was a realty improvement, S.D. Codified Laws § *43-33-1*; the court held up the decision of the Department of Revenue because the decision was not clearly erroneous or the court was not left with a firm conviction that a mistake had been made. S.D. Codified Laws § *1-26-36*. *Dakota Harvestore Sys. v. S.D. Dep't of Revenue, 331 N.W.2d 828, 1983 S.D. LEXIS 288 (S.D. 1983)*.

If a state employer wished to terminate a state employee for incompetence, pursuant to administrative rules the employer had to give the employee a 30-day work improvement notice; in addition, "incompetency" could not have arisen from one incident; thus, the court held that under S.D. Codified Laws § *1-26-36*, a reversal was required, because the commission's decision was erroneous. *Hartpence v. Youth Forestry Camp, 325 N.W.2d 292, 1982 S.D. LEXIS 400 (S.D. 1982)*.

Although slick and icy roads may have been a contributing factor in an employee's accident in which the employee struck a bridge when he was unable to stop the car by applying the brakes, the effects of the employee's intoxication in causing his injury were sufficient to lead reasonable men to conclude that it was a substantial factor in causing the injury. Therefore, a finding that the accident was proximately caused by the employee's intoxication and that worker's compensation was barred under S.D. Codified Laws § *62-4-37* was not clearly erroneous and was affirmed on appellate review under S.D. Codified Laws § *1-26-36(5)*. *Driscoll v. Great Plains Mktg. Co., 322 N.W.2d 478, 1982 S.D. LEXIS 354 (S.D. 1982)*.

In reviewing on appeal a circuit court's judgment under the South Dakota Administrative Procedures Act, S.D. Codified Laws ch. 1-26, an appellate court must make the same review of the administrative agency's action as

does the circuit court, unaided by a presumption that the circuit court's decision is correct. This review is limited under S.D. Codified Laws § 1-26-36(5) to determining whether the agency's findings are clearly erroneous. Driscoll v. Great Plains Mktg. Co., 322 N.W.2d 478, 1982 S.D. LEXIS 354 (S.D. 1982).

In a worker's compensation benefit claim where the Director of the Division of Labor and Management awarded benefits to an employee, the director's findings were not clearly erroneous pursuant to S.D. Codified Laws § 1-26-36(5) because despite conflicts in the testimony and in the medical records, the employee was totally disabled and the employer had sufficient notice of the injury. Barkdull v. Homestake Mining Co., 317 N.W.2d 417, 1982 S.D. LEXIS 282 (S.D. 1982).

Administrative Law: Judicial Review: Standards of Review: De Novo Review

Documentary evidence before the South Dakota Department of Labor, Division of Human Rights was reviewed de novo on appeal, and under this standard the Division properly determined that probable cause did not exist to support a secretary's claim that the secretary was subjected to a sexually hostile work environment because of a male co-worker's comments and that the secretary was retaliated against by being discharged for complaining where the secretary was discharged for unsatisfactory work performance two years after the comments. Charge of Sandra M. Williams v. S.D. Dep't of Agric., 2010 SD 19, 779 N.W.2d 397, 2010 S.D. LEXIS 19 (S.D. 2010).

In an employer's appeal from a circuit court's determination that an employee was entitled to permanent total disability payments, the clearly erroneous standard of review did not apply to the factual finding of recurrence, even though that standard of review applied to findings of fact based on the entire record, because the medical testimony that provided the sole basis for the finding of recurrence was given solely by deposition and deposition testimony received de novo review. Enger v. FMC, 1997 SD 70, 565 N.W.2d 79, 1997 S.D. LEXIS 72 (S.D. 1997).

On review of a decision under S.D. Codified Laws § 1-26-36 the question is not whether there is substantial evidence contrary to the Career Service Commission's findings but whether there is substantial evidence to support those findings. Conclusions of law, on the other hand, are fully reviewable, as are mixed questions of fact and law which require the application of a legal standard. Schroeder v. Dep't of Social Servs., 1996 SD 34, 545 N.W.2d 223, 1996 S.D. LEXIS 30 (S.D. 1996).

Pursuant to S.D. Codified Laws § 1-26-36 and case law, when the issue on appeal is a question of law, the decisions of an administrative agency and the circuit court are fully reviewable. When the issue is a question of fact, the clearly erroneous standard of review applies to the findings of an administrative agency. Cox v. Sioux Falls Sch. Dist. 49-5, 514 N.W.2d 868, 1994 S.D. LEXIS 45 (S.D. 1994).

In an action concerning unfair labor practices the scope of review in an administrative appeal was governed by S.D. Codified Law § 1-26-36. Oberle v. Aberdeen, 470 N.W.2d 238, 1991 S.D. LEXIS 74 (S.D. 1991).

S.D. Codified Laws § 1-26-36 and S.D. Codified Laws § 1-26-37, respectively, provided that, regarding an administrative proceeding that resulted in a sales tax assessment that was the subject of a taxpayer's action for judicial review, the clearly erroneous standard of review applied to the factual findings of the Department of Revenue (South Dakota) and its rulings on the questions of law were fully reviewable. In re State & City Sales Tax Liab. of Quality Serv. Railcar Repair Corp., 437 N.W.2d 209, 1989 S.D. LEXIS 41 (S.D. 1989).

Under S.D. Codified Laws § 1-26-36, an appellate court reviewing an administrative appeal must first determine whether the holding involves a finding of fact or conclusion of law; questions of law are reviewed by the appellate court de novo, and no deference is given to the conclusions of law by the trial court or the agency. Beville v. University of South Dakota, 420 N.W.2d 9, 1988 S.D. LEXIS 33 (S.D. 1988).

Where suitable employment opportunities existed for claimant, even without a college education and with his drug and alcohol problem, and a college degree would not automatically lift him to a suitable, stable position assuring him of a good living, the crucial conclusion of law entered by the deputy director of the Department of Labor, denying the claimant a four-year college degree as a program of rehabilitation, when reviewed as prescribed by

S.D. Codified Laws § 1-26-37, was not affected by mistake of law or error of law, as set forth in S.D. Codified Laws § 1-26-36(4). Barkdull v. Homestake Mining Co., 411 N.W.2d 408, 1987 S.D. LEXIS 334 (S.D. 1987).

Administrative Law: Judicial Review: Standards of Review: Substantial Evidence

South Dakota Board of Environmental Protection's findings that a proposed solid waste disposal site met all regulations and would not cause pollution only had to be supported by substantial evidence. In re Solid Waste Disposal Permit Application, 295 N.W.2d 328, 1980 S.D. LEXIS 355 (S.D. 1980).

Decision by the South Dakota Comprehensive Health Planning Agency to deny an application for a certificate of need for construction of an intermediate care facility in a city was upheld under S.D. Codified Laws §§ 1-26-1 and S.D. Codified Laws § 1-26-36 because the Agency's findings and conclusions were supported by substantial evidence on the whole record; and because the decision which denied the application was not arbitrary, capricious, or characterized by abuse of discretion. Nehlich v. South Dakota Comprehensive Health Planning Agency, 290 N.W.2d 477, 1980 S.D. LEXIS 270 (S.D. 1980).

Appellate court reviewing a trial court's decision to affirm a decision by the Division of Labor and Management Relations on an employee's workmen's compensation claim had to review the agency's decision in the same manner as the circuit court, unaided by any presumption of correctness of the circuit court's decision; when there was no substantial evidence in the record to support the examiner's finding of fact that the employee's fall did not aggravate a preexisting arthritis condition or hasten the need for a total knee replacement, the denial of benefits to the employee had to be reversed. Vetter v. Bison, 278 N.W.2d 202, 1979 S.D. LEXIS 224 (S.D. 1979).

Decision by the South Dakota Secretary of Revenue, finding sales tax due by a city as a result of an audit of one of its bars, was proper because the method used to reconstruct the tax base was reasonable under the circumstances and based upon substantial evidence as required by S.D. Codified Laws § 1-26-36, and even if the 10-day period was applicable, it could not begin to run until the day of notification of the Secretary's decision.. Lennox v. Wendell, 278 N.W.2d 635, 1979 S.D. LEXIS 227 (S.D. 1979).

South Dakota Supreme Court's review of circuit court decision, which was the review of an administrative agency's decision, was governed by S.D. Codified Laws § 1-26-36, requiring that the supreme court determine whether the agency's decision could be sustained by substantial evidence. For this purpose, "substantial evidence" is defined in S.D. Codified Laws § 1-26-1. Lindsey v. Minnehaha County, 281 N.W.2d 808, 1979 S.D. LEXIS 270 (S.D. 1979), superseded by statute as stated in Division of Human Rights ex rel. Miller v. Miller, 349 N.W.2d 42, 1984 S.D. LEXIS 306 (S.D. 1984).

When after a hearing under S.D. Consolidated Laws § 3-6A-38, the South Dakota Personnel Policy Board restored a demoted employee to his classification as Social Worker III, substantial evidence under S.D. Consolidated Laws § 1-26-36 did not support its decision. The record as a whole demonstrated that the employee lacked the personal and professional attributes required of a person holding the position of Social Worker III, and there was nothing indicating that his supervisors in demoting him were motivated by retaliatory, vindictive, or nonprofessional motives. In re Appeal of Miller, 283 N.W.2d 241, 1979 S.D. LEXIS 276 (S.D. 1979).

Taxpayer operated a hotel, lounge, and restaurant under an authorized retail sales tax license was not liable for for sales tax and penalties, pursuant to S.D. Codified Laws § 10-45-2, because the overwhelming evidence established that a lessee was the retailer, as defined in S.D. Codified Laws § 10-45-1, and that the taxpayer was not carrying on business for sales tax purposes; a court could reverse the decision of a Secretary of Revenue, if the decision was (1) made upon unlawful procedure, or (2) was unsupported by substantial evidence on the whole record. S.D. Codified Laws § 1-26-36. Ward Co. v. Department of Revenue, 284 N.W.2d 883, 1979 S.D. LEXIS 295 (S.D. 1979).

South Dakota State Banking Commission properly followed the Administrative Procedure Act, S.D. Codified Laws § 1-26-1, and its own rules when it conducted an adjudicative hearing in a contested case in order to determine whether or not to grant a charter for a new bank to an applicant. However, the Commission's decision to grant the

charter was not supported by substantial evidence as required by S.D. Codified Laws § 1-26-36 and the decision had to be reversed because the economic picture of the town in which the bank would be opened was less than promising and the area did not need and could not support an additional banking facility. Valley State Bank v. Farmers State Bank, 87 S.D. 614, 213 N.W.2d 459, 1973 S.D. LEXIS 165 (S.D. 1973).

Banking Law: Bank Expansion: Bank Creations & Reorganizations

South Dakota State Banking Commission properly followed the Administrative Procedure Act, S.D. Codified Laws § 1-26-1, and its own rules when it conducted an adjudicative hearing in a contested case in order to determine whether or not to grant a charter for a new bank to an applicant. However, the Commission's decision to grant the charter was not supported by substantial evidence as required by S.D. Codified Laws § 1-26-36 and the decision had to be reversed because the economic picture of the town in which the bank would be opened was less than promising and the area did not need and could not support an additional banking facility. Valley State Bank v. Farmers State Bank, 87 S.D. 614, 213 N.W.2d 459, 1973 S.D. LEXIS 165 (S.D. 1973).

Civil Procedure: Declaratory Judgment Actions: General Overview

Where parents did not direct appeal agency's administrative refusal to remove parents from child abuser registry, the parents did not exhaust all of their administrative remedies and deprived the trial court of jurisdiction over their declaratory judgment action. Small v. State, 2003 SD 29, 659 N.W.2d 15, 2003 S.D. LEXIS 29 (S.D. 2003).

Civil Procedure: Remedies: Costs & Attorney Fees: Costs: General Overview

While a taxpayer argued on appeal that it was entitled to sanctions pursuant to S.D. Codified Laws § 15-6-11(d), it made no motion for sanctions in the trial court, and this foreclosed its notice of review that the trial court abused its discretion when it failed to award the attorney fees and sales tax incurred as authorized by S.D. Codified Laws § 1-26-36. In re K. O. Lee Co., 489 N.W.2d 606, 1992 S.D. LEXIS 113 (S.D. 1992).

Civil Procedure: Appeals: Standards of Review: General Overview

Under S.D. Codified Laws § 1-26-37 and S.D. Codified Laws § 1-26-36, the decision to grant an applicant a Class B motor carrier permit is a question of law for an appellate court to decide on review, without giving any deference to either the trial court or the Public Utilities Commission. In re Harms, 491 N.W.2d 760, 1992 S.D. LEXIS 147 (S.D. 1992).

Trial de novo required by S.D. Codified Laws § 13-46-6 permitted an independent inquiry into the facts surrounding a school board's decision not to renew a teacher's contract, but this was only for the purpose of passing on the legality of the school board's decision, and this did not mean that a circuit court could substitute its judgment for that of the school board or that the circuit court had to justify its decision by a preponderance of the evidence received in the trial de novo. While S.D. Codified Laws § 1-26-36, a part of the South Dakota Administrative Procedures Act on which the circuit court based its review, did not specify that it applied to local governing boards, the circuit court did not err in applying the standards of this statute to the teacher's appeal from the school board's decision not to renew her teaching contract. Mortweet v. Ethan Bd. of Educ., 90 S.D. 368, 241 N.W.2d 580, 1976 S.D. LEXIS 216 (S.D. 1976), overruled in part, State v. Troy Twp., 2017 SD 50, 2017 S.D. LEXIS 105 (S.D. 2017).

Even though S.D. Codified Laws § 13-46-6 provided that a teacher's appeal from a school board's determination not to renew her teaching contract was to be a trial de novo in a circuit court, the circuit court based its review on S.D. Codified Laws § 1-26-36, a part of the South Dakota Administrative Procedures Act, because the words "de novo" in S.D. Codified Laws § 13-46-6 did not mean that the school board had to justify its decision in the circuit court by a preponderance of the evidence. Only when the school board, as a legislative agency, had acted unreasonably, arbitrarily, or had manifestly abused its discretion in exercising legislative authority, could the circuit court interfere with the school board's action. Mortweet v. Ethan Bd. of Educ., 90 S.D. 368, 241 N.W.2d 580, 1976 S.D. LEXIS 216 (S.D. 1976), overruled in part, State v. Troy Twp., 2017 SD 50, 2017 S.D. LEXIS 105 (S.D. 2017).

Civil Procedure: Appeals: Standards of Review: Clearly Erroneous Review

City met its self-imposed burden by showing, before a civil service board, by conclusive evidence, that an employee's demotion and suspension was for just cause; the supreme court's standard of review of the board's decision was a clearly erroneous standard, and the employee failed to show that the decision was not supported by the board's factual findings. *Irvine v. City of Sioux Falls, 2006 SD 20, 711 N.W.2d 607, 2006 S.D. LEXIS 27 (S.D. 2006)*.

Credibility of witnesses, the weight to be accorded their testimony, and the weight of evidence is left to the factfinder. Conflicts in the evidence are resolved in favor of the trier of fact under S.D. Codified Laws § *1-26-36*. *Eide v. Oldham-Ramona Sch. Dist. # 39-5, 516 N.W.2d 322, 1994 S.D. LEXIS 69 (S.D. 1994)*.

Trial court's affirmation of a finding by the South Dakota Department of Labor that an employee's injury arose out of and in the course of his employment was not found to have been clearly erroneous under the standard's of review set forth in S.D. Codified Laws § *1-26-37* and S.D. Codified Laws § *1-26-36* because evidence had been presented to support that finding that the employee's fall and resulting concussion had been caused by carbon monoxide poisoning that the employee incurred while at work earlier that day. *Erickson v. Minnesota Gas Co., 358 N.W.2d 526, 1984 S.D. LEXIS 409 (S.D. 1984)*.

Under S.D. Codified Laws § *1-26-37* and S.D. Codified Laws § *1-26-36*, findings by the human rights commission that an employee was discriminated against and discharged in retaliation for complaining were not clearly erroneous, although the employer claimed the discharge was for economic reasons. *Division of Human Rights ex rel. Miller v. Miller, 349 N.W.2d 42, 1984 S.D. LEXIS 306 (S.D. 1984)*.

Although a circuit court's scope of review of a school board decision is limited to the standards enumerated in S.D. Codified Laws § *1-26-36*, the last paragraph of that statute excusing a trial court from entering its own findings of fact and conclusions law cannot apply to appeals heard pursuant to S.D. Codified Laws § *13-46-6*; the school board does not enter findings of fact or conclusions of law for the trial to affirm, modify, or reverse; the circuit court must enter findings of fact and conclusions of law in cases appealed under S.D. Codified Laws § *13-46-6*, as the supreme court must have the circuit court's findings in order to apply S.D. Codified Laws § *15-6-52(a)*. *Dale v. Board of Educ., 316 N.W.2d 108, 1982 S.D. LEXIS 263 (S.D. 1982)*.

Civil Procedure: Appeals: Standards of Review: De Novo Review

S.D. Codified Laws § *10-38-31* expressly required de novo review by a trial court in determining whether the state revenue department's proportional assessment of an interstate railroad's property was proper, not a more deferential standard of review contained in S.D. Codified Laws § *1-26-36*. *Fall River County v. South Dakota Dep't of Revenue, 1996 SD 106, 552 N.W.2d 620, 1996 S.D. LEXIS 115 (S.D. 1996)*.

Constitutional Law: Separation of Powers

In an appeal of a school board decision terminating an employee's contract to the circuit court pursuant to S.D. Codified Laws § *13-46-6*, the doctrine of separation of powers limits the scope of review to that provided in S.D. Codified Laws § *1-26-36*, which provides that the court shall give great weight to the findings made and the inferences drawn by the school board and may reverse or modify the decision only if the substantial rights of the appellant have been prejudiced. *Maasjo v. McLaughlin Sch. Dist. No. 15-2, 489 N.W.2d 618, 1992 S.D. LEXIS 115 (S.D. 1992)*.

Criminal Law & Procedure: Sentencing: Alternatives: Probation: General Overview

Court reviewing Board of Pardons and Paroles' decision to revoke the suspended portion of a defendant's sentence could overrule Board's findings of fact only if they were clearly erroneous; the question was not whether there was substantial evidence contrary to the Board's finding, but whether there was substantial evidence to support the

finding. *In re Revocation of Suspended Sentence of Brown, 1997 SD 133, 572 N.W.2d 435, 1997 S.D. LEXIS 132 (S.D. 1997)*.

Criminal Law & Procedure: Sentencing: Alternatives: Probation: Revocation: Proceedings

Where a parolee convicted of possessing child pornography was released on parole and, as a condition thereof, was required to maintain residence at an addiction rehabilitation facility and attend sex offender counseling and where the parolee was terminated from the rehabilitation facility and dismissed from the treatment program after he was found fondling himself, the Parole Board did not abuse its discretion in revoking the parole because, under the terms of his parole supervision agreement, if the parolee was unable to participate in and complete the programs, regardless of the reason, the Parole Board has a basis to be reasonably satisfied that the parolee violated this parole. *Martin v. S.D. Bd. of Pardons & Paroles, 2009 SD 103, 776 N.W.2d 93, 2009 S.D. LEXIS 179 (S.D. 2009)*.

Criminal Law & Procedure: Postconviction Proceedings: Parole

When an individual's suspended sentence was revoked by the South Dakota Board of Pardons and Paroles, the trial court erred in reversing that decision when the Board's findings were not clearly erroneous or arbitrary or capricious. The trial court failed to give sufficient weight to the findings made and the inferences drawn by the Board. *Amundson v. South Dakota Bd. of Pardons & Paroles, 2000 SD 95, 614 N.W.2d 800, 2000 S.D. LEXIS 98 (S.D. 2000)*.

Education Law: Administration & Operation: Boards of Elementary & Secondary Schools: General Overview

Teacher's personnel file and related materials were admissible under the business records hearsay exception at the school board's hearing on contract renewal; the board's decision to not renew was not clearly erroneous and was supported by competent evidence. *Tschetter v. Doland Board of Educ., 302 N.W.2d 43, 1981 S.D. LEXIS 212 (S.D. 1981)*.

Education Law: Administration & Operation: School Districts: Alteration

While school boards may be "creatures of the legislature," when they rule on the petition of a taxpayer to transfer his property to another school district, the circuit court has appellate jurisdiction over the board's decision under S.D. Codified Laws § *13-6-85*, and the decision may be overturned if it is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. *Kellogg v. Hoven Sch. Dist. No. 53-2, 479 N.W.2d 147, 1991 S.D. LEXIS 182 (S.D. 1991)*.

Where the parents of a school-aged child lived closer to another school district than the school district in which they were placed, where they were more aligned to the economic and social life of the community in the other school district, where they were graduates of the high school in the other school district, where the other school district's bus went directly by their residence, where the other school district offered the special education classes that their child needed, and where the district line that placed their property in the undesired school district was drawn in an arbitrary fashion, the decision of the State Superintendent of of Elementary and Secondary Education to permit the redistricting of the parents' home was substantiated by the evidence. *Shumaker v. Canova Sch. Dist., 322 N.W.2d 869, 1982 S.D. LEXIS 359 (S.D. 1982)*.

Education Law: Faculty & Staff: Discipline & Dismissal: Administrative Proceedings: Appeals & Reviews

When an administrative agency's decision is appealed to circuit court and the final judgment of that court is appealed to the appellate court, it makes the same review made by the circuit court. Conclusions of Law are open to full review without any presumption that the circuit court's decision is correct under S.D. Codified Laws § *1-26-37*; however, the appellate court gives great weight to the findings made and inferences drawn by the Department of Labor on questions of fact under S.D. Codified Laws § *1-26-36*. *Eide v. Oldham-Ramona Sch. Dist. # 39-5, 516 N.W.2d 322, 1994 S.D. LEXIS 69 (S.D. 1994)*.

In an appeal of a school board decision terminating an employee's contract to the circuit court pursuant to S.D. Codified Laws § 13-46-6, the doctrine of separation of powers limits the scope of review to that provided in S.D. Codified Laws § 1-26-36, which provides that the court shall give great weight to the findings made and the inferences drawn by the school board and may reverse or modify the decision only if the substantial rights of the appellant have been prejudiced. Maasjo v. McLaughlin Sch. Dist. No. 15-2, 489 N.W.2d 618, 1992 S.D. LEXIS 115 (S.D. 1992).

Where a teacher was due for a formal evaluation by May, but the school board decided not to renew his contract in April, there was no need to evaluate him, and on review of the school board's decision not to renew his contract, the circuit could did not have to find in the teacher's favor as a matter of law pursuant to S.D. Codified Laws § 1-26-36(1); the teacher had met numerous times with the board and had a number of discussions with school administration officials concerning his teaching methods and was therefore, fully cognizant of the board's concerns. Dale v. Board of Educ., 316 N.W.2d 108, 1982 S.D. LEXIS 263 (S.D. 1982).

Constitutional separation of powers cannot be abrogated by legislative action; consequently, S.D. Codified Laws § 13-46-6, which provides for de novo trials when county school board matters are appealed to the circuit court, may not be given a literal construction, because to do so would be to presume that the legislature intended to confer on the court's powers inconsistent with the discharge of their inherent judicial functions, and this a court may not do. Mortweet v. Ethan Bd. of Educ., 90 S.D. 368, 241 N.W.2d 580, 1976 S.D. LEXIS 216 (S.D. 1976), overruled in part, State v. Troy Twp., 2017 SD 50, 2017 S.D. LEXIS 105 (S.D. 2017).

Education Law: Faculty & Staff: Discipline & Dismissal: Administrative Proceedings: Contract Requirements

Deference is not given to a school board's decision by the Department of Labor in a grievance review under S.D. Codified Laws § 3-18-15.2. Rather, the Department issues a binding order based upon its own investigation and hearing; the circuit court and the appellate court then review the Department's findings of fact and conclusions of law under S.D. Codified Laws § 1-26-36. Cox v. Sioux Falls Sch. Dist. 49-5, 514 N.W.2d 868, 1994 S.D. LEXIS 45 (S.D. 1994).

Education Law: Faculty & Staff: Discipline & Dismissal: Administrative Proceedings: Statutory Procedures

Where a teacher was due for a formal evaluation by May, but the school board decided not to renew his contract in April, there was no need to evaluate him, and on review of the school board's decision not to renew his contract, the circuit could did not have to find in the teacher's favor as a matter of law pursuant to S.D. Codified Laws § 1-26-36(1); the teacher had met numerous times with the board and had a number of discussions with school administration officials concerning his teaching methods and was therefore, fully cognizant of the board's concerns. Dale v. Board of Educ., 316 N.W.2d 108, 1982 S.D. LEXIS 263 (S.D. 1982).

Education Law: Faculty & Staff: Employment Contracts

On review of a school board's decision not to renew a teacher's contract, a circuit court properly found that the board decided not to renew the teacher's contract because he failed to teach biology in an adequate manner and in conformity with the board's policies and guidelines, and the circuit court properly upheld the board's decision because it did not violate the provisions of S.D. Codified Laws § 1-26-36(1)-(6). Dale v. Board of Educ., 316 N.W.2d 108, 1982 S.D. LEXIS 263 (S.D. 1982).

Education Law: Faculty & Staff: Misconduct & Performance: Dishonesty

In a labor dispute, Department of Labor's determination that the teacher did not deceive the school district was not clearly erroneous as contemplated by S.D. Codified Laws § 1-26-36, and the teacher was entitled to reinstatement; the evidence on either side of this issue was credible and capable of supporting inferences leading to either conclusion, and the burden of proof is not sustained when the probabilities are equal. Rininger v. Bennett County Sch. Dist., 468 N.W.2d 423, 1991 S.D. LEXIS 56 (S.D. 1991).

Energy & Utilities Law: Administrative Proceedings: Judicial Review: General Overview

Appellate court reviewed an order of the South Dakota Public Utilities Commission pursuant to S.D. Codified Laws § 1-26-36. *In re Northern States Power Co., 328 N.W.2d 852, 1983 S.D. LEXIS 247 (S.D. 1983)*.

In reviewing the actions of any agency, it is the duty of the Supreme Court of South Dakota to decide whether the law has been correctly applied and whether the agency's findings are clearly erroneous; in reviewing the sufficiency of the evidence the court does not sit as a trial de novo of the agency but limits its review to whether the findings and decision of that agency are clearly erroneous; the review by the Supreme Court of South Dakota is the same as that conducted by the circuit court without a presumption of correctness as to the lower court's findings. *In re Clay-Union Elec. Corp., 300 N.W.2d 58, 1980 S.D. LEXIS 470 (S.D. 1980)*.

Energy & Utilities Law: Administrative Proceedings: Judicial Review: Scope & Standards of Review

Approval by the South Dakota Public Utility Commission of a public utility's application for authority to increase electric rates was appropriate because the Commission did not act arbitrarily or capriciously in its consideration of the utility's pension expenses. *In re Black Hills Power, 2016 SD 92, 889 N.W.2d 631, 2016 S.D. LEXIS 161 (S.D. 2016)*.

Energy & Utilities Law: Administrative Proceedings: Public Utility Commissions: General Overview

Under S.D. Codified Laws § 1-26-36, the Supreme Court of South Dakota is required to give great weight to the findings made and the inferences drawn by the South Dakota Public Utilities Commission (PUC) on questions of fact. The court may reverse or modify a decision of the PUC only if the substantial rights of an appellant have been prejudiced because the PUC's administrative findings, inferences, conclusions, or decisions are: (1) in violation of constitutional or statutory provisions, (2) In excess of the PUC's statutory authority, (3) made upon unlawful procedure. (4) affected by other error of law, (5) clearly erroneous in light of the entire evidence in the record, or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. *US West Communs., Inc. v. AT&T Communs. of the Midwest, Inc. (In re Establishment of Switched Access Rates), 2000 SD 140, 618 N.W.2d 847, 2000 S.D. LEXIS 144 (S.D. 2000)*.

Standard of review of a decision of the Public Utilities Commission is not whether there is substantial evidence contrary to the court's finding, but whether there is substantial evidence to support the agency's finding or whether there is such relevant or competent evidence as a reasonable mind might accept as being sufficiently adequate to support a conclusion. A power company should have been allowed to increase its rate with regard to compensating bank balances and inflation and the Commission's denial of the company's request was arbitrary and capricious. *South Dakota Pub. Utils. Comm'n v. Otter Tail Power Co., 291 N.W.2d 291, 1980 S.D. LEXIS 280 (S.D. 1980)*.

Energy & Utilities Law: Administrative Proceedings: Ratemaking

Approval by the South Dakota Public Utility Commission of a public utility's application for authority to increase electric rates was appropriate because the Commission did not act arbitrarily or capriciously in its consideration of the utility's pension expenses. *In re Black Hills Power, 2016 SD 92, 889 N.W.2d 631, 2016 S.D. LEXIS 161 (S.D. 2016)*.

Energy & Utilities Law: Utility Companies: Rates: General Overview

On appeal from a trial court's decision reversing the South Dakota Public Utilities Commission's disallowance of a rate increase, the clearly erroneous rule of S.D. Codified Laws § 15-6-52(a) did not apply because the trial court's decision was based entirely on the written record from the agency; pursuant to S.D. Codified Laws § 1-26-36, the appellate court reviewed the agency record in the same light as did the trial court to determine whether or not the agency's decision was clearly erroneous in light of all the evidence in the record. *In re Northwestern Bell Tel. Co., 382 N.W.2d 413, 1986 S.D. LEXIS 221 (S.D. 1986)*.

Environmental Law: Air Quality: General Overview

In light of the two-step permit process, the South Dakota Board of Minerals and Environment's decision granting a mining corporation's application for an air quality construction permit was not arbitrary, capricious, or clearly erroneous under S.D. Codified Laws § 1-26-36(5), (6) because it was clearly supported by the evidence; testing by the mining corporation under the air quality construction permit was required in order to submit the results to obtain an air quality operation permit. *In re Air Quality Constr. Permit etc., 441 N.W.2d 927, 1989 S.D. LEXIS 93 (S.D. 1989)*.

Environmental Law: Solid Wastes: Permits: General Overview

Applying the standard of review of an administrative decision as set forth in S.D. Codified Laws § 1-26-36, the South Dakota Board of Environmental Protection's decision to grant a city a permit to operate a solid waste disposal facility was supported by substantial evidence on the whole record based on the suitability of the site with regard to disposal criteria, such as danger to water quality, the proximity of the site to highways and public parks, and also to operational factors including operational methods, site improvements necessary to proper operation, and proper closure; the Board's decision was neither arbitrary nor capricious. *In re Solid Waste Disposal Permit Application, 268 N.W.2d 599, 1978 S.D. LEXIS 189 (S.D. 1978)*.

Evidence: Hearsay: Exceptions: Business Records: General Overview

Teacher's personnel file and related materials were admissible under the business records hearsay exception at the school board's hearing on contract renewal; the board's decision to not renew was not clearly erroneous and was supported by competent evidence. *Tschetter v. Doland Board of Educ., 302 N.W.2d 43, 1981 S.D. LEXIS 212 (S.D. 1981)*.

Evidence: Procedural Considerations: Burdens of Proof: General Overview

Burden is on an appellant to show that the procedural violations of an administrative agency prejudiced his substantial rights to justify an appellate court's reversal or modification of the agency's decision under S.D. Codified Laws § 1-26-36(3). *Ashland v. South Dakota Dep't of Labor, Unemployment Ins. Div., 321 N.W.2d 103, 1982 S.D. LEXIS 341 (S.D. 1982)*.

Family Law: Family Protection & Welfare: Children: General Overview

Where parents did not direct appeal agency's administrative refusal to remove parents from child abuser registry, the parents did not exhaust all of their administrative remedies and deprived the trial court of jurisdiction over their declaratory judgment action. *Small v. State, 2003 SD 29, 659 N.W.2d 15, 2003 S.D. LEXIS 29 (S.D. 2003)*.

Governments: Legislation: Interpretation

S.D. Codified Laws § 1-26-36 requires the court to give great weight to the findings made and inferences drawn by the administrative agency on questions of fact. *In re State Sales & Use Tax Liab. of Pam Oil, 459 N.W.2d 251, 1990 S.D. LEXIS 132 (S.D. 1990)*.

In a worker's compensation case where an employee's claim for permanent total disability benefits was denied by the South Dakota Department of Labor, its denial was upheld because the factual determinations made by the department were not clearly erroneous, S.D. Codified Laws § 1-26-36(5),and because the employee failed to prove that work as a fry cook caused the coronary heart disease, earlier version of S.D. Codified Laws § 62-1-1. *Lawler v. Windmill Restaurant, 435 N.W.2d 708, 1989 S.D. LEXIS 15 (S.D. 1989)*.

Governments: Local Governments: Administrative Boards

In an action to change school district boundaries, an appeal from the decision of the state superintendent could be made pursuant to S.D. Codified Laws § 13-6-89. On appeal from a decision of the state superintendent, the appeal should be heard and determined in the same manner as a direct appeal from the school board decision pursuant to § 13-6-89 without any presumption of the correctness of the decision of the state superintendent, and the provisions of S.D. Codified Laws § 1-26-36 cannot be applied to the decision of the state superintendent. *Oldham-Ramona Sch. Dist. #39-5 v. Ust, 502 N.W.2d 574, 1993 S.D. LEXIS 78 (S.D. 1993)*.

Governments: State & Territorial Governments: Employees & Officials

Under the clearly erroneous standard of S.D. Codified Laws § 1-26-37, the Supreme Court of South Dakota reversed the circuit court's judgment that reversed the administrative decision of the South Dakota Law Enforcement Civil Service Commission that it could not consider the state trooper's grievance regarding the propriety of an involuntary transfer and that good cause existed for the three-day suspension that was primarily for the trooper's numerous refusals to adhere to the required standards regarding the maintenance of his appearance and his equipment; precedent established that the commission could not modify disciplinary action that was taken but could determine if good cause existed for that action, its powers under S.D. Codified Laws § 3-7-18 to make rules regarding transfers did not include the authority to review non-disciplinary transfers, such as the current one that was designed to give the trooper a "clean slate," and the standard of review under S.D. Codified Laws § 1-26-36 did not authorize the circuit court's reversal of the commission's decision because the commission acted within its authority and its decision was not clearly erroneous, arbitrary and capricious, or otherwise improper. *Stavig v. South Dakota Highway Patrol, 371 N.W.2d 166, 1985 S.D. LEXIS 302 (S.D. 1985)*.

Where the parents of a school-aged child lived closer to another school district than the school district in which they were placed, where they were more aligned to the economic and social life of the community in the other school district, where they were graduates of the high school in the other school district, where the other school district's bus went directly by their residence, where the other school district offered the special education classes that their child needed, and where the district line that placed their property in the undesired school district was drawn in an arbitrary fashion, the decision of the State Superintendent of of Elementary and Secondary Education to permit the redistricting of the parents' home was substantiated by the evidence. *Shumaker v. Canova Sch. Dist., 322 N.W.2d 869, 1982 S.D. LEXIS 359 (S.D. 1982)*.

Governments: State & Territorial Governments: Licenses

Although the general burden of proof for administrative hearings is preponderance of the evidence, in matters concerning the revocation of a professional license, the appropriate standard of proof to be utilized by an agency is clear and convincing evidence. *Foley v. State ex rel. South Dakota Real Estate Comm'n, 1999 SD 101, 598 N.W.2d 217, 1999 S.D. LEXIS 121 (S.D. 1999)*.

Healthcare Law: Business Administration & Organization: Judicial Review: General Overview

Trial court exceeded the scope of review permitted by S.D. Codified Laws § 1-26-36 when, in reviewing an administrative agency's decision not to renew a nursing home's contract to continue to participate in the Medicaid program, it considered whether there was substantial evidence contrary to the agency's decision; the proper scope of review was whether there was substantial evidence to support the agency's findings. *Department of Social Servs. v. Rodvik, 264 N.W.2d 898, 1978 S.D. LEXIS 161 (S.D. 1978)*.

Labor & Employment Law: Collective Bargaining & Labor Relations: Bargaining Units

Circuit court erred in reversing the decision of the Director of the Division of Labor and Management Relations, South Dakota Department of Manpower Affairs that was made after a hearing under S.D. Codified Laws § 3-18-4 and authorized city firemen to proceed as a separate bargaining unit because the Director's decision was reviewable by the circuit court only to the extent provided in S.D. Codified Laws § 1-26-36 and was supported by substantial evidence as to the substantial dissimilarity in the hiring, firing, promotion, hours of work, and essential

mission of firemen as compared to that of other city employees. *Appeal of City of Aberdeen, 270 N.W.2d 139, 1978 S.D. LEXIS 278, 1978 S.D. LEXIS 291 (S.D. 1978)*.

Labor & Employment Law: Collective Bargaining & Labor Relations: Subjects of Bargaining

School district and its board of education were not found to have committed an unfair labor practice in violation of S.D. Codified Laws §§ 3-18-3.1, 3-18-3 under the clearly erroneous standard of review set forth in S.D. Codified Laws § 1-26-36 when it included contract language that allowed it to go over and above the salary schedule when deemed necessary by the board of education, because the board of education was not given unfettered discretion. *Sisseton Educ. Ass'n v. Sisseton Sch. Dist. No. 54-8, 516 N.W.2d 301, 1994 S.D. LEXIS 64 (S.D. 1994)*.

Labor & Employment Law: Collective Bargaining & Labor Relations: Unfair Labor Practices: General Overview

In an action concerning unfair labor practices the scope of review in an administrative appeal was governed by S.D. Codified Law § 1-26-36. *Oberle v. Aberdeen, 470 N.W.2d 238, 1991 S.D. LEXIS 74 (S.D. 1991)*.

Labor & Employment Law: Disability & Unemployment Insurance: Unemployment Compensation: Eligibility: General Overview

Secretary of Labor's denial of unemployment benefits was reversed on appeal, pursuant to S.D. Codified Laws § 1-26-36(5), because the finding that the employee's failure to pay the balance due on her charge slips constituted misconduct was clearly erroneous; the employee's conduct, which was an isolated incident not related to job performance, did not demonstrate a wilful and wanton disregard for the employer's interest. *Gratzfeld v. Bomgaars Supply, 391 N.W.2d 200, 1986 S.D. LEXIS 295 (S.D. 1986)*.

Under the standard of review under S.D. Codified Laws § 1-26-36(1) regarding administrative decisions that provided for affirming an agency's decision if that decision did not violate any statutory provisions, the unemployment compensation claimant was not entitled to any relief in her action that sought judicial review of the denial of her request for benefits based on the finding under S.D. Codified Laws § 61-6-15 that she failed without good cause to apply for available suitable work when she was directed to do so by the South Dakota Department of Labor; the claimant's parental duties did not provide good cause for not applying for the job because she did not show that she made a good faith effort to find day care for her son during the Saturday hours that the job required, and she did not substantiate her claim that she and her son could not have lived on the wages, which were 10 percent lower than her previous wages, that the job paid. *In re Appeal from Final Decision of South Dakota Dep't of Labor, Unemployment Ins. Div., etc., 323 N.W.2d 133, 1982 S.D. LEXIS 368 (S.D. 1982)*.

Labor & Employment Law: Disability & Unemployment Insurance: Unemployment Compensation: Review

Supreme Court reviews administrative decisions in the same manner as the circuit court; where substantial evidence existed to support Department of Labor's determination that call center employees had used employer's 800 number in order to listen to music rather than to enhance their quotas, the determination was not clearly erroneous. *Abild v. Gateway 2000, 1996 SD 50, 547 N.W.2d 556, 1996 S.D. LEXIS 58 (S.D. 1996)*.

Standard of review under S.D. Codified Laws § 1-26-36(5), (6) to be applied to a decision of the Secretary of the Department of Labor in an unemployment compensation matter is whether the Secretary was clearly erroneous in light of the entire evidence in the record or whether the action of the Secretary was arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion. *In re Johnson, 337 N.W.2d 442, 1983 S.D. LEXIS 384 (S.D. 1983)*.

On appeal of an employment benefits decision, a court must give "great weight" to the Department of Labor's findings pursuant to S.D. Codified Laws § 1-26-36, while the Secretary of the Department of Labor may, on review of an appeal referee's decision, affirm, modify, or set aside any decision pursuant to S.D. Codified Laws § 61-7-12. The Secretary, however, does not have unbridled discretion, as an appeal referee's decision is part of the record

and the record must be considered as a whole to see whether the result comports with the judicial standard of review upon appeal. *In re Johnson, 337 N.W.2d 442, 1983 S.D. LEXIS 384 (S.D. 1983)*.

Where an appeal referee found that unemployment compensation claimants did not meet the eligibility requirement of actively seeking work because they did not submit evidence of two minimum employment contacts per week, the decision was clearly erroneous in light of the entire evidence in the record. Under S.D. Codified Laws § *61-6-15*, the Department of Labor was required to direct the claimant to apply for work, but the appeal referee specifically found that the claimants were advised by the Department that they would not be required to make weekly job contacts; further, the claimants returned 14 weekly claim forms to the Department on which they did not list any job contacts, and the Department neither informed the claimants that they had to start reporting employment contacts nor refused benefits based upon lack of reported employment contacts. *Zeig v. South Dakota Dep't of Labor, Unemployment Ins. Div., 337 N.W.2d 435, 1983 S.D. LEXIS 383 (S.D. 1983)*.

Under the standard of review under S.D. Codified Laws § *1-26-36(1)* regarding administrative decisions that provided for affirming an agency's decision if that decision did not violate any statutory provisions, the unemployment compensation claimant was not entitled to any relief in her action that sought judicial review of the denial of her request for benefits based on the finding under S.D. Codified Laws § *61-6-15* that she failed without good cause to apply for available suitable work when she was directed to do so by the South Dakota Department of Labor; the claimant's parental duties did not provide good cause for not applying for the job because she did not show that she made a good faith effort to find day care for her son during the Saturday hours that the job required, and she did not substantiate her claim that she and her son could not have lived on the wages, which were 10 percent lower than her previous wages, that the job paid. *In re Appeal from Final Decision of South Dakota Dep't of Labor, Unemployment Ins. Div., etc., 323 N.W.2d 133, 1982 S.D. LEXIS 368 (S.D. 1982)*.

Labor & Employment Law: Discrimination: Harassment: Sexual Harassment: Hostile Work Environment

Documentary evidence before the South Dakota Department of Labor, Division of Human Rights was reviewed de novo on appeal, and under this standard the Division properly determined that probable cause did not exist to support a secretary's claim that the secretary was subjected to a sexually hostile work environment because of a male co-worker's comments and that the secretary was retaliated against by being discharged for complaining where the secretary was discharged for unsatisfactory work performance two years after the comments. *Charge of Sandra M. Williams v. S.D. Dep't of Agric., 2010 SD 19, 779 N.W.2d 397, 2010 S.D. LEXIS 19 (S.D. 2010)*.

Labor & Employment Law: Employment Relationships: At-Will Employment: Employees

In a proceeding concerning a company's liability for unemployment insurance taxes, the Unemployment Insurance Division of the South Dakota Department of Labor ruled that an individual's relationship with the company was that of employer-employee, as opposed to supplier-distributor; based on the standard of review set forth in S.D. Codified Laws § *1-26-36(5)*, the department's ruling was clearly erroneous based on the evidence in the record. *In re Balhorn-Moyle Petroleum Co., 315 N.W.2d 481, 1982 S.D. LEXIS 260 (S.D. 1982)*.

Labor & Employment Law: Wrongful Termination: Defenses: Employee Misconduct

South Dakota Civil Service Commission was not clearly erroneous in finding that just cause existed for the termination of a law-enforcement agent of the South Dakota Division of Criminal Investigation because the agent's supervisors testified as to the agent's unbecoming conduct, ranging from allegations of domestic abuse and emotional outbursts to severe and chronic lapses in judgment, and, at least two of the agent's actions were apparent to the general public as they transpired through the Internet. *Black v. Div. of Crim. Investigation, 2016 SD 82, 887 N.W.2d 731, 2016 S.D. LEXIS 136 (S.D. 2016)*.

Public Health & Welfare Law: Social Security: Medicaid: General Overview

South Dakota Department of Social Services (DSS) abused its discretion by failing to consider any reasonable sanctions against the medical equipment provider where the record did not demonstrate that DSS considered any

other reasonable sanctions; DSS did not explain why, under the circumstances, particularly with its own finding that the services were actually provided, were medically necessary, and were appropriately priced, the lesser sanctions would be inappropriate. *Westmed Rehab, Inc. v. Dep't of Soc. Servs., 2004 SD 104, 687 N.W.2d 516, 2004 S.D. LEXIS 174 (S.D. 2004)*.

Public Health & Welfare Law: Social Security: Medicaid: Eligibility: General Overview

There was no error in an agency finding that an applicant, who had Spinal Muscular Atrophy Type II, and received services through a state-funded, non-waiver program, S.D. Codified Laws § *27B-1-18*, was not qualified for the Medicaid Family Support Waiver program because the applicant was not mentally retarded nor did the applicant have a condition closely related to mental retardation, 42 C.F.R. § *435.1010(a)(2)*, *S.D. Admin. R. 67:54:04:05(1)*. *Snelling v. S.D. Dep't of Soc. Servs., 2010 SD 24, 780 N.W.2d 472, 2010 S.D. LEXIS 26 (S.D. 2010)*.

Public Health & Welfare Law: Social Security: Medicaid: Providers: Types: Intermediate Care Facilities

There was no error in an agency finding that an applicant, who had Spinal Muscular Atrophy Type II, and received services through a state-funded, non-waiver program, S.D. Codified Laws § *27B-1-18*, was not qualified for the Medicaid Family Support Waiver program because the applicant was not mentally retarded nor did the applicant have a condition closely related to mental retardation, 42 C.F.R. § *435.1010(a)(2)*, *S.D. Admin. R. 67:54:04:05(1)*. *Snelling v. S.D. Dep't of Soc. Servs., 2010 SD 24, 780 N.W.2d 472, 2010 S.D. LEXIS 26 (S.D. 2010)*.

Tax Law: State & Local Taxes: Administration & Proceedings: General Overview

In a case involving a question over whether a corporation was properly subjected to sales tax for the price of its seminars, a reviewing court properly gave great weight to the findings and inferences made by the Department of Revenue on factual questions concerning the subject matter of the seminars offered to people in the business world. *Graceland College Ctr. for Prof'l Dev. & Lifelong Learning, Inc. v. S.D. Dep't of Revenue, 2002 SD 145, 654 N.W.2d 779, 2002 S.D. LEXIS 162 (S.D. 2002)*.

Under S.D. Codified Laws § *10-11-42.1*, the hearing examiner tries the issues de novo; on appeal both the circuit court and the South Dakota Supreme Court review that decision as set forth in S.D. Codified Laws § *1-26-36*. This standard of review requires the court to accord great weight to the findings and inferences made by the hearing examiner on factual questions; when the issue is a question of fact, the court ascertains whether the administrative agency was clearly erroneous. *Bison Twp. v. Perkins County, 2000 SD 38, 607 N.W.2d 589, 2000 S.D. LEXIS 37 (S.D. 2000)*.

Decision by the South Dakota Secretary of Revenue, finding sales tax due by a city as a result of an audit of one of its bars, was proper because the method used to reconstruct the tax base was reasonable under the circumstances and based upon substantial evidence as required by S.D. Codified Laws § *1-26-36*, and even if the 10-day period was applicable, it could not begin to run until the day of notification of the Secretary's decision.. *Lennox v. Wendell, 278 N.W.2d 635, 1979 S.D. LEXIS 227 (S.D. 1979)*.

Tax Law: State & Local Taxes: Sales Tax: General Overview

In a case involving a question over whether a corporation was properly subjected to sales tax for the price of its seminars, a reviewing court properly gave great weight to the findings and inferences made by the Department of Revenue on factual questions concerning the subject matter of the seminars offered to people in the business world. *Graceland College Ctr. for Prof'l Dev. & Lifelong Learning, Inc. v. S.D. Dep't of Revenue, 2002 SD 145, 654 N.W.2d 779, 2002 S.D. LEXIS 162 (S.D. 2002)*.

Workers' Compensation & SSDI: Administrative Proceedings: Claims: Time Limitations: General Overview

In a workers' compensation case, the trial court should not substitute its judgment for that of the Department of Labor as to the weight of the evidence on questions of fact; however, the determination of what was "knowledge"

sufficient to initiate the running of the statute of limitations was a legal determination, not a factual one. *Bearshield v. Gregory, 278 N.W.2d 164, 1979 S.D. LEXIS 215 (S.D. 1979)*.

Workers' Compensation & SSDI: Administrative Proceedings: Evidence: General Overview

In review a South Dakota Department of Labor decision, the supreme court reviewed de novo, unhampered by the clearly erroneous rule, because the record consisted solely of documentary evidence and depositions. *Horn v. Dakota Pork, 2006 SD 5, 709 N.W.2d 38, 2006 S.D. LEXIS 11 (S.D. 2006)*.

Workers' Compensation & SSDI: Administrative Proceedings: Judicial Review: General Overview

Standard of review used by the Supreme Court of South Dakota in an employee's appeal of a circuit court order upholding the Department of Labor's denial of the employee's claim for total disability benefits for an occupational disease is governed by S.D. Codified Laws § *1-26-36*. *Sauer v. Tiffany Laundry & Dry Cleaners, 2001 SD 24, 622 N.W.2d 741, 2001 S.D. LEXIS 21 (S.D. 2001)*.

In a workers' compensation action, an appellate court reviewed administrative appeals according to S.D. Codified Laws § *1-26-36*. *Kurtz v. SCI, 1998 SD 37, 576 N.W.2d 878, 1998 S.D. LEXIS 34 (S.D. 1998)*.

Appellate court reversed a final decision of the Division of Labor and Management of the South Dakota Department of Labor because a finding that there was no credible evidence to establish causation was clearly erroneous under S.D. Codified Laws § *1-26-36*. *Kirnan v. Dakota Midland Hosp., 331 N.W.2d 72, 1983 S.D. LEXIS 274 (S.D. 1983)*.

Workers' Compensation & SSDI: Benefit Determinations: Medical Benefits: Rehabilitation

In a worker's compensation proceeding in which an injured worker sought vocational rehabilitation benefits, a trial court erred in reversing the decision of an administrative law judge (ALJ) awarding benefits because the ALJ found the worker's testimony to be credible. *McKibben v. Horton Vehicle Components, Inc., 2009 SD 47, 767 N.W.2d 890, 2009 S.D. LEXIS 132 (S.D. 2009)*.

Workers' Compensation & SSDI: Compensability: Injuries: General Overview

Although slick and icy roads may have been a contributing factor in an employee's accident in which the employee struck a bridge when he was unable to stop the car by applying the brakes, the effects of the employee's intoxication in causing his injury were sufficient to lead reasonable men to conclude that it was a substantial factor in causing the injury. Therefore, a finding that the accident was proximately caused by the employee's intoxication and that worker's compensation was barred under S.D. Codified Laws § *62-4-37* was not clearly erroneous and was affirmed on appellate review under S.D. Codified Laws § *1-26-36(5)*. *Driscoll v. Great Plains Mktg. Co., 322 N.W.2d 478, 1982 S.D. LEXIS 354 (S.D. 1982)*.

Workers' Compensation & SSDI: Coverage: Actions Against Employers: Statutory Requirements

In review a South Dakota Department of Labor decision, the supreme court reviewed de novo, unhampered by the clearly erroneous rule, because the record consisted solely of documentary evidence and depositions. *Horn v. Dakota Pork, 2006 SD 5, 709 N.W.2d 38, 2006 S.D. LEXIS 11 (S.D. 2006)*.

Research References & Practice Aids

Law Reviews.

38 S.D. L. Rev. 402, THE NEW CAUSATION AND EXPERT REQUIREMENTS IN WORKERS' COMPENSATION CLAIMS AFTER CALDWELL V. JOHN MORRELL & CO.

39 S.D. L. Rev. 237, ARTICLE: NONRENEWAL OF TEACHER CONTRACTS: A PRIMER ON SOUTH DAKOTA STATUTORY AND CASE LAW.

48 S.D. L. Rev. 388, STUDENT ARTICLES: OUTH DAKOTA SHOULD FOLLOW PUBLIC POLICY AND SWITCH TO THE PREPONDERANCE STANDARD FOR MEDICAL LICENSE REVOCATION AFTER IN RE THE MEDICAL LICENSE OF DR. REUBEN SETLIFF, M.D.

51 S.D. L. Rev. 313, STUDENT ARTICLE: DROWNING IN A SEA OF AMBIGUITY: ANALYZING THE SOUTH DAKOTA DEPARTMENT OF SOCIAL SERVICES' DECISION TO INCLUDE ALIMONY PAYMENTS AS AVAILABLE INCOME WHEN DETERMINING MEDICAID BENEFITS.

End of Document

S.D. Codified Laws § 2-14-1

Current through acts received from the 2017 Special Session of the 92nd Legislative Assembly, Supreme Court Rule 17-11, and the November 8, 2016 General Election.

LexisNexis® South Dakota Codified Laws Annotated > Title 2 Legislature and Statutes > Chapter 2-14 Construction of Statutes

2-14-1. Words to be understood in ordinary sense.

Words used are to be understood in their ordinary sense except also that words defined or explained in § 2-14-2 are to be understood as thus defined or explained.

History

SDC 1939, § 65.0202 (7).

Annotations

Case Notes

Civil Procedure: Remedies: Costs & Attorney Fees: Attorney Expenses & Fees: Statutory Awards

Criminal Law & Procedure: Sentencing: Restitution

Governments: Legislation: Interpretation

Governments: Local Governments: Finance

Real Property Law: Brokers: Discipline, Licensing & Regulation

Tax Law: State & Local Taxes: Real Property Tax: Assessment & Valuation: Valuation

Civil Procedure: Remedies: Costs & Attorney Fees: Attorney Expenses & Fees: Statutory Awards

Real Estate Commission's complaint that an agent's conduct violated S.D. Codified Laws § 36-21A-71(15), prohibiting acts involving dishonesty was sufficient by alleging that the agent signed the names of her sellers on a release without prior written authorization so she could obtain her commission. However, an award of attorney's fees was not authorized under S.D. Codified Laws § 1-26-29.1. St. Pierre v. State ex rel. S.D. Real Estate Comm'n, 2012 SD 25, 813 N.W.2d 151, 2012 S.D. LEXIS 25 (S.D. 2012).

Criminal Law & Procedure: Sentencing: Restitution

Trial court properly denied the State's application for a show cause order against defendant seeking to have the trial court order defendant to pay additional restitution for future counseling to one of defendant's sexual abuse victims because although the oral sentence that defendant would pay the costs of counseling for victims was ambiguous as

it did not adequately set forth the extent of the restitution, the written sentence stated that defendant should make restitution for counseling costs that the victims might have incurred as a result of said offenses, and when using the plain ordinary meaning of the words of the written sentence pursuant to S.D. Codified Laws § 2-14-1, counseling costs were limited to those incurred and not future costs. State v. Holsing, 2007 SD 72, 736 N.W.2d 883, 2007 S.D. LEXIS 141 (S.D. 2007).

Governments: Legislation: Interpretation

When a statute does not define a term, the court construes the term according to its accepted usage to avoid a strained, impractical, or absurd result. City of Sioux Falls v. Ewoldt, 1997 SD 106, 568 N.W.2d 764, 1997 S.D. LEXIS 107 (S.D. 1997).

Where a dentist's license was suspended indefinitely after he allowed assistants to administer and monitor nitrous oxide sedation in violation of administrative rules, the court noted that the rules stated that procedures that may not be delegated by a dentist to dental auxiliaries include the administration of analgesia, except for topical anesthetic; the court held under S.D. Codified Laws § 2-14-1, "analgesia" included the administration of nitrous oxide. Nelson v. South Dakota State Bd. of Dentistry, 464 N.W.2d 621, 1991 S.D. LEXIS 2 (S.D. 1991).

In S.D. Codified Laws § 58-11-9.3, the operative language is "written agreement with the named insured"; the words "written agreement" must be interpreted in their ordinary sense and the ordinary meaning of this term is a written document that represents an agreement between the insured and the insurer and signed by the insured. American Family Mut. Ins. Co. v. Merrill, 454 N.W.2d 555, 1990 S.D. LEXIS 50 (S.D. 1990).

Camping and tourist accommodation facilities are not statutorily defined; thus, those words should be used in the sense attributed to them ordinarily. Olsen v. Spearfish, 288 N.W.2d 497, 1980 S.D. LEXIS 255 (S.D. 1980).

Because S.D. Codified Laws § 2-14-1 requires statutory words to be understood in their ordinary sense, the term "intoxication" in S.D. Codified Laws § 22-5-5 means poisoning or the abnormal state induced by a chemical agent. State v. Pickering, 245 N.W.2d 634, 1976 S.D. LEXIS 262 (S.D. 1976).

Governments: Local Governments: Finance

In calculating the tax incremental base for a tax incremental district, S.D. Codified Laws § 11-9-20, the Department of Revenue properly used the county's most recent valuation of the property and improvements; contrary to a developer's contention, it was not required to use the valuation in effect at the time of the district's creation, despite the definition language in S.D. Codified Laws § 11-9-19. Deadwood Stage Run, LLC v. S.D. Dep't of Revenue, 2014 SD 90, 857 N.W.2d 606, 2014 S.D. LEXIS 146 (S.D. 2014).

Real Property Law: Brokers: Discipline, Licensing & Regulation

Real Estate Commission's complaint that an agent's conduct violated S.D. Codified Laws § 36-21A-71(15), prohibiting acts involving dishonesty was sufficient by alleging that the agent signed the names of her sellers on a release without prior written authorization so she could obtain her commission. However, an award of attorney's fees was not authorized under S.D. Codified Laws § 1-26-29.1. St. Pierre v. State ex rel. S.D. Real Estate Comm'n, 2012 SD 25, 813 N.W.2d 151, 2012 S.D. LEXIS 25 (S.D. 2012).

Tax Law: State & Local Taxes: Real Property Tax: Assessment & Valuation: Valuation

In calculating the tax incremental base for a tax incremental district, S.D. Codified Laws § 11-9-20, the Department of Revenue properly used the county's most recent valuation of the property and improvements; contrary to a developer's contention, it was not required to use the valuation in effect at the time of the district's creation, despite the definition language in S.D. Codified Laws § 11-9-19. Deadwood Stage Run, LLC v. S.D. Dep't of Revenue, 2014 SD 90, 857 N.W.2d 606, 2014 S.D. LEXIS 146 (S.D. 2014).

Opinion Notes

Opinions of Attorney General

Presence of persons under 21 on premises of on-sale alcoholic beverage establishments, OFFICIAL OPINION No. 77-35, *1977 S.D. AG LEXIS 67*; *1977 Op. Atty Gen. S.D. 73*.

SDCL 49-16A-43, OFFICIAL OPINION No. 88-06, *1988 S.D. AG LEXIS 6*; 1987-1988 Op. Atty Gen. S.D. 155.

Distribution of fire insurance premium tax, OFFICIAL OPINION No. 88-36, *1988 S.D. AG LEXIS 36*; 1987-1988 Op. Atty Gen. S.D. 267.

Election campaign disclaimers, OFFICIAL OPINION No. 88-48, *1988 S.D. AG LEXIS 48*; 1987-1988 Op. Atty Gen. S.D. 307.

Gaming in Deadwood, OFFICIAL OPINION No. 89-28, *1989 S.D. AG LEXIS 29*; 1989-1990 Op. Atty Gen. S.D. 105.

Senate Bill 210 (SDCL ch. 34-12D) living wills, OFFICIAL OPINION No. 91-12, *1991 S.D. AG LEXIS 12*; 1991-1992 Op. Atty Gen. S.D. 41.

Interpretation of *SDCL 10-11-27*, OFFICIAL OPINION No. 93-02, *1993 S.D. AG LEXIS 2*; 1993-1994 Op. Atty Gen. S.D. 4.

Confidentiality of REDI Loan Information, OFFICIAL OPINION No. 93-10, *1993 S.D. AG LEXIS 14*; 1993-1994 Op. Atty Gen. S.D. 32.

Capital Outlay Certificates, OFFICIAL OPINION No. 94-04, *1994 S.D. AG LEXIS 3*; 1993-1994 Op. Atty Gen. S.D. 67.

Leases of School and Public Lands, OFFICIAL OPINION NO: 94-05, *1994 S.D. AG LEXIS 4*; 1993-1994 Op. Atty Gen. S.D. 71.

“Public” agencies and juveniles, OFFICIAL OPINION No. 94-12, *1994 S.D. AG LEXIS 12*; 1993-1994 Op. Atty Gen. S.D. 103.

SDCL 10-6-33.10, OFFICIAL OPINION No. 94-13, *1994 S.D. AG LEXIS 13*; 1993-1994 Op. Atty Gen. S.D. 106.

Handling of Edwin Blashfield Mural, OFFICIAL OPINION No. 94-14, *1994 S.D. AG LEXIS 14*; 1993-1994 Op. Atty Gen. S.D. 111.

County drainage questions, OFFICIAL OPINION No. 95-04, *1995 S.D. AG LEXIS 2*.

Affidavit of correction, OFFICIAL OPINION No. 97-02, *1997 S.D. AG LEXIS 1*.

Responsibility for transporting juveniles and intoxicated persons, OFFICIAL OPINION No. 97-03, *1997 S.D. AG LEXIS 2*.

Responsibility for transporting juveniles and intoxicated persons, Official Opinion No. 97-03, *1997 S.D. AG LEXIS 9*.

School Reorganization Incentive Payments, Official Opinion 03-04, *2003 S.D. AG LEXIS 4*.

Reduced tuition for members of South Dakota National Guard, Official Opinion No. 76-49, *1976 S.D. AG LEXIS 48*; 1975-1976 Op. Atty Gen. S.D. 567.

County financial aid to private hospitals, Official Opinion No. 74-41, *1974 S.D. AG LEXIS 15*; 1975-1976 Op. Atty Gen. S.D. 32.

Exemptions from motor carrier compensation under 32-9-3(8) and 32-9-3(9) for trout ranches and rabbit ranches, Official Opinion No. 75-107, *1975 S.D. AG LEXIS 134*; 1975-1976 Op. Atty Gen. S.D. 244.

Expenditure limits for Alumni Center at SDSU, Official Opinion No. 75-138, *1975 S.D. AG LEXIS 167*; 1975-1976 Op. Atty Gen. S.D. 315.

Pasturing agreements on leased school or endowment lands, Official Opinion No. 75-142, *1975 S.D. AG LEXIS 171*; 1975-1976 Op. Atty Gen. S.D. 323.

Distinction between official and legal newspapers., No. 72-75, *1972 S.D. AG LEXIS 42*; 1973-1974 Op. Atty Gen. S.D. 153.

Validity of Executive Order 73-1, No. 73-4, *1973 S.D. AG LEXIS 4*; 1973-1974 Op. Atty Gen. S.D. 165.

Lease for food service space within state government buildings., No. 73-41, *1973 S.D. AG LEXIS 41*; 1973-1974 Op. Atty Gen. S.D. 236.

End of Document

ARSD 20:10:01:01.02

This file includes all rules adopted and filed through the South Dakota Register, Vol. 44 Pg. 62, dated September 25, 2017

South Dakota Administrative Code > TITLE 20. REVENUE AND REGULATION > ARTICLE 10. PUBLIC UTILITIES COMMISSION > CHAPTER 1. GENERAL RULES OF PRACTICE

20:10:01:01.02. Use of rules of civil procedure

Except to the extent a provision is not appropriately applied to an agency proceeding or is in conflict with *SDCL chapter 1-26*, another statute governing the proceeding, or the commission's rules, the rules of civil procedure as used in the circuit courts of this state shall apply.

Statutory Authority

GENERAL AUTHORITY:

SDCL 49-1-11(2),(4).

LAW IMPLEMENTED:

SDCL 49-1-11(2),(4).

History

33 SDR 107, effective December 26, 2006.

End of Document

ARSD 20:10:01:15.01

This file includes all rules adopted and filed through the South Dakota Register, Vol. 44 Pg. 62, dated September 25, 2017

South Dakota Administrative Code > TITLE 20. REVENUE AND REGULATION > ARTICLE 10. PUBLIC UTILITIES COMMISSION > CHAPTER 1. GENERAL RULES OF PRACTICE

20:10:01:15.01. Burden in contested case proceeding

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

Statutory Authority

GENERAL AUTHORITY:

SDCL 49-1-11(2),(4), 49-34A-4.

LAW IMPLEMENTED:

SDCL 49-1-11(2),(4), 49-34A-61.

History

2 SDR 56, effective February 2, 1976; transferred from § 20:10:14:16, 12 SDR 85, effective November 24, 1985; 12 SDR 151, 12 SDR 155, effective July 1, 1986; 33 SDR 107, effective December 26, 2006.

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USCS Fed Rules Civ Proc R 23, Part 1 of 9

Current through changes received September 11, 2017.

USCS Court Rules > Federal Rules of Civil Procedure > Title IV. Parties

Rule 23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) *Certification Order.*

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) *Notice.*

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment.* Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues.* When appropriate, an action may be maintained as a class action with respect to particular issues.

(5) *Subclasses.* When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) *In General.* In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders.* An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) *Appointing Class Counsel.* Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel.* When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) *Interim Counsel.* The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) *Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

History

(Amended Feb. 28, 1966, eff. July 1, 1966; March 2, 1987, eff. Aug. 1, 1987; April 24, 1998, eff. Dec. 1, 1998; March 27, 2003, eff. Dec. 1, 2003; April 30, 2007, eff. Dec. 1, 2007; March 26, 2009, eff. Dec. 1, 2009.)

Annotations

Notes

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee on Rules.*Note to Subdivision (a).* This is a substantial restatement of former Equity Rule 38 (Representatives of Class) as that rule has been construed. It applies to all actions, whether formerly denominated legal or equitable. For a general analysis of class actions, effect of judgment, and requisites of jurisdiction see Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Georgetown L J 551, 570 et seq. (1937); Moore and Cohn, *Federal Class Actions*, 32 Ill L Rev 307 (1937); Moore and Cohn, *Federal Class Actions—Jurisdiction and Effect of Judgment*, 32 Ill L Rev 555–567 (1938); Lesar, *Class Suits and the Federal Rules*, 22 Minn L Rev 34 (1937); cf. Arnold and James, *Cases on Trials, Judgments and Appeals* (1936) 175; and see Blume, *Jurisdictional Amount in Representative Suits*, 15 Minn L Rev 501 (1931).

The general test of former Equity Rule 38 (Representatives of Class) that the question should be "one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court," is a common test. For states which require the two elements of a common or general interest and numerous persons, as provided for in former Equity Rule 38, see Del Ch Rule 113; Fla Comp Gen Laws Ann (Supp, 1936) § 4918(7); Georgia Code (1933) § 37-1002, and see *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 16, r. 9. For statutory provisions providing for class actions when the question is one of common or general interest or when the parties are numerous, see Ala Code Ann (Michie, 1928) § 5701; 2 Ind Stat Ann (Burns, 1933) § 2-220; NYCPA (1937) § 195; Wis Stat (1935) § 260.12. These statutes have, however, been uniformly construed as though phrased in the conjunctive. See *Garfein v Stiglitz, 260 Ky 430, 86 SW2d 155 (1935)*. The rule adopts the test of former Equity Rule 38, but defines what constitutes a "common or general interest". Compare with code provisions which make the action dependent upon the propriety of joinder of the parties. See Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits*, 30 Mich L Rev 878 (1932). For discussion of what constitutes "numerous persons" see Wheaton, *Representative Suits Involving Numerous Litigants*, 19 Corn L Q 399 (1934); Note, 36 Harv L Rev 89 (1922).

Clause (1), Joint, Common, or Secondary Right. This clause is illustrated in actions brought by or against representatives of an unincorporated association. See *Oster v Brotherhood of Locomotive Firemen and Enginemen, 271 Pa 419, 114 A 377 (1921)*; *Pickett v Walsh, 192 Mass 572, 78 NE 753, 6 LRA NS 1067 (1906)*; *Colt v Hicks, 97 Ind App 177, 179 NE 335 (1932)*. Compare Rule 17(b) as to when an unincorporated association has capacity to sue or be sued in its common name; *United Mine Workers of America v Coronado Coal Co., 259 US 344, 66 L Ed 975, 42 S Ct 570, 27 ALR 762 (1922)* (an unincorporated association was sued as an entity for the purpose of enforcing against it a federal substantive right); Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Georgetown L J 551, 566 (for discussion of jurisdictional requisites when an unincorporated association sues or is sued in its common name and jurisdiction is founded upon diversity of citizenship). For an action brought by representatives of one group against representatives of another group for distribution of a fund held by an unincorporated association, see *Smith v Swormstedt, 16 How 288, 14 L Ed 942 (US 1853)*. Compare *Christopher et al. v Brusselback, 302 US 500, 82 L Ed 388, 58 S Ct 350 (1938)*.

For an action to enforce rights held in common by policyholders against the corporate issuer of the policies, see *Supreme Tribe of Ben Hur v Cauble, 255 US 356, 41 S Ct 338, 65 L Ed 673 (1921)*. See also *Terry v Little, 101 US 216, 25 L Ed 864 (1880)*; *John A. Roebling's Sons Co. v Kinnicutt, 248 F 596 (DC NY, 1917)* dealing with the right held in common by creditors to enforce the statutory liability of stockholders.

Typical of a secondary action is a suit by stockholders to enforce a corporate right. For discussion of the general nature of these actions see *Ashwander v Tennessee Valley Authority, 297 US 288, 80 L Ed 688, 56 S Ct 466 (1936)*; Glenn, *The Stockholder's Suit—Corporate and Individual Grievances*, 33 Yale L J 580 (1924); McLaughlin, *Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit*, 46 Yale L J 421 (1937). See also *Subdivision (b)* of this rule which deals with Shareholder's Action; Note, 15 Minn L Rev 453 (1931).

Clause (2). A creditor's action for liquidation or reorganization of a corporation is illustrative of this clause. An action by a stockholder against certain named defendants as representatives of numerous claimants presents a situation converse to the creditor's action.

Clause (3). See *Everglades Drainage League v Napoleon Broward Drainage Dist., 253 F 246 (DC Fla, 1918)*; *Gramling v Maxwell, 52 F2d 256 (DC NC, 1931)*, approved in 30 Mich L Rev 624 (1932); *Skinner v Mitchell, 108 Kan 861, 197 P 569 (1921)*; *Duke of Bedford v Ellis* (1901) AC 1, for class actions when there were numerous persons and there was only a question of law or fact common to them; and see Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits*, 30 Mich L Rev 878 (1932).

Note to Subdivision (b). This is former Equity Rule 27 (Stockholder's Bill) with verbal changes. See also *Hawes v Oakland, 104 US 450, 26 L Ed 827 (1882)* and former Equity Rule 94, promulgated January 23, 1882, 104 US IX.

Note to Subdivision (c). See McLaughlin, *Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit*, 46 Yale L J 421 (1937).

Notes of Advisory Committee on 1966 Amendment.*Note to Subdivision (b).* Subdivision (b), relating to secondary actions by shareholders, provides among other things, that in such an action the complainant "shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law . . ."

As a result of the decision in *Erie R. Co. v Tompkins, 304 US 64, 82 L Ed 1188, 58 S Ct 817, 114 ALR 1487* (decided April 25, 1938, after this rule was promulgated by the Supreme Court, though before it took effect) a question has arisen as to whether the provision above quoted deals with a matter of substantive right or is a matter of procedure. If it is a matter of substantive law or right, then under *Erie R. Co. v Tompkins*, clause (1) may not be validly applied in cases pending in states whose local law permits a shareholder to maintain such actions, although not a shareholder at the time of the transactions complained of. The Advisory Committee, believing the question should be settled in the Courts, proposes no change in Rule 23 but thinks rather that the situation should be explained in an appropriate note.

The rule has a long history. *In Hawes v Oakland, 1882, 104 US 450, 26 L Ed 827*, the Court held that a shareholder could not maintain such an action unless he owned shares at the time of the transactions complained of, or unless they devolved on him by operation of law. At that time the decision in *Swift v Tyson, 1842, 16 Peters 1, 10 L Ed 865*, was the law, and the federal courts considered themselves free to establish their own principles of equity jurisprudence, so the Court was not in 1882 and has not been, until *Erie R. Co. v Tompkins* in 1938, concerned with the question whether *Hawes v Oakland* dealt with substantive right or procedure.

Following the decision in *Hawes v Oakland*, and at the same term, the Court, to implement its decision, adopted former Equity Rule 94, which contained the same provision above quoted from *Rule 23 FRCP.* The provision in former Equity Rule 94 was later embodied in former Equity Rule 27, of which the present Rule 23 is substantially a copy.

In City of Quincy v Steel, 1887, 120 US 241, 245, 30 L Ed 624, 7 S Ct 520, the Court referring to *Hawes v Oakland* said: “In order to give effect to the principles there laid down, this Court at that term adopted Rule 94 of the rules of practice for courts of equity of the United States.”

Some other cases dealing with former Equity Rules 94 or 27 prior to the decision in *Erie R. Co. v Tompkins* are *Dimpfel v Ohio & Miss. R.R. (1884), 110 US 209, 28 L Ed 121, 3 S Ct 573*; *Illinois Central R. Co. v Adams, 1901, 180 US 28, 34, 45 L Ed 410, 21 S Ct 251*; *Venner v Great Northern Ry. (1908), 209 US 24, 30, 52 L Ed 666, 28 S Ct 328*; *Jacobson v General Motors Corp., SD NY 1938, 22 F Supp 255, 257*. These cases generally treat *Hawes v Oakland* as establishing a “principle” of equity, or as dealing not with jurisdiction but with the “right” to maintain an action, or have said that the defense under the equity rule is analogous to the defense that the plaintiff has no “title” and results in a dismissal “for want of equity.”

Those state decisions which held that a shareholder acquiring stock after the event may maintain a derivative action are founded on the view that it is a right belonging to the shareholder at the time of the transaction and which passes as a right to the subsequent purchaser. See *Pollitz v Gould, 1911, 202 NY 11, 94 NE 1088*.

The first case arising after the decision in *Erie R. Co. v Tompkins*, in which this problem was involved, was *Summers v Hearst, SD NY 1938, 23 F Supp 986*. It concerned former Equity Rule 27, as Federal Rule 23 was not then in effect. In a well considered opinion Judge Leibell reviewed the decisions and said: “The federal cases that discuss this section of Rule 27 support the view that it states a principle of substantive law.” He quoted *Pollitz v Gould (1911), 202 NY 11, 94 NE 1088*, as saying that the United States Supreme Court “seems to have been more concerned with establishing this rule as one of practice than of substantive law” but that “whether it be regarded as establishing a principle of law or a rule of practice, this authority has been subsequently followed in the United States courts.”

He then concluded that, although the federal decisions treat the equity rule as “stating a principle of substantive law”, if former “Equity Rule 27 is to be modified or revoked in view of *Erie R. Co. v Tompkins*, it is not the province of this Court to suggest it, much less impliedly to follow that course by disregarding the mandatory provisions of the Rule.”

Some other federal decisions since 1938 touch the question.

In Picard v Sperry Corporation, SD NY 1941, 36 F Supp 1006, 1009–10, affirmed without opinion, *CCA 2d, 1941, 120 F2d 328*, a shareholder, not such at the time of the transactions complained of, sought to intervene. The court held an intervenor was as much subject to Rule 23 as an original plaintiff; and that the requirement of Rule 23(b) was “a matter of practice,” not substance, and applied in New York where the state law was otherwise, despite *Erie R. Co. v Tompkins. In York v Guaranty Trust Co. of New York, CCA 2d, 1944, 143 F2d 503*, rev’d on other grounds, *1945, 89 L Ed 2079, 65 S Ct 1464, 160 ALR 1231*, the court said: “Restrictions on the bringing of stockholders’ actions, such as those imposed by *FRCP 23(b)* or other state statutes are procedural,” citing the Picard and other cases.

In Gallup v Caldwell, CCA 3d, 1941, 120 F2d 90, 95, arising in New Jersey, the point was raised but not decided, the court saying that it was not satisfied that the then New Jersey rule differed from Rule 23(b), and that "under the circumstances the proper course was to follow Rule 23(b)."

In *Mullins v DeSoto Securities Co.*, WD La 1942, 45 F Supp 871, 878, the point was not decided, because the court found the Louisiana rule to be the same as that stated in Rule 23(b).

In Toebelman v Missouri-Kansas Pipe Line Co., D Del 1941, 41 F Supp 334, 340, the court dealt only with another part of Rule 23(b), relating to prior demands on the stockholders and did not discuss *Erie R. Co. v Tompkins*, or its effect on the rule.

In Perrott v United States Banking Corp., D Del 1944, 53 F Supp 953, it appeared that the Delaware law does not require the plaintiff to have owned shares at the time of the transaction complained of. The court sustained Rule 23(b), after discussion of the authorities, saying:

"It seems to me the rule does not go beyond procedure. . . . Simply because a particular plaintiff cannot qualify as a proper party to maintain such an action does not destroy or even whittle at the cause of action. The cause of action exists until a qualified plaintiff can get it started in a federal court."

In *Bankers Nat. Corp. v Barr*, SD NY 1945, 9 Fed Rules Serv 23b 11, Case 1, the court held Rule 23(b) to be one of procedure, but that whether the plaintiff was a stockholder was a substantive question to be settled by state law.

The New York rule, as stated in *Pollitz v Gould*, supra, has been altered by an act of the New York Legislature, Chapter 667, Laws of 1944, effective April 9, 1944, General Corporation Law, § 61, which provides that "in any action brought by a shareholder in the right of a . . . corporation, it must appear that the plaintiff was a stockholder at the time of the transaction of which he complains, or that his stock thereafter devolved upon him by operation of law." At the same time a further and separate provision was enacted, requiring under certain circumstances the giving of security for reasonable expenses and attorney's fees, to which security the corporation in whose right the action is brought and the defendants therein may have recourse. (Chapter 668, Laws of 1944, effective April 9, 1944, General Corporation Law, § 61-b). These provisions are aimed at so-called "strike" stockholders' suits and their attendant abuses. *Shielcrawt v Moffett, Ct App 1945, 294 NY 180, 61 NE 2d 435*, revg *51 NYS 2d 188*, affg *49 NYS 2d 64*; *Noel Associates, Inc. v Merrill, Sup Ct 1944, 184 Misc 646, 63 NYS 2d 143*.

Insofar as § 61 is concerned, it has been held that the section is procedural in nature. *Klum v Clinton Trust Co., Sup Ct 1944, 183 Misc 340, 48 NYS 2d 267*; *Noel Associates, Inc. v Merrill*, supra. In the latter case the court pointed out that "The 1944 amendment to Section 61 rejected the rule laid down in the Pollitz case and substituted, in place thereof, in its precise language, the rule which has long prevailed in the Federal Courts and which is now Rule 23(b) . . ." There is, nevertheless, a difference of opinion regarding the application of the statute to pending actions. See *Klum v Clinton Trust Co.*, supra (applicable); *Noel Associates, Inc. v Merrill*, supra (inapplicable).

With respect to § 61-b, which may be regarded as a separate problem, *Noel Associates, Inc. v Merrill*, supra, it has been held that even though the statute is procedural in nature—a matter not definitely decided—the Legislature evinced no intent that the provision should apply to actions pending when it became effective. *Shielcrawt v Moffett*, supra. As to actions instituted after the effective date of the legislation, the constitutionality of § 61-b is in dispute. See *Wolf v Atkinson, Sup Ct 1944, 182 Misc 675, 49 NYS 2d 703* (constitutional); *Citron v Mangel Stores Corp., Sup Ct 1944, 50 NYS 2d 416* (unconstitutional); Zlinkoff, *The American Investor and the Constitutionality of Section 61-B of the New York General Corporation Law*, 1945, 54 Yale LJ 352.

New Jersey also enacted a statute, similar to Chapters 667 and 668 of the New York law. See P. L. 1945, Ch 131, R S Cum Supp 14:3-15. The New Jersey provision similar to Chapter 668, § 61-b, differs, however, in that it specifically applies retroactively. It has been held that this provision is procedural and hence will not govern a pending action brought against a New Jersey corporation in the New York courts. *Shielcrawt v Moffett, Sup Ct NY 1945, 184 Misc 1074, 56 NYS 2d 134*.

See also generally, 2 *Moore's Federal Practice*, 1938, 2250–2253, and Cum. Supplement § 23.05.

The decisions here discussed show that the question is a debatable one, and that there is respectable authority for either view, with a recent trend towards the view that Rule 23(b)(1) is procedural. There is reason to say that the question is one which should not be decided by the Supreme Court ex parte, but left to await a judicial decision in a litigated case, and that in the light of the material in this note, the only inference to be drawn from a failure to amend Rule 23(b) would be that the question is postponed to await a litigated case.

The Advisory Committee is unanimously of the opinion that this course should be followed.

If, however, the final conclusion is that the rule deals with a matter of substantive right, then the rule should be amended by adding a provision that Rule 23(b)(1) does not apply in jurisdictions where state law permits a shareholder to maintain a secondary action, although he was not a shareholder at the time of the transactions of which he complains.

Notes of Advisory Committee on 1966 amendments. Difficulties with the original rule. The categories of class actions in the original rule were defined in terms of the abstract nature of the rights involved: the so-called "true" category was defined as involving "joint, common, or secondary rights"; the "hybrid" category, as involving "several" rights related to "specific property"; the "spurious" category, as involving "several" rights affected by a common question and related to common relief. It was thought that the definitions accurately described the situations amenable to the class-suit device, and also would indicate the proper extent of the judgment in each category, which would in turn help to determine the res judicata effect of the judgment if questioned in a later action. Thus the judgments in "true" and "hybrid" class actions would extend to the class (although in somewhat different ways); the judgment in a "spurious" class action would extend only to the parties including intervenors. See Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Geo LJ 551, 570–76 (1937).

In practice the terms "joint," "common," etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain. See Chafee, *Some Problems of Equity*, 245–46, 256–57 (1950); Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U of Chi L Rev 684, 707 & n 73 (1941); Keeffe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 Corn LQ 327, 329–36 (1948); *Developments in the Law: Multiparty Litigation in the Federal Courts*, 71 Harv L Rev 874, 931 (1958); Advisory Committee's Note to Rule 19, as amended. The courts had considerable difficulty with these terms. See, e.g., *Gullo v Veterans' Coop. H. Assn., 13 FRD 11 (DDC 1952)*; *Shipley v Pittsburgh & L.E.R. Co., 70 F Supp 870 (WD Pa 1947)*; *Deckert v Independence Shares Corp., 27 F Supp 763 (ED Pa 1939)*, revd, *108 F2d 51 (3d Cir 1939)*, revd *311 US 282, 85 L Ed 189, 61 S Ct 229 (1940)*, on remand, *39 F Supp 592 (ED Pa 1941)*, revd sub nom *Pennsylvania Co. for Ins. on Lives v Deckert, 123 F2d 979 (3d Cir 1941)* (see Chafee, supra, at 264–65).

Nor did the rule provide an adequate guide to the proper extent of the judgments in class actions. First, we find instances of the courts classifying actions as "true" or intimating that the judgments would be decisive for the class where these results seemed appropriate but were reached by dint of depriving the word "several" of coherent meaning. See, e.g., *System Federation No. 91 v Reed, 180 F2d 991 (6th Cir 1950)*; *Wilson v City of Paducah, 100 F Supp 116 (WD Ky 1951)*; *Citizens Banking Co. v Monticello State Bank, 143 F2d 261 (8th Cir 1944)*; *Redmond v Commerce Trust Co., 144 F2d 140 (8th Cir 1944)*, cert den *323 US 776, 89 L Ed 620, 65 S Ct 188 (1944)*; *United States v American Optical Co., 97 F Supp 66 (ND Ill 1951)*; *National Hairdressers' & C. Assn. v Philad Co., 34 F Supp 264 (D Del 1940), 41 F Supp 701 (D Del 1940)*, affd mem, *129 F2d 1020 (3d Cir 1942)*. Second, we find cases classified by the courts as "spurious" in which, on a realistic view, it would seem fitting for the judgments to extend to the class. See, e.g., *Knapp v Bankers Sec. Corp., 17 FRD 245 (ED Pa 1954)*, affd *230 F2d 717 (3d Cir 1956)*; *Giesecke v Denver Tramway Corp., 81 F Supp 957 (D Del 1949)*; *York v Guaranty Trust Co., 143 F2d 503 (2d Cir 1944)*, revd on grounds not here relevant, *326 US 99, 89 L Ed 2079, 65 S Ct 1464, 160 ALR 1231*, reh den *326 US 806, 90 L Ed 491, 66 S Ct 7 (1945)* (see Chafee, supra, at 208); cf. *Webster Eisenlohr, Inc. v Kalodner, 145 F2d 316, 320 (3d Cir 1944)*, cert den *325 US 867, 89 L Ed 1986, 65 S Ct 1404 (1945)*. But cf. the early decisions, *Duke of Bedford v Ellis*, [1901] AC 1; *Sheffield Waterworks v Yeomans*, LR 2 Ch App 8 (1866); *Brown v Vermuden*, 1 Ch Cas 272, 22 Eng Rep 796 (1866).

The "spurious" action envisaged by original Rule 23 was in any event an anomaly because, although denominated a "class" action and pleaded as such, it was supposed not to adjudicate the rights or liabilities of any person not a

party. It was believed to be an advantage of the "spurious" category that it would invite decisions that a member of the "class" could, like a member of the class in a "true" or "hybrid" action, intervene on an ancillary basis without being required to show an independent basis of Federal jurisdiction, and have the benefit of the date of the commencement of the action for purposes of the statute of limitations. See 3 *Moore's Federal Practice*, pars 23.10 [1], 23.12 (2d ed 1963). These results were attained in some instances but not in others. On the statute of limitations, see *Union Carbide & Carbon Corp. v Nisley, 300 F2d 561 (10th Cir 1961)*, pet cert dism *371 US 801, 9 L Ed 2d 46, 83 S Ct 13 (1963)*; but cf. *P. W. Husserl, Inc. v Newman, 25 FRD 264 (SD NY 1960)*; *Athas v Day, 161 F Supp 916 (D Colo 1958)*. On ancillary intervention, see *Amen v Black, 234 F2d 12 (10th Cir 1956)*, cert granted *352 US 888, 1 L Ed 2d 84, 77 S Ct 127 (1956)*, dism on stip *355 US 600, 2 L Ed 2d 523, 78 S Ct 530 (1958)*; but cf. *Wagner v Kemper, 13 FRD 128 (WD Mo 1952)*. The results, however, can hardly depend upon the mere appearance of a "spurious" category in the rule; they should turn on more basic considerations. See discussion of subdivision (c)(1) below.

Finally, the original rule did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness, particularly giving notice to members of the class, which may in turn be related in some instances to the extension of the judgment to the class. See Chafee, supra, at 230–31; Keeffe, Levy & Donovan, supra; Developments in the Law, supra, 71 Harv L Rev at 937–38; Note, Binding Effect of Class Actions, 67 Harv L Rev 1059, 1062–65 (1954); Note, Federal Class Actions: A Suggested Revision of Rule 23, 46 Colum L Rev 818, 833–36 (1946); Mich Gen Court R 208.4 (effective Jan. 1, 1963); Idaho R Civ P 23 (d); Minn R Civ P 23.04; N Dak R Civ P 23(d).

The amended rule describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions.

Subdivision (a) states the prerequisites for maintaining any class action in terms of the numerousness of the class making joinder of the members impracticable, the existence of questions common to the class, and the desired qualifications of the representative parties. See Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 Buffalo L Rev 433, 458–59 (1960); 2 Barron & Holtzoff, *Federal Practice & Procedure* § 562, at 265, § 572, at 351–52 (Wright ed 1961). These are necessary but not sufficient conditions for a class action. See, e.g., *Giordano v Radio Corp. of Am., 183 F2d 558, 560 (3d Cir 1950)*; *Zachman v Erwin, 186 F Supp 681 (SD Tex 1959)*; *Baim & Blank, Inc. v Warren-Connelly Co., Inc., 19 FRD 108 (SD NY 1956)*. Subdivision (b) describes the additional elements which in varying situations justify the use of a class action.

Note to Subdivision (b)(1). The difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device. The considerations stated under clauses (A) and (B) are comparable to certain of the elements which define the persons whose joinder in an action is desirable as stated in Rule 19(a), as amended. See amended Rule 19(a)(2) (i) and (ii), and the Advisory Committee's Note thereto; Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 Colum L Rev 1254, 1259–60 (1961); cf. 3 *Moore*, supra, par 23.08, at 3435.

Clause (A): One person may have rights against, or be under duties toward, numerous persons constituting a class, and be so positioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct. The class action device can be used effectively to obviate the actual or virtual dilemma which would thus confront the party opposing the class. The matter has been stated thus: "The felt necessity for a class action is greatest when the courts are called upon to order or sanction the alteration of the status quo in circumstances such that a large number of persons are in a position to call on a single person to alter the status quo, or to complain if it is altered, and the possibility exists that [the] actor might be called upon to act in inconsistent ways." Louisell & Hazard, *Pleading and Procedure: State and Federal* 719 (1962); see *Supreme Tribe of Ben-Hur v Cauble, 255 US 356, 366–67, 65 L Ed 673, 41 S Ct 338 (1921)*. To illustrate: Separate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent

or varying determinations. In the same way, individual litigations of the rights and duties of riparian owners, or of landowners' rights and duties respecting a claimed nuisance, could create a possibility of incompatible adjudications. Actions by or against a class provide a ready and fair means of achieving unitary adjudication. See Maricopa County Mun. Water Con. Dist. v Looney, 219 F2d 529 (9th Cir 1955); *Rank v Krug, 142 F Supp 1, 154–59 (SD Calif 1956)*, on app, State of California v Rank, 293 F2d 340, 348 (9th Cir 1961); Gart v Cole, 263 F2d 244 (2d Cir 1959), cert den *359 US 978, 3 L Ed 2d 929, 79 S Ct 898 (1959)*; cf. Martinez v Maverick Cty. Water Con. & Imp. Dist., 219 F2d 666 (5th Cir 1955); 3 Moore, supra, par 23.11 [2], at 3458–59.

Clause (B): This clause takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter. The vice of an individual action would lie in the fact that the other members of the class, thus practically concluded, would have had no representation in the lawsuit. In an action by policy holders against a fraternal benefit association attacking a financial reorganization of the society, it would hardly have been practical, if indeed it would have been possible, to confine the effects of a validation of the reorganization to the individual plaintiffs. Consequently a class action was called for with adequate representation of all members of the class. See Supreme Tribe of Ben-Hur v Cauble, 255 US 356, 65 L Ed 673, 41 S Ct 338 (1921); Waybright v Columbian Mut. Life Ins. Co., 30 F Supp 885 (WD Tenn 1939); cf. Smith v Swormstedt, 16 How 288, 14 L Ed 942 (US, 1853). For much the same reason actions by shareholders to compel the declaration of a dividend, the proper recognition and handling of redemption or pre-emption rights, or the like (or actions by the corporation for corresponding declarations of rights), should ordinarily be conducted as class actions, although the matter has been much obscured by the insistence that each shareholder has an individual claim. See Knapp v Bankers Securities Corp., 17 FRD 245 (ED Pa 1954), affd, 230 F2d 717 (3d Cir 1956); Giesecke v Denver Tramway Corp., 81 F Supp 957 (D Del 1949); Zahn v Transamerica Corp., 162 F2d 36 (3d Cir 1947); Speed v Transamerica Corp., 100 F Supp 461 (D Del 1951); Sobel v Whittier Corp., 95 F Supp 643 (ED Mich 1951), app dism, 195 F2d 361 (6th Cir 1952); Goldberg v Whittier Corp., 111 F Supp 382 (ED Mich 1953); Dann v Studebaker-Packard Corp., 288 F2d 201 (6th Cir 1961); Edgerton v Armour & Co., 94 F Supp 549 (SD Calif 1950); Ames v Mengel Co., 190 F2d 344 (2d Cir 1951). (These shareholders' actions are to be distinguished from derivative actions by shareholders dealt with in new Rule 23.1). The same reasoning applies to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust. See Boesenberg v Chicago T. & T. Co., 128 F2d 245 (7th Cir 1942); Citizens Banking Co. v Monticello State Bank, 143 F2d 261 (8th Cir 1944); Redmond v Commerce Trust Co., 144 F2d 140 (8th Cir 1944), cert den *323 US 776, 89 L Ed 620, 65 S Ct 187 (1944)*; cf. York v Guaranty Trust Co., 143 F2d 503 (2d Cir 1944), revd on grounds not here relevant, 326 US 99, 89 L Ed 2079, 65 S Ct 1464, 160 ALR 1231 (1945).

In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem. Cf. Dickinson v Burnham, 197 F2d 973 (2d Cir 1952), cert den *344 US 875, 97 L Ed 678, 73 S Ct 169 (1952)*; 3 Moore, supra, at par 23.09. The same reasoning applies to an action by a creditor to set aside a fraudulent conveyance by the debtor and to appropriate the property to his claim, when the debtor's assets are insufficient to pay all creditors' claims. See Heffernan v Bennett & Armour, 110 Cal App 2d 564, 243 P2d 846 (1952); cf. City & County of San Francisco v Market Street Ry., 95 Cal App 2d 648, 213 P2d 780 (1950). Similar problems, however, can arise in the absence of a fund either present or potential. A negative or mandatory injunction secured by one of a numerous class may disable the opposing party from performing claimed duties toward the other members of the class or materially affect his ability to do so. An adjudication as to movie "clearances and runs" nominally affecting only one exhibitor would often have practical effects on all the exhibitors in the same territorial area. Cf. United States v Paramount Pictures, Inc., 66 F Supp 323, 341–46 (SD NY 1946); 334 US 131, 144–48, 92 L Ed 1260, 68 S Ct 915 (1948). Assuming a sufficiently numerous class of exhibitors, a class action would be advisable. (Here representation of subclasses of exhibitors could become necessary; see subdivision (c)(3)(B).).

Note to Subdivision (b)(2). This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. Declaratory relief "corresponds" to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration. See *Potts v Flax, 313 F2d 284 (5th Cir 1963)*; *Bailey v Patterson, 323 F2d 201 (5th Cir 1963)*, cert den *376 US 910, 11 L Ed 2d 609, 84 S Ct 666 (1964)*; *Brunson v Board of Trustees of School District No. 1, Clarendon Cty., S.C., 311 F2d 107 (4th Cir 1962)*, cert den *373 US 933, 10 L Ed 2d 690, 83 S Ct 1538 (1963)*; *Green v School Bd. of Roanoke, Va., 304 F2d 118 (4th Cir 1962)*; *Orleans Parish School Bd. v Bush, 242 F2d 156 (5th Cir 1957)*, cert den *354 US 921, 1 L Ed 2d 1436, 77 S Ct 1380 (1957)*; *Mannings v Board of Public Inst. of Hillsborough County, Fla., 277 F2d 370 (5th Cir 1960)*; *Northcross v Board of Ed. of City of Memphis, 302 F2d 818 (6th Cir 1962)*, cert den *370 US 944, 8 L Ed 2d 810, 82 S Ct 1586 (1962)*; *Frasier v Board of Trustees of Univ. of N.C., 134 F Supp 589 (MD NC 1955, 3-judge court)*, affd, *350 US 979, 100 L Ed 848, 76 S Ct 467 (1956)*. Subdivision (b)(2) is not limited to civil-rights cases. Thus an action looking to specific or declaratory relief could be brought by a numerous class of purchasers, say retailers of a given description, against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential. So also a patentee of a machine, charged with selling or licensing the machine on condition that purchasers or licensees also purchase or obtain licenses to use an ancillary unpatented machine, could be sued on a class basis by a numerous group of purchasers or licensees, or by a numerous group of competing sellers or licensors of the unpatented machine, to test the legality of the "tying" condition.

Note to Subdivision (b)(3). In the situations to which this subdivision relates, class-action treatment is not as clearly called for as in those described above, but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. Cf. Chafee, supra, at 201.

The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device. In this view, a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed. See *Oppenheimer v F. J. Young & Co., Inc., 144 F2d 387 (2d Cir 1944)*; *Miller v National City Bank of N. Y., 166 F2d 723 (2d Cir 1948)*; and for like problems in other contexts, see *Hughes v Encyclopaedia Britannica, 199 F2d 295 (7th Cir 1952)*; *Sturgeon v Great Lakes Steel Corp., 143 F2d 819 (6th Cir 1944)*. A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried. See *Pennsylvania R.R. v United States, 111 F Supp 80 (DNJ 1953)*; cf. Weinstein, supra, 9 Buffalo L Rev at 469. Private damage claims by numerous individuals arising out of concerted antitrust violations may or may not involve predominating common questions. See *Union Carbide & Carbon Corp. v Nisley, 300 F2d 561 (10th Cir 1961)*, pet cert dism, *371 US 801, 9 L Ed 2d 46, 83 S Ct 13 (1963)*; cf. *Weeks v Bareco Oil Co., 125 F2d 84 (7th Cir 1941)*; *Kainz v Anheuser-Busch, Inc., 194 F2d 737 (7th Cir 1952)*; *Hess v Anderson, Clayton & Co., 20 FRD 466 (SD Calif 1957)*.

That common questions predominate is not itself sufficient to justify a class action under subdivision (b)(3), for another method of handling the litigious situation may be available which has greater practical advantages. Thus one or more actions agreed to by the parties as test or model actions may be preferable to a class action; or it may prove feasible and preferable to consolidate actions. Cf. Weinstein, supra, 9 Buffalo L Rev at 438–54. Even when a number of separate actions are proceeding simultaneously, experience shows that the burdens on the parties and the courts can sometimes be reduced by arrangements for avoiding repetitious discovery or the like. Currently the Coordinating Committee on Multiple Litigation in the United States District Courts (a subcommittee of the Committee on Trial Practice and Technique of the Judicial Conference of the United States) is charged with developing methods for expediting such massive litigation. To reinforce the point that the court with the aid of the parties ought to assess the relative advantages of alternative procedures for handling the total controversy, subdivision (b)(3) requires, as a further condition of maintaining the class action, that the court shall find that that procedure is "superior" to the others in the particular circumstances.

Factors (A)–(D) are listed, non-exhaustively, as pertinent to the findings. The court is to consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit. See *Weeks v Bareco Oil Co., 125 F2d 84, 88–90, 93–94 (7th Cir 1941)* (anti-trust action); see also *Pentland v Dravo Corp., 152 F2d 851 (3d Cir 1945)*, and Chafee, supra, at 273–75, regarding policy of Fair Labor Standards Act of 1938, § 16(b), *29 USC § 216(b)*, prior to amendment by Portal-to-Portal Act of 1947, § 5(a). [The present provisions of *29 USC § 216(b)* are not intended to be affected by Rule 23, as amended.]

In this connection the court should inform itself of any litigation actually pending by or against the individuals. The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretical rather than practical: the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable. The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered. (See the discussion, under subdivision (c)(2) below, of the right of members to be excluded from the class upon their request.).

Also pertinent is the question of the desirability of concentrating the trial of the claims in the particular forum by means of a class action, in contrast to allowing the claims to be litigated separately in forums to which they would ordinarily be brought. Finally, the court should consider the problems of management which are likely to arise in the conduct of a class action.

Note to Subdivision (c)(1). In order to give clear definition to the action, this provision requires the court to determine, as early in the proceedings as may be practicable, whether an action brought as a class action is to be so maintained. The determination depends in each case on satisfaction of the terms of subdivision (a) and the relevant provisions of subdivision (b).

An order embodying a determination can be conditional; the court may rule, for example, that a class action may be maintained only if the representation is improved through intervention of additional parties of a stated type. A determination once made can be altered or amended before the decision on the merits if, upon fuller development of the facts, the original determination appears unsound. A negative determination means that the action should be stripped of its character as a class action. See subdivision (d)(4). Although an action thus becomes a nonclass action, the court may still be receptive to interventions before the decision on the merits so that the litigation may cover as many interests as can be conveniently handled; the questions whether the intervenors in the nonclass action shall be permitted to claim "ancillary" jurisdiction or the benefit of the date of the commencement of the action for purposes of the statute of limitations are to be decided by reference to the laws governing jurisdiction and limitations as they apply in particular contexts.

Whether the court should require notice to be given to members of the class of its intention to make a determination, or of the order embodying it, is left to the court's discretion under subdivision (d)(2).

Subdivision (c)(2) makes special provision for class actions maintained under subdivision (b)(3). As noted in the discussion of the latter subdivision, the interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected. Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request. A member who does not request exclusion may, if he wishes, enter an appearance in the action through his counsel; whether or not he does so, the judgment in the action will embrace him.

The notice, setting forth the alternatives open to the members of the class, is to be the best practicable under the circumstances, and shall include individual notice to the members who can be identified through reasonable effort. (For further discussion of this notice, see the statement under subdivision (d)(2) below.).

Note to Subdivision (c)(3). The judgment in a class action maintained as such to the end will embrace the class, that is, in a class action under subdivision (b)(1) or (b)(2), those found by the court to be class members; in a class action under subdivision (b)(3), those to whom the notice prescribed by subdivision (c)(2) was directed, excepting those who requested exclusion or who are ultimately found by the court not to be members of the class. The judgment has this scope whether it is favorable or unfavorable to the class. In a (b)(1) or (b)(2) action the judgment "describes" the members of the class, but need not specify the individual members; in a (b)(3) action the judgment "specifies" the individual members who have been identified and describes the others.

Compare subdivision (c)(4) as to actions conducted as class actions only with respect to particular issues. Where the class-action character of the lawsuit is based solely on the existence of a "limited fund," the judgment, while extending to all claims of class members against the debtor. See ordinarily left unaffected the personal claims of nonappearing members against the debtor. See 3 Moore, supra, par 23.11 [4].

Hitherto, in a few actions conducted as "spurious" class actions and thus nominally designed to extend only to parties and others intervening before the determination of liability, courts have held or intimated that class members might be permitted to intervene after a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision. See, as to the propriety of this so-called "one-way" intervention in "spurious" actions, the conflicting views expressed in *Union Carbide & Carbon Corp. v Nisley, 300 F2d 561 (10th Cir 1961)*, pet cert dism, *371 US 801, 9 L Ed 2d 46, 83 S Ct 13 (1963)*; *York v Guaranty Trust Co., 143 F2d 503, 529 (2d Cir 1944)*, revd on grounds not here relevant, *326 US 99, 89 L Ed 2079, 65 S Ct 1464, 160 ALR 1231 (1945)*; *Pentland v Dravo Corp., 152 F2d 851, 856 (3d Cir 1945)*; *Speed v Transamerica Corp., 100 F Supp 461, 463 (D Del 1951)*; *State Wholesale Grocers v Great Atl. & Pac. Tea Co., 24 FRD 510 (ND Ill 1959)*; *Alabama Ind. Serv. Stat. Assn. v Shell Pet. Corp., 28 F Supp 386, 390 (ND Ala 1939)*; *Tolliver v Cudahy Packing Co., 39 F Supp 337, 339 (ED Tenn 1941)*; *Kalven & Rosenfield*, supra, 8 U of Chi L Rev 684 (1941); Comment, 53 Nw UL Rev 627, 632–33 (1958); *Developments in the Law*, supra, 71 Harv L Rev at 935; 2 Barron & Holtzoff, supra, § 568; but cf. *Lockwood v Hercules Powder Co., 7 FRD 24, 28–29 (WD Mo 1947)*; *Abram v Sam Joaquin Cotton Oil Co., 46 F Supp 969, 976–77 (SD Calif 1942)*; Chafee, supra, at 280, 285; 3 Moore, supra, par 23.12, at 3476. Under proposed subdivision (c)(3), one-way intervention is excluded; the action will have been early determined to be a class or nonclass action, and in the former case the judgment, whether or not favorable, will include the class, as above stated.

Although thus declaring that the judgment in a class action includes the class, as defined, subdivision (c)(3) does not disturb the recognized principle that the court conducting the action cannot predetermine the *res judicata* effect of the judgment; this can be tested only in a subsequent action. See Restatement, *Judgments* § 86, comment (h), § 116 (1942). The court, however, in framing the judgment in any suit brought as a class action, must decide what its extent or coverage shall be, and if the matter is carefully considered, questions of *res judicata* are less likely to be raised at a later time and if raised will be more satisfactorily answered. See Chafee, supra, at 294; Weinstein, supra, 9 Buffalo L Rev at 460.

Note to Subdivision (c)(4). This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its "class" character only through

the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

Two or more classes may be represented in a single action. Where a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class.

Subdivision (d) is concerned with the fair and efficient conduct of the action and lists some types of orders which may be appropriate.

The court should consider how the proceedings are to be arranged in sequence, and what measures should be taken to simplify the proof and argument. See subdivision (d)(1). The orders resulting from this consideration, like the others referred to in subdivision (d), may be combined with a pretrial order under Rule 16, and are subject to modification as the case proceeds.

Subdivision (d)(2) sets out a non-exhaustive list of possible occasions for orders requiring notice to the class. Such notice is not a novel conception. For example, in "limited fund" cases, members of the class have been notified to present individual claims after the basic class decision. Notice has gone to members of a class so that they might express any opposition to the representation, see *United States v American Optical Co., 97 F Supp 66 (ND Ill 1951)*, and 1950–51 CCH Trade Cases 64573–74 (par 62869); cf. *Weeks v Bareco Oil Co., 125 F2d 84, 94 (7th Cir 1941)*, and notice may encourage interventions to improve the representation of the class. *Cf. Oppenheimer v F. J. Young & Co., 144 F2d 387 (2d Cir 1944)*. Notice has been used to poll members on a proposed modification of a consent decree. See record in *Sam Fox Publishing Co. v United States, 366 US 683, 6 L Ed 2d 604, 81 S Ct 1309 (1961)*.

Subdivision (d)(2) does not require notice at any stage, but rather calls attention to its availability and invokes the court's discretion. In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum. These indicators suggest that notice under subdivision (d)(2) may be particularly useful and advisable in certain class actions maintained under subdivision (b)(3), for example, to permit members of the class to object to the representation. Indeed, under subdivision (c)(2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class. This mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject. See *Hansberry v Lee, 311 US 32, 85 L Ed 22, 61 S Ct 115, 132 ALR 741 (1940)*; *Mullane v Central Hanover Bank & Trust Co., 339 US 306, 94 L Ed 865, 70 S Ct 652 (1950)*; cf. *Dickinson v Burnham, 197 F2d 973, 979 (2d Cir 1952)*, and studies cited at 979 n 4; see also *All American Airways, Inc. v Elderd, 209 F2d 247, 249 (2d Cir 1954)*; *Gart v Cole, 263 F2d 244, 248–49 (2d Cir 1959)*, cert den *359 US 978, 3 L Ed 2d 929, 79 S Ct 898 (1959)*.

Notice to members of the class, whenever employed under amended Rule 23, should be accommodated to the particular purpose but need not comply with the formalities for service of process. See Chafee, supra, at 230–31; *Brendle v Smith, 7 FRD 119 (SD NY 1946)*. The fact that notice is given at one stage of the action does not mean that it must be given at subsequent stages. Notice is available fundamentally "for the protection of the members of the class or otherwise for the fair conduct of the action" and should not be used merely as a device for the undesirable solicitation of claims. See the discussion in *Cherner v Transitron Electronic Corp., 201 F Supp 934 (D Mass 1962)*; *Hormel v United States, 17 FRD 303 (SD NY 1955)*.

In appropriate cases the court should notify interested government agencies of the pendency of the action or of particular steps therein.

Subdivision (d)(3) reflects the possibility of conditioning the maintenance of a class action, e.g., on the strengthening of the representation, see subdivision (c) (1) above; and recognizes that the imposition of conditions on intervenors may be required for the proper and efficient conduct of the action.

As to orders under subdivision (d)(4), see subdivision (c)(1) above.

Subdivision (e) requires approval of the court, after notice, for the dismissal or compromise of any class action.

Notes of Advisory Committee on 1998 amendments. *Note to Subdivision (f).* This permissive interlocutory appeal provision is adopted under the power conferred by *28 U.S.C. § 1292(e)*. Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals. No other type of Rule 23 order is covered by this provision. The court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari. This discretion suggests an analogy to the provision in *28 U.S.C. § 1292(b)* for permissive appeal on certification by a district court. Subdivision (f), however, departs from the § 1292(b) model in two significant ways. It does not require that the district court certify the certification ruling for appeal, although the district court often can assist the parties and court of appeals by offering advice on the desirability of appeal. And it does not include the potentially limiting requirements of § 1292(b) that the district court order "involve a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

The courts of appeals will develop standards for granting review that reflect the changing areas of uncertainty in class litigation. The Federal Judicial Center study supports the view that many suits with class-action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings. Yet several concerns justify expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.

Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive. Permission is most likely to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation.

The district court, having worked through the certification decision, often will be able to provide cogent advice on the factors that bear on the decision whether to permit appeal. This advice can be particularly valuable if the certification decision is tentative. Even as to a firm certification decision, a statement of reasons bearing on the probable benefits and costs of immediate appeal can help focus the court of appeals decision, and may persuade the disappointed party that an attempt to appeal would be fruitless.

The 10-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings. It is expected that the courts of appeals will act quickly in making the preliminary determination whether to permit appeal. Permission to appeal does not stay trial court proceedings. A stay should be sought first from the trial court. If the trial court refuses a stay, its action and any explanation of its views should weigh heavily with the court of appeals.

Appellate Rule 5 has been modified to establish the procedure for petitioning for leave to appeal under subdivision (f).

Changes Made after Publication (GAP Report). No changes were made in the text of Rule 23(f) as published.

Several changes were made in the published Committee Note. (1) References to *28 U.S.C. § 1292(b)* interlocutory appeals were revised to dispel any implication that the restrictive elements of § 1292(b) should be read in to Rule 23(f). New emphasis was placed on court of appeals discretion by making explicit the analogy to certiorari discretion. (2) Suggestions that the new procedure is a "modest" expansion of appeal opportunities, to be applied with "restraint," and that permission "almost always will be denied when the certification decision turns on case-specific matters of fact and district court discretion," were deleted. It was thought better simply to observe that courts of appeals will develop standards "that reflect the changing areas of uncertainty in class litigation."

Notes of Advisory Committee on 2003 amendments. *Note to Subdivision (c).* Subdivision (c) is amended in several respects. The requirement that the court determine whether to certify a class "as soon as practicable after commencement of an action" is replaced by requiring determination "at an early practicable time." The notice provisions are substantially revised.

Paragraph (1). Subdivision (c)(1)(A) is changed to require that the determination whether to certify a class be made "at an early practicable time." The "as soon as practicable" exaction neither reflects prevailing practice nor captures the many valid reasons that may justify deferring the initial certification decision. See Willging, Hooper & Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 26–36* (Federal Judicial Center 1996).

Time may be needed to gather information necessary to make the certification decision. Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is appropriate to conduct controlled discovery into the "merits," limited to those aspects relevant to making the certification decision on an informed basis. Active judicial supervision may be required to achieve the most effective balance that expedites an informed certification determination without forcing an artificial and ultimately wasteful division between "certification discovery" and "merits discovery." A critical need is to determine how the case will be tried. An increasing number of courts require a party requesting class certification to present a "trial plan" that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof. See Manual For Complex Litigation Third, § 21.213, p. 44; § 30.11, p. 214; § 30.12, p. 215.

Other considerations may affect the timing of the certification decision. The party opposing the class may prefer to win dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified. Time may be needed to explore designation of counsel under Rule 23(g), recognizing that in many cases the need to progress toward the certification determination may require designation of interim class counsel under Rule 23(g)(2)(A).

Although many circumstances may justify deferring the certification decision, active management may be necessary to ensure that the certification decision is not unjustifiably delayed.

Subdivision (c)(1)(C) reflects two amendments. The provision that a class certification "may be conditional" is deleted. A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met. The provision that permits alteration or amendment of an order granting or denying class certification is amended to set the cut-off point at final judgment rather than "the decision on the merits." This change avoids the possible ambiguity in referring to "the decision on the merits." Following a determination of liability, for example, proceedings to define the remedy may demonstrate the need to amend the class definition or subdivide the class. In this setting the final judgment concept is pragmatic. It is not the same as the concept used for appeal purposes, but it should be, particularly in protracted litigation.

The authority to amend an order under Rule 23(c)(1) before final judgment does not restore the practice of "one-way intervention" that was rejected by the 1966 revision of Rule 23. A determination of liability after certification, however, may show a need to amend the class definition. Decertification may be warranted after further proceedings.

If the definition of a class certified under Rule 23(b)(3) is altered to include members who have not been afforded notice and an opportunity to request exclusion, notice — including an opportunity to request exclusion — must be directed to the new class members under Rule 23(c)(2)(B).

Paragraph (2). The first change made in Rule 23(c)(2) is to call attention to the court's authority — already established in part by Rule 23(d)(2) — to direct notice of certification to a Rule 23(b)(1) or (b)(2) class. The present rule expressly requires notice only in actions certified under Rule 23(b)(3). Members of classes certified under Rules 23(b)(1) or (b)(2) have interests that may deserve protection by notice.

The authority to direct notice to class members in a (b)(1) or (b)(2) class action should be exercised with care. For several reasons, there may be less need for notice than in a (b)(3) class action. There is no right to request exclusion from a (b)(1) or (b)(2) class. The characteristics of the class may reduce the need for formal notice. The cost of providing notice, moreover, could easily cripple actions that do not seek damages. The court may decide not to direct notice after balancing the risk that notice costs may deter the pursuit of class relief against the benefits of notice.

When the court does direct certification notice in a (b)(1) or (b)(2) class action, the discretion and flexibility established by subdivision (c)(2)(A) extend to the method of giving notice. Notice facilitates the opportunity to participate. Notice calculated to reach a significant number of class members often will protect the interests of all. Informal methods may prove effective. A simple posting in a place visited by many class members, directing attention to a source of more detailed information, may suffice. The court should consider the costs of notice in relation to the probable reach of inexpensive methods.

If a Rule 23(b)(3) class is certified in conjunction with a (b)(2) class, the (c)(2)(B) notice requirements must be satisfied as to the (b)(3) class.

The direction that class-certification notice be couched in plain, easily understood language is a reminder of the need to work unremittingly at the difficult task of communicating with class members. It is difficult to provide information about most class actions that is both accurate and easily understood by class members who are not themselves lawyers. Factual uncertainty, legal complexity, and the complication of class-action procedure raise the barriers high. The Federal Judicial Center has created illustrative clear-notice forms that provide a helpful starting point for actions similar to those described in the forms.

Note to Subdivision (e). Subdivision (e) is amended to strengthen the process of reviewing proposed class-action settlements. Settlement may be a desirable means of resolving a class action. But court review and approval are essential to assure adequate representation of class members who have not participated in shaping the settlement.

Paragraph (1). Subdivision (e)(1)(A) expressly recognizes the power of a class representative to settle class claims, issues, or defenses.

Rule 23(e)(1)(A) resolves the ambiguity in former Rule 23(e)'s reference to dismissal or compromise of "a class action." That language could be — and at times was — read to require court approval of settlements with putative class representatives that resolved only individual claims. See Manual for Complex Litigation Third, § 30.41. The new rule requires approval only if the claims, issues, or defenses of a certified class are resolved by a settlement, voluntary dismissal, or compromise.

Subdivision (e)(1)(B) carries forward the notice requirement of present Rule 23(e) when the settlement binds the class through claim or issue preclusion; notice is not required when the settlement binds only the individual class representatives. Notice of a settlement binding on the class is required either when the settlement follows class certification or when the decisions on certification and settlement proceed simultaneously.

Reasonable settlement notice may require individual notice in the manner required by Rule 23(c)(2)(B) for certification notice to a Rule 23(b)(3) class. Individual notice is appropriate, for example, if class members are required to take action — such as filing claims — to participate in the judgment, or if the court orders a settlement opt-out opportunity under Rule 23(e)(3).

Subdivision (e)(1)(C) confirms and mandates the already common practice of holding hearings as part of the process of approving settlement, voluntary dismissal, or compromise that would bind members of a class.

Subdivision (e)(1)(C) states the standard for approving a proposed settlement that would bind class members. The settlement must be fair, reasonable, and adequate. A helpful review of many factors that may deserve consideration is provided by *In re: Prudential Ins. Co. America Sales Practice Litigation Agent Actions, 148 F.3d 283, 316–324* (3d Cir. 1998). Further guidance can be found in the Manual for Complex Litigation.

The court must make findings that support the conclusion that the settlement is fair, reasonable, and adequate. The findings must be set out in sufficient detail to explain to class members and the appellate court the factors that bear on applying the standard.

Settlement review also may provide an occasion to review the cogency of the initial class definition. The terms of the settlement themselves, or objections, may reveal divergent interests of class members and demonstrate the need to redefine the class or to designate subclasses. Redefinition of a class certified under Rule 23(b)(3) may require notice to new class members under Rule 23(c)(2)(B). See Rule 23(c)(1)(C).

Paragraph (2). Subdivision (e)(2) requires parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) to file a statement identifying any agreement made in connection with the settlement. This provision does not change the basic requirement that the parties disclose all terms of the settlement or compromise that the court must approve under Rule 23(e)(1). It aims instead at related undertakings that, although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others. Doubts should be resolved in favor of identification.

Further inquiry into the agreements identified by the parties should not become the occasion for discovery by the parties or objectors. The court may direct the parties to provide to the court or other parties a summary or copy of the full terms of any agreement identified by the parties. The court also may direct the parties to provide a summary or copy of any agreement not identified by the parties that the court considers relevant to its review of a proposed settlement. In exercising discretion under this rule, the court may act in steps, calling first for a summary of any agreement that may have affected the settlement and then for a complete version if the summary does not provide an adequate basis for review. A direction to disclose a summary or copy of an agreement may raise concerns of confidentiality. Some agreements may include information that merits protection against general disclosure. And the court must provide an opportunity to claim work-product or other protections.

Paragraph (3). Subdivision (e)(3) authorizes the court to refuse to approve a settlement unless the settlement affords class members a new opportunity to request exclusion from a class certified under Rule 23(b)(3) after settlement terms are known. An agreement by the parties themselves to permit class members to elect exclusion at this point by the settlement agreement may be one factor supporting approval of the settlement. Often there is an opportunity to opt out at this point because the class is certified and settlement is reached in circumstances that lead to simultaneous notice of certification and notice of settlement. In these cases, the basic opportunity to elect exclusion applies without further complication. In some cases, particularly if settlement appears imminent at the time of certification, it may be possible to achieve equivalent protection by deferring notice and the opportunity to elect exclusion until actual settlement terms are known. This approach avoids the cost and potential confusion of providing two notices and makes the single notice more meaningful. But notice should not be delayed unduly after certification in the hope of settlement.

Rule 23 (e)(3) authorizes the court to refuse to approve a settlement unless the settlement affords a new opportunity to elect exclusion in a case that settles after a certification decision if the earlier opportunity to elect exclusion provided with the certification notice has expired by the time of the settlement notice. A decision to remain in the class is likely to be more carefully considered and is better informed when settlement terms are known.

The opportunity to request exclusion from a proposed settlement is limited to members of a (b)(3) class. Exclusion may be requested only by individual class members; no class member may purport to opt out other class members by way of another class action.

The decision whether to approve a settlement that does not allow a new opportunity to elect exclusion is confided to the court’s discretion. The court may make this decision before directing notice to the class under Rule 23(e)(1)(B) or after the Rule 23(e)(1)(C) hearing. Many factors may influence the court’s decision. Among these are changes in the information available to class members since expiration of the first opportunity to request exclusion, and the nature of the individual class members’ claims.

The terms set for permitting a new opportunity to elect exclusion from the proposed settlement of a Rule 23(b)(3) class action may address concerns of potential misuse. The court might direct, for example, that class members

who elect exclusion are bound by rulings on the merits made before the settlement was proposed for approval. Still other terms or conditions may be appropriate.

Paragraph (4). Subdivision (e)(4) confirms the right of class members to object to a proposed settlement, voluntary dismissal, or compromise. The right is defined in relation to a disposition that, because it would bind the class, requires court approval under subdivision (e)(1)(C).

Subdivision (e)(4)(B) requires court approval for withdrawal of objections made under subdivision (e)(4)(A). Review follows automatically if the objections are withdrawn on terms that lead to modification of the settlement with the class. Review also is required if the objector formally withdraws the objections. If the objector simply abandons pursuit of the objection, the court may inquire into the circumstances.

Approval under paragraph (4)(B) may be given or denied with little need for further inquiry if the objection and the disposition go only to a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members. Different considerations may apply if the objector has protested that the proposed settlement is not fair, reasonable, or adequate on grounds that apply generally to a class or subclass. Such objections, which purport to represent class-wide interests, may augment the opportunity for obstruction or delay. If such objections are surrendered on terms that do not affect the class settlement or the objector's participation in the class settlement, the court often can approve withdrawal of the objections without elaborate inquiry.

Once an objector appeals, control of the proceeding lies in the court of appeals. The court of appeals may undertake review and approval of a settlement with the objector, perhaps as part of appeal settlement procedures, or may remand to the district court to take advantage of the district court's familiarity with the action and settlement.

Note to Subdivision (g). Subdivision (g) is new. It responds to the reality that the selection and activity of class counsel are often critically important to the successful handling of a class action. Until now, courts have scrutinized proposed class counsel as well as the class representative under Rule 23(a)(4). This experience has recognized the importance of judicial evaluation of the proposed lawyer for the class, and this new subdivision builds on that experience rather than introducing an entirely new element into the class certification process. Rule 23(a)(4) will continue to call for scrutiny of the proposed class representative, while this subdivision will guide the court in assessing proposed class counsel as part of the certification decision. This subdivision recognizes the importance of class counsel, states the obligation to represent the interests of the class, and provides a framework for selection of class counsel. The procedure and standards for appointment vary depending on whether there are multiple applicants to be class counsel. The new subdivision also provides a method by which the court may make directions from the outset about the potential fee award to class counsel in the event the action is successful.

Paragraph (1) sets out the basic requirement that class counsel be appointed if a class is certified and articulates the obligation of class counsel to represent the interests of the class, as opposed to the potentially conflicting interests of individual class members. It also sets out the factors the court should consider in assessing proposed class counsel.

Paragraph (1)(A) requires that the court appoint class counsel to represent the class. Class counsel must be appointed for all classes, including each subclass that the court certifies to represent divergent interests.

Paragraph (1)(A) does not apply if "a statute provides otherwise." This recognizes that provisions of the Private Securities Litigation Reform Act of 1995, *Pub. L. No. 104-67*, *109 Stat. 737* (1995) (codified in various sections of 15 U.S.C.), contain directives that bear on selection of a lead plaintiff and the retention of counsel. This subdivision does not purport to supersede or to affect the interpretation of those provisions, or any similar provisions of other legislation.

Paragraph 1(B) recognizes that the primary responsibility of class counsel, resulting from appointment as class counsel, is to represent the best interests of the class. The rule thus establishes the obligation of class counsel, an obligation that may be different from the customary obligations of counsel to individual clients. Appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it. The

class representatives do not have an unfettered right to “fire” class counsel.In the same vein, the class representatives cannot command class counsel to accept or reject a settlement proposal. To the contrary, class counsel must determine whether seeking the court’s approval of a settlement would be in the best interests of the class as a whole.

Paragraph (1)(C) articulates the basic responsibility of the court to appoint class counsel who will provide the adequate representation called for by paragraph (1)(B). It identifies criteria that must be considered and invites the court to consider any other pertinent matters. Although couched in terms of the court’s duty, the listing also informs counsel seeking appointment about the topics that should be addressed in an application for appointment or in the motion for class certification.

The court may direct potential class counsel to provide additional information about the topics mentioned in paragraph (1)(C) or about any other relevant topic. For example, the court may direct applicants to inform the court concerning any agreements about a prospective award of attorney fees or nontaxable costs, as such agreements may sometimes be significant in the selection of class counsel. The court might also direct that potential class counsel indicate how parallel litigation might be coordinated or consolidated with the action before the court.

The court may also direct counsel to propose terms for a potential award of attorney fees and nontaxable costs. Attorney fee awards are an important feature of class action practice, and attention to this subject from the outset may often be a productive technique. Paragraph (2)(C) therefore authorizes the court to provide directions about attorney fees and costs when appointing class counsel. Because there will be numerous class actions in which this information is not likely to be useful, the court need not consider it in all class actions.

Some information relevant to class counsel appointment may involve matters that include adversary preparation in a way that should be shielded from disclosure to other parties. An appropriate protective order may be necessary to preserve confidentiality.

In evaluating prospective class counsel, the court should weigh all pertinent factors. No single factor should necessarily be determinative in a given case. For example, the resources counsel will commit to the case must be appropriate to its needs, but the court should be careful not to limit consideration to lawyers with the greatest resources.

If, after review of all applicants, the court concludes that none would be satisfactory class counsel, it may deny class certification, reject all applications, recommend that an application be modified, invite new applications, or make any other appropriate order regarding selection and appointment of class counsel.

Paragraph (2). This paragraph sets out the procedure that should be followed in appointing class counsel. Although it affords substantial flexibility, it provides the framework for appointment of class counsel in all class actions. For counsel who filed the action, the materials submitted in support of the motion for class certification may suffice to justify appointment so long as the information described in paragraph (g)(1)(C) is included. If there are other applicants, they ordinarily would file a formal application detailing their suitability for the position.

In a plaintiff class action the court usually would appoint as class counsel only an attorney or attorneys who have sought appointment. Different considerations may apply in defendant class actions.

The rule states that the court should appoint “class counsel.” In many instances, the applicant will be an individual attorney. In other cases, however, an entire firm, or perhaps of numerous attorneys who are not otherwise affiliated but are collaborating on the action will apply. No rule of thumb exists to determine when such arrangements are appropriate; the court should be alert to the need for adequate staffing of the case, but also to the risk of overstaffing or an ungainly counsel structure.

Paragraph (2)(A) authorizes the court to designate interim counsel during the pre-certification period if necessary to protect the interests of the putative class. Rule 23(c)(1)(B) directs that the order certifying the class include appointment of class counsel. Before class certification, however, it will usually be important for an attorney to take action to prepare for the certification decision. The amendment to Rule 23(c)(1) recognizes that some discovery is

often necessary for that determination. It also may be important to make or respond to motions before certification. Settlement may be discussed before certification. Ordinarily, such work is handled by the lawyer who filed the action. In some cases, however, there may be rivalry or uncertainty that makes formal designation of interim counsel appropriate. Rule 23(g)(2)(A) authorizes the court to designate interim counsel to act on behalf of the putative class before the certification decision is made. Failure to make the formal designation does not prevent the attorney who filed the action from proceeding in it. Whether or not formally designated interim counsel, an attorney who acts on behalf of the class before certification must act in the best interests of the class as a whole. For example, an attorney who negotiates a pre-certification settlement must seek a settlement that is fair, reasonable, and adequate for the class.

Rule 23(c)(1) provides that the court should decide whether to certify the class "at an early practicable time," and directs that class counsel should be appointed in the order certifying the class. In some cases, it may be appropriate for the court to allow a reasonable period after commencement of the action for filing applications to serve as class counsel. The primary ground for deferring appointment would be that there is reason to anticipate competing applications to serve as class counsel. Examples might include instances in which more than one class action has been filed, or in which other attorneys have filed individual actions on behalf of putative class members. The purpose of facilitating competing applications in such a case is to afford the best possible representation for the class. Another possible reason for deferring appointment would be that the initial applicant was found inadequate, but it seems appropriate to permit additional applications rather than deny class certification.

Paragraph (2)(B) states the basic standard the court should use in deciding whether to certify the class and appoint class counsel in the single applicant situation — that the applicant be able to provide the representation called for by paragraph (1)(B) in light of the factors identified in paragraph (1)(C).

If there are multiple adequate applicants, paragraph (2)(B) directs the court to select the class counsel best able to represent the interests of the class. This decision should also be made using the factors outlined in paragraph (1)(C), but in the multiple applicant situation the court is to go beyond scrutinizing the adequacy of counsel and make a comparison of the strengths of the various applicants. As with the decision whether to appoint the sole applicant for the position, no single factor should be dispositive in selecting class counsel in cases in which there are multiple applicants. The fact that a given attorney filed the instant action, for example, might not weigh heavily in the decision if that lawyer had not done significant work identifying or investigating claims. Depending on the nature of the case, one important consideration might be the applicant's existing attorney-client relationship with the proposed class representative.

Paragraph (2)(C) builds on the appointment process by authorizing the court to include provisions regarding attorney fees in the order appointing class counsel. Courts may find it desirable to adopt guidelines for fees or nontaxable costs, or to direct class counsel to report to the court at regular intervals on the efforts undertaken in the action, to facilitate the court's later determination of a reasonable attorney fee.

Note to Subdivision (h). Subdivision (h) is new. Fee awards are a powerful influence on the way attorneys initiate, develop, and conclude class actions. Class action attorney fee awards have heretofore been handled, along with all other attorney fee awards, under Rule 54(d)(2), but that rule is not addressed to the particular concerns of class actions. This subdivision is designed to work in tandem with new subdivision (g) on appointment of class counsel, which may afford an opportunity for the court to provide an early framework for an eventual fee award, or for monitoring the work of class counsel during the pendency of the action.

Subdivision (h) applies to "an action certified as a class action." This includes cases in which there is a simultaneous proposal for class certification and settlement even though technically the class may not be certified unless the court approves the settlement pursuant to review under Rule 23(e). When a settlement is proposed for Rule 23(e) approval, either after certification or with a request for certification, notice to class members about class counsel's fee motion would ordinarily accompany the notice to the class about the settlement proposal itself.

This subdivision does not undertake to create new grounds for an award of attorney fees or nontaxable costs. Instead, it applies when such awards are authorized by law or by agreement of the parties. Against that background, it provides a format for all awards of attorney fees and nontaxable costs in connection with a class

action, not only the award to class counsel. In some situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as attorneys who acted for the class before certification but were not appointed class counsel, or attorneys who represented objectors to a proposed settlement under Rule 23(e) or to the fee motion of class counsel. Other situations in which fee awards are authorized by law or by agreement of the parties may exist.

This subdivision authorizes an award of "reasonable" attorney fees and nontaxable costs. This is the customary term for measurement of fee awards in cases in which counsel may obtain an award of fees under the "common fund" theory that applies in many class actions, and is used in many fee-shifting statutes. Depending on the circumstances, courts have approached the determination of what is reasonable in different ways. In particular, there is some variation among courts about whether in "common fund" cases the court should use the lodestar or a percentage method of determining what fee is reasonable. The rule does not attempt to resolve the question whether the lodestar or percentage approach should be viewed as preferable.

Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process. Continued reliance on caselaw development of fee-award measures does not diminish the court's responsibility. In a class action, the district court must ensure that the amount and mode of payment of attorney fees are fair and proper whether the fees come from a common fund or are otherwise paid. Even in the absence of objections, the court bears this responsibility.

Courts discharging this responsibility have looked to a variety of factors. One fundamental focus is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members. The Private Securities Litigation Reform Act of 1995 explicitly makes this factor a cap for a fee award in actions to which it applies. See *15 U.S.C. §§ 77z-1(a)(6)*; 78u-4(a)(6) (fee award should not exceed a "reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class"). For a percentage approach to fee measurement, results achieved is the basic starting point.

In many instances, the court may need to proceed with care in assessing the value conferred on class members. Settlement regimes that provide for future payments, for example, may not result in significant actual payments to class members. In this connection, the court may need to scrutinize the manner and operation of any applicable claims procedure. In some cases, it may be appropriate to defer some portion of the fee award until actual payouts to class members are known. Settlements involving nonmonetary provisions for class members also deserve careful scrutiny to ensure that these provisions have actual value to the class. On occasion the court's Rule 23(e) review will provide a solid basis for this sort of evaluation, but in any event it is also important to assessing the fee award for the class.

At the same time, it is important to recognize that in some class actions the monetary relief obtained is not the sole determinant of an appropriate attorney fees award. *Cf. Blanchard v. Bergeron, 489 U.S. 87*, *95 [103 L. Ed. 2d 67, 76] (1989)* (cautioning in an individual case against an "undesirable emphasis" on "the importance of the recovery of damages in civil rights litigation" that might "shortchange efforts to seek effective injunctive or declaratory relief").

Any directions or orders made by the court in connection with appointing class counsel under Rule 23(g) should weigh heavily in making a fee award under this subdivision.

Courts have also given weight to agreements among the parties regarding the fee motion, and to agreements between class counsel and others about the fees claimed by the motion. Rule 54(d)(2)(B) provides: "If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made." The agreement by a settling party not to oppose a fee application up to a certain amount, for example, is worthy of consideration, but the court remains responsible to determine a reasonable fee. "Side agreements" regarding fees provide at least perspective pertinent to an appropriate fee award.

In addition, courts may take account of the fees charged by class counsel or other attorneys for representing individual claimants or objectors in the case. In determining a fee for class counsel, the court's objective is to ensure an overall fee that is fair for counsel and equitable within the class. In some circumstances individual fee

agreements between class counsel and class members might have provisions inconsistent with those goals, and the court might determine that adjustments in the class fee award were necessary as a result.

Finally, it is important to scrutinize separately the application for an award covering nontaxable costs. If costs were addressed in the order appointing class counsel, those directives should be a presumptive starting point in determining what is an appropriate award.

Paragraph (1). Any claim for an award of attorney fees must be sought by motion under Rule 54(d)(2), which invokes the provisions for timing of appeal in Rule 58 and Appellate Rule 4. Owing to the distinctive features of class action fee motions, however, the provisions of this subdivision control disposition of fee motions in class actions, while Rule 54(d)(2) applies to matters not addressed in this subdivision.

The court should direct when the fee motion must be filed. For motions by class counsel in cases subject to court review of a proposed settlement under Rule 23(e), it would be important to require the filing of at least the initial motion in time for inclusion of information about the motion in the notice to the class about the proposed settlement that is required by Rule 23(e). In cases litigated to judgment, the court might also order class counsel's motion to be filed promptly so that notice to the class under this subdivision (h) can be given.

Besides service of the motion on all parties, notice of class counsel's motion for attorney fees must be "directed to the class in a reasonable manner." Because members of the class have an interest in the arrangements for payment of class counsel whether that payment comes from the class fund or is made directly by another party, notice is required in all instances. In cases in which settlement approval is contemplated under Rule 23(e), notice of class counsel's fee motion should be combined with notice of the proposed settlement, and the provision regarding notice to the class is parallel to the requirements for notice under Rule 23(e). In adjudicated class actions, the court may calibrate the notice to avoid undue expense.

Paragraph (2). A class member and any party from whom payment is sought may object to the fee motion. Other parties — for example, nonsettling defendants — may not object because they lack a sufficient interest in the amount the court awards. The rule does not specify a time limit for making an objection. In setting the date objections are due, the court should provide sufficient time after the full fee motion is on file to enable potential objectors to examine the motion.

The court may allow an objector discovery relevant to the objections. In determining whether to allow discovery, the court should weigh the need for the information against the cost and delay that would attend discovery. See Rule 26(b)(2). One factor in determining whether to authorize discovery is the completeness of the material submitted in support of the fee motion, which depends in part on the fee measurement standard applicable to the case. If the motion provides thorough information, the burden should be on the objector to justify discovery to obtain further information.

Paragraph (3). Whether or not there are formal objections, the court must determine whether a fee award is justified and, if so, set a reasonable fee. The rule does not require a formal hearing in all cases. The form and extent of a hearing depend on the circumstances of the case. The rule does require findings and conclusions under Rule 52(a).

Paragraph (4). By incorporating Rule 54(d)(2), this provision gives the court broad authority to obtain assistance in determining the appropriate amount to award. In deciding whether to direct submission of such questions to a special master or magistrate judge, the court should give appropriate consideration to the cost and delay that such a process might entail.

Changes Made After Publication and Comment. Rule 23(c)(1)(B) is changed to incorporate the counsel-appointment provisions of Rule 23(g). The statement of the method and time for requesting exclusion from a (b)(3) class has been moved to the notice of certification provision in Rule 23(c)(2)(B).

Rule 23(c)(1)(C) is changed by deleting all references to "conditional" certification.

Rule 23(c)(2)(A) is changed by deleting the requirement that class members be notified of certification of a (b)(1) or (b)(2) class. The new version provides only that the court may direct appropriate notice to the class.

Rule 23(c)(2)(B) is revised to require that the notice of class certification define the certified class in terms identical to the terms used in (c)(1)(B), and to incorporate the statement transferred from (c)(1)(B) on "when and how members may elect to be excluded."

Rule 23(e)(1) is revised to delete the requirement that the parties must win court approval for a precertification dismissal or settlement.

Rule 23(e)(2) is revised to change the provision that the court may direct the parties to file a copy or summary of any agreement or understanding made in connection with a proposed settlement. The new provision directs the parties to a proposed settlement to identify any agreement made in connection with the settlement.

Rule 23(e)(3) is proposed in a restyled form of the second version proposed for publication.

Rule 23(e)(4)(B) is restyled.

Rule 23(g)(1)(C) is a transposition of criteria for appointing class counsel that was published as Rule 23(g)(2)(B). The criteria are rearranged, and expanded to include consideration of experience in handling claims of the type asserted in the action and of counsel's knowledge of the applicable law.

Rule 23(g)(2)(A) is a new provision for designation of interim counsel to act on behalf of a putative class before a certification determination is made.

Rule 23(g)(2)(B) is revised to point up the differences between appointment of class counsel when there is only one applicant and when there are competing applicants. When there is only one applicant the court must determine that the applicant is able to fairly and adequately represent class interests. When there is more than one applicant the court must appoint the applicant best able to represent class interests.

Rule 23(h) is changed to require that notice of an attorney-fee motion by class counsel be "directed to class members," rather than "given to all class members."

Notes of Advisory Committee on 2007 amendments. The language of Rule 23 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Amended Rule 23(d)(2) carries forward the provisions of former Rule 23(d) that recognize two separate propositions. First, a Rule 23(d) order may be combined with a pretrial order under Rule 16. Second, the standard for amending the Rule 23(d) order continues to be the more open-ended standard for amending Rule 23(d) orders, not the more exacting standard for amending Rule 16 orders.

As part of the general restyling, intensifiers that provide emphasis but add no meaning are consistently deleted. Amended Rule 23(f) omits as redundant the explicit reference to court of appeals discretion in deciding whether to permit an interlocutory appeal. The omission does not in any way limit the unfettered discretion established by the original rule.

Notes of Advisory Committee on 1966 amendments. A derivative action by a shareholder of a corporation or by a member of an unincorporated association has distinctive aspects which require the special provisions set forth in the new rule. The next-to-the-last sentence recognizes that the question of adequacy of representation may arise when the plaintiff is one of a group of shareholders or members. Cf. 3 Moore's Federal Practice, par 23.08 (2d ed 1963).

The court has inherent power to provide for the conduct of the proceedings in a derivative action, including the power to determine the course of the proceedings and require that any appropriate notice be given to shareholders or members.

Notes of Advisory Committee on 2007 amendments. The language of Rule 23.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Notes of Advisory Committee on 2009 amendments. The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 6.

INTERPRETIVE NOTES AND DECISIONS

I. IN GENERAL

1. Generally

Federal Rule of Civil Procedure governing class actions does not purport to define class suit; it merely permits certain class suits of limited nature to be brought in limited manner, is in no sense mandatory, and impliedly recognizes right of all members of class to join as plaintiffs if they so desire. *Grand Rapids Furniture Co. v. Grand Rapids Furniture Co. (7th Cir. Ill. Apr. 16, 1942), 127 F2d 245*.

Class suit was invention of equity mothered by practical necessity of providing procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights, nor grant them immunity from equitable wrongs; Federal Rules have in no ways limited or restricted right to bring class suits in proper cases, as was previously provided for by former Equity Rule. *System Federation No. 91, etc. v. Reed (6th Cir. Mar. 13, 1950), 180 F2d 991, 17 Lab Cas (CCH) P65651*.

Restrictions on flexible language of Rule 23 are necessary contribution to effort to avoid intractable problems of massive class actions and to maintain wholesome degree of difference between judicial and administrative functions. *La Mar v. H & B Novelty & Loan Co. (9th Cir. Or. Dec. 7, 1973), 489 F2d 461, 17 Fed R Serv 2d (Callaghan) 1468*.

Frequently rigorous class analysis will entail some overlap with merits of plaintiff's underlying claim; court may consider substantive elements of plaintiffs' case in order to envision form that trial on those issues would take. *Gates v. Rohm & Haas Co. (3d Cir. Pa. Aug. 25, 2011), 655 F3d 255, 80 Fed R Serv 3d (Callaghan) 604*.

New Rule 23 was intended by creators to be ongoing experiment in sound judicial administration, with substance of rule providing basic limits and standards for exercise of judicial discretion. *Contract Buyers League v. F & F Inv. (N.D. Ill. 1969), 48 FRD 7, 13 Fed R Serv 2d (Callaghan) 590, 1969 Trade Cas (CCH) P72754*.

Rule 23 was drafted with recognition that only certain types of cases were amenable to class action and that vast majority of cases would not be amenable to class action. *Stuart v. Hewlett-Packard Co. (E.D. Mich. Feb. 6, 1975), 66 FRD 73, 9 Empl Prac Dec (CCH) P9993, 19 Fed R Serv 2d (Callaghan) 1346*.

Rule 23 permits class actions by way of offense or defense. *Jones v. United States Dep't of Housing & Urban Development (HUD) (E.D. La. 1975), 68 FRD 60, 21 Fed R Serv 2d (Callaghan) 682*.

Contractual waiver of individual rights granted by *Fed. R. Civ. P. 23* to class representative must be explicit. *Tardiff v. Knox County (D. Me. July 29, 2008), 567 F Supp 2d 201, 71 Fed R Serv 3d (Callaghan) 269*.

2. Liberal construction

History of class suit litigation, its development over century of growth, and origin and status of Rule 23 are persuasive of necessity of liberal construction of such rule. *Weeks v. Bareco Oil Co. (7th Cir. Ill. Dec. 22, 1941), 125 F2d 84*.

Rule 23 must be liberally interpreted. *King v. Kansas City Southern Industries, Inc. (7th Cir. Ill. June 19, 1975), 519 F2d 20, 20 Fed R Serv 2d (Callaghan) 593, Fed Sec L Rep (CCH) P95213*.

Although Rule 23 is to be liberally construed in favor of class actions, qualification is not mandatory but must depend upon particular circumstances under consideration. *Caceres v. International Air Transport Asso. (S.D.N.Y. 1969), 46 FRD 89, 12 Fed R Serv 2d (Callaghan) 561, 1969 Trade Cas (CCH) P72693*.

Earlier stage of proceeding, more liberally should court construe applicability of Rule 23. *Contract Buyers League v. F & F Inv. (N.D. Ill. 1969), 48 FRD 7, 13 Fed R Serv 2d (Callaghan) 590, 1969 Trade Cas (CCH) P72754*.

Rule 23 is to be liberally construed with view to enhancing use of class actions as means of vindicating rights of absent members who are unable, for one reason or another, personally to prosecute actions. *Berland v. Mack (S.D.N.Y. 1969), 48 FRD 121, 13 Fed R Serv 2d (Callaghan) 659, Fed Sec L Rep (CCH) P92499*, disapproved as stated in *In re Franklin Nat'l Bank Sec. Litigation (2d Cir. N.Y. Apr. 3, 1978), 574 F2d 662, 25 Fed R Serv 2d (Callaghan) 1, Fed Sec L Rep (CCH) P96373*.

Rule 23 is liberally construed, so that in doubtful cases maintenance of class action is favored, and theory behind liberal construction of rule is that determination of propriety of class action is to be made at early stage of proceedings, with court thereafter maintaining power to supervise course of action and to modify order as necessary when facts become developed. *Gerstle v. Continental Airlines, Inc. (D. Colo. July 16, 1970), 50 FRD 213, 2 Empl Prac Dec (CCH) P10273, 14 Fed R Serv 2d (Callaghan) 342*, aff'd, *(10th Cir. Colo. Oct. 2, 1972), 466 F2d 1374, 5 Empl Prac Dec (CCH) P7998, 16 Fed R Serv 2d (Callaghan) 693*.

Rule 23 is to be interpreted broadly so that in close cases decisions are made in favor of class actions. *Thomas v. Clarke (D. Minn. 1971), 54 FRD 245, 15 Fed R Serv 2d (Callaghan) 1579*.

Rule 23 is liberally construed, and even in doubtful cases maintenance of class action is favored. *Alameda Oil Co. v. Ideal Basic Industries, Inc. (D. Colo. Apr. 15, 1971), 326 F Supp 98, 15 Fed R Serv 2d (Callaghan) 171, Fed Sec L Rep (CCH) P93086*.

Spirit of Rule 23 calls for liberal rather than restrictive reading of language. *Frost v. Weinberger (E.D.N.Y. May 3, 1974), 375 F Supp 1312*, rev'd, *(2d Cir. N.Y. Apr. 17, 1975), 515 F2d 57, 20 Fed R Serv 2d (Callaghan) 117*.

FRCP 23 should be given broad, rather than restrictive, interpretation by court. *Becher v. Long Island Lighting Co. (E.D.N.Y. Jan. 6, 1996), 164 FRD 144*, amended, *(E.D.N.Y. Apr. 15, 1997), 172 FRD 28, 38 Fed R Serv 3d (Callaghan) 1102, 134 Lab Cas (CCH) P10032*.

FRCP 23 should be given broad, rather than restrictive, interpretation by court, to favor maintenance of class actions. *Labbate-D'Alauro v. GC Servs. Ltd. Pshp. (E.D.N.Y. Sept. 30, 1996), 168 FRD 451, 36 Fed R Serv 3d (Callaghan) 885*.

Despite district court's obligation to carefully analyze each prong of *Fed. R. Civ. P. 23* before granting class certification, Second Circuit has emphasized that Rule 23 should be given liberal rather than restrictive construction and has shown general preference for granting rather than denying class certification. *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co. (In re Vitamin C Antitrust Litig.) (E.D.N.Y. Jan. 25, 2012), 279 FRD 90, 81 Fed R Serv 3d (Callaghan) 851, 2012-1 Trade Cas (CCH) P77781*.

Unpublished decision: It is not rule in Third Circuit that *Fed. R. Civ. P. 23* is to receive liberal construction; rather, rule in Third Circuit is that district courts should not suppress doubt as to whether requirement of *Fed. R. Civ. P. 23* is met, no matter area of substantive law. *In re Ford Motor Co. E-350 Van Prods. Liab. Litig. (D.N.J. Feb. 6, 2012), 2012 US Dist LEXIS 13887*.

Unpublished decision: It is not rule in Third Circuit that *Fed. R. Civ. P. 23* is to receive liberal construction; rather, rule in Third Circuit is that district courts should not suppress doubt as to whether requirement of *Fed. R. Civ. P. 23*

is met, no matter area of substantive law. *In re Ford Motor Co. E-350 Van Prods. Liab. Litig. (D.N.J. Feb. 6, 2012), 2012 US Dist LEXIS 13887*.

3. —Discretion of court

In exercising its discretion, district court should construe *FRCP 23* liberally, and resolve all doubts in favor of class certification. *Schreiber v. NCAA (D. Kan. May 29, 1996), 167 FRD 169*; *Law v. NCAA (D. Kan. May 10, 1996), 167 FRD 178, 1996-2 Trade Cas (CCH) P71517*.

Because courts are given discretion to tailor scope of class later in litigation, liberal consideration of requirements for class certification is permitted in early stages of litigation. *Weigmann v. Glorious Food (S.D.N.Y. Nov. 6, 1996), 169 FRD 280, 36 Fed R Serv 3d (Callaghan) 1275*.

4. —Particular cases

Rule 23 should be liberally construed in favor of use of class action device as means of vindicating rights of absent members unable to prosecute, particularly in suits charging violations of anti-fraud provisions of federal securities acts. *Rosenblatt v. Omega Equities Corp. (S.D.N.Y. 1970), 50 FRD 61, 14 Fed R Serv 2d (Callaghan) 336, Fed Sec L Rep (CCH) P92739*.

Liberal approach to Rule 23 of not dismissing proceeding as class action unless there is clear showing that proceeding is not class action and until there is proper appraisal of all factors enumerated on face of rule, and of favoring maintenance of class action is correct approach in civil rights suits such as action brought under Civil Rights Act of 1964 (*42 USCS §§ 2000e* et seq.) with respect to alleged discrimination in employment. *Moss v. Lane Co. (W.D. Va. Mar. 24, 1970), 50 FRD 122, 2 Empl Prac Dec (CCH) P10309, 14 Fed R Serv 2d (Callaghan) 422, 63 Lab Cas (CCH) P9530*, aff'd in part, *(4th Cir. Va. Jan. 11, 1973), 471 F2d 853, 5 Empl Prac Dec (CCH) P8401, 16 Fed R Serv 2d (Callaghan) 1345*.

It would cut against grain of liberality with which class allegations under Rule 23 should be viewed to dismiss class action in which defendant objects that no person other than plaintiff complains of discrimination, where plaintiff has not yet had opportunity to conduct discovery into matters essential to combat defendant's arguments; however, as permitted by Rule 23, court reserves right to review decision after discovery has proceeded in accordance with opinion. *Pittman v. Anaconda Wire & Cable Co. (E.D.N.C. Sept. 9, 1974), 408 F Supp 286, 12 Empl Prac Dec (CCH) P10966, 20 Fed R Serv 2d (Callaghan) 825*.

Civil rights nature of claimed deprivation of liberty and due process under Fifth Amendment did not require or permit less stringent application of Rule 23 prerequisites in action brought on behalf of class of children airlifted from Vietnam in orphan airlift for alleged violation of rights of children in Fifth Amendment liberty and due process. *Nguyen Da Yen v. Kissinger (N.D. Cal. 1976), 70 FRD 656, 21 Fed R Serv 2d (Callaghan) 528*.

5. Validity of Rule

Test of validity or continued existence of Rule 23 is not difficulty or complexity of administration; so long as it is on books, it is to be given effect. *Rich v. Martin Marietta Corp. (10th Cir. Colo. Aug. 1, 1975), 522 F2d 333, 10 Empl Prac Dec (CCH) P10339, 21 Fed R Serv 2d (Callaghan) 509*, disapproved as stated in *Griffin v. Dugger (11th Cir. Fla. Aug. 7, 1987), 823 F2d 1476, 44 Empl Prac Dec (CCH) P37334, 8 Fed R Serv 3d (Callaghan) 782*.

Rule 23 is presumptively valid as comprehending adequate due process protections. *Watson v. Branch County Bank (W.D. Mich. Aug. 12, 1974), 380 F Supp 945*, rev'd, *(6th Cir. Mich. 1975), 516 F2d 902*.

6. Procedural characterization of Rule

Rule 23 is rule of procedure, not limitation upon jurisdiction. *Harris v Palm Springs Alpine Estates, Inc. (1964, CA9 Cal) 329 F2d 909, 8 FR Serv 2d 23A*.33, Case 1.

Rule 23 is only rule of procedure for enforcement of substantive rights. *Sperry Products, Inc. v. Association of American Railroads (D.N.Y. Jan. 12, 1942), 44 F Supp 660*, aff'd in part and rev'd in part, *(2d Cir. N.Y. Dec. 14, 1942), 132 F2d 408*.

Rule 23 is wholly procedural. *Glover v. McFaddin (D. Tex. Nov. 10, 1948), 81 F Supp 426*.

Even if it is assumed that all of requirements of Rule 23(a) and (b)(1), or (b)(2), or (b)(3) exist in given case, it does not necessarily follow that action may proceed, since Rule 23 is merely procedural, not jurisdictional. *Sigel v. General Development Corp. (M.D. Fla. 1973), 59 FRD 577, 17 Fed R Serv 2d (Callaghan) 1554*.

Rule 23 of North Dakota Rules of Civil Procedure (Rule identical to Federal Rule 23) is rule of procedure, as is Federal Rule 23. *Horst v. Guy (N.D. 1973), 211 NW2d 723*.

7. Amendments of 1966

Amendment of Rule 23 in 1966 was intended primarily as simplification and clarification of prior rule. *Esplin v. Hirschi (10th Cir. Utah Sept. 30, 1968), 402 F2d 94, 12 Fed R Serv 2d (Callaghan) 525, Fed Sec L Rep (CCH) P92276*, cert. denied, *(U.S. 1969), 394 US 928, 89 S Ct 1194, 22 L Ed 2d 459*.

There is nothing in Advisory Committee's Note that suggests that 1966 Amendments to Rule 23 had as their purpose authorization of massive class actions conducted by attorneys engaged by near-nominal plaintiffs. *La Mar v. H & B Novelty & Loan Co. (9th Cir. Or. Dec. 7, 1973), 489 F2d 461, 17 Fed R Serv 2d (Callaghan) 1468*.

In 1966 Rule 23 was amended to provide more flexible remedy. *Kline v Coldwell, Banker & Co. (1974, CA9 Cal) 508 F2d 226, 1974-2 CCH Trade Cases P 75436, 19 FR Serv 2d 819*, cert den *(1975) 421 US 963, 95 S Ct 1950, 44 L Ed 2d 449* and (criticized in *Bateman v Am. Multi-Cinema, Inc. (2010, CA9 Cal) 623 F3d 708, 77 FR Serv 3d 808*).

Amendment of 1966 to Rule 23, which inserted subparagraph (c)(1), was specifically intended to deal with post-merits certifications. *Jimenez v Weinberger (1975, CA7 Ill) 523 F2d 689, 21 FR Serv 2d 911*, cert den *(1976) 427 US 912, 96 S Ct 3200, 49 L Ed 2d 1204* and (criticized in *Armstrong v Martin Marietta Corp. (1998, CA11 Fla) 138 F3d 1374, 76 BNA FEP Cas 1007, 73 CCH EPD P 45338, 11 FLW Fed C 1240*) and (criticized in *Stone Container Corp. v United States (1998) 22 CIT 959, 27 F Supp 2d 195, 99-1 USTC P 70107*) and (criticized in *Southwire Co. v J.P. Morgan Chase & Co. (In re Copper Mkt. Antitrust Litig.) (2003, WD Wis) 300 F Supp 2d 805, 2004-1 CCH Trade Cases P 74349*) and (criticized in *Hupp v Beck Energy Corp. (2014, Ohio App, Monroe Co) 2014 Ohio 4255, 20 NE3d 732*).

Thrust of 1966 revision of Rule requires that class sought to be represented be defined adequately at beginning of lawsuit and that determination by court should be made as soon as practicable prior to trial whether action is maintainable as class action, and, if so, class which would be proper in light of status of pleadings. *Hardy v. United States Steel Corp. (N.D. Ala. Aug. 2, 1967), 289 F Supp 200, 1 Empl Prac Dec (CCH) P9822, 12 Fed R Serv 2d (Callaghan) 521, 56 Lab Cas (CCH) P9087*.

It was not intention of Committee, Supreme Court, or Congress that 1966 Amendment to Rule 23 should have any effect upon period of limitations established by Congress in Clayton Act. *Philadelphia Elec. Co. v. Anaconda American Brass Co. (E.D. Pa. 1968), 43 FRD 452, 11 Fed R Serv 2d (Callaghan) 594, 1968 Trade Cas (CCH) P72359* (criticized in *Calhoun v Horn (1997, ED Pa) 1997 US Dist LEXIS 15719*).

Rule 23 was amended in 1966 to make access to class actions easier for litigating plaintiffs. *Bennett v. Gravelle (D. Md. Jan. 19, 1971), 323 F Supp 203, 3 Empl Prac Dec (CCH) P8101, 14 Fed R Serv 2d (Callaghan) 1557, 66 Lab Cas (CCH) P12240*, aff'd, *(4th Cir. Md. Nov. 19, 1971), 451 F2d 1011, 4 Empl Prac Dec (CCH) P7566, 66 Lab Cas (CCH) P12241*, disapproved, *Sethy v. Alameda Co. Water Dist. (9th Cir. Sept. 20, 1976), 545 F2d 1157, 13 Empl Prac Dec (CCH) P11328*.

One of primary purposes for 1966 amendments to Rule 23 was to allow court more leeway to continually shape parameters of class and even to periodically determine whether class should continue to exist at all, in effort to assure procedural fairness and to allow court opportunity to periodically consider practical aspects of litigation that might arise. *Arey v. Providence Hospital (D.D.C. Apr. 28, 1972), 55 FRD 62, 4 Empl Prac Dec (CCH) P7788, 15 Fed R Serv 2d (Callaghan) 1559*.

Amendment of 1966 to Rule 23 imposes heavy burden of adequate representation upon class standard bearer and his attorney. *Richardson v. Hamilton Int'l Corp. (E.D. Pa. 1974), 62 FRD 413, 18 Fed R Serv 2d (Callaghan) 756*.

Provisions of Rule 23, as amended effective 1966, are designed to provide due process and, at same time, achieve finality in class litigation. Re Four Seasons Secur. *In re Four Seasons Sec. Laws Litig. (W.D. Okla. 1974), 63 FRD 422, 19 Fed R Serv 2d (Callaghan) 395*.

One of purposes of 1966 amendment was to enable maintenance of class action where party is charged with discriminating unlawfully against class, usually one whose members are incapable of specific enumeration. *Richmond Black Police Officers Ass'n v. City of Richmond (E.D. Va. Nov. 18, 1974), 386 F Supp 151, 10 Empl Prac Dec (CCH) P10268, 19 Fed R Serv 2d (Callaghan) 1296*.

Amendment of 1966 to Rule 23 was brought about to prevent previous advantage class member had of "sideline sitting" until outcome of litigation was known and then "opting in" if it was favorable to do so and to eliminate previous uncertainty which party opposing class had of never knowing with certainty number of people who would be affected by judgment prior to final determination. *Chrapliwy v. Uniroyal, Inc. (N.D. Ind. June 11, 1976), 71 FRD 461, 12 Empl Prac Dec (CCH) P11056, 21 Fed R Serv 2d (Callaghan) 1326*.

Unpublished decision: Plaintiff creditor could not represent class of claimants with disputed property damage claims in adversary proceeding alleging breach of fiduciary duty in handling those claims as it had not alleged its claims or defenses were typical of those of class under *Fed. R. Civ. P. 23(a)(3)*, nor had it produced evidence in response to defendant bankruptcy settlement trust's challenge to standing that it had disputed property damage claim; thus, dismissal was not error. *Southern Wesleyan University v. Asbestos Settlement Trust (In re Celotex Corp.) (11th Cir. Fla. Nov. 6, 2012), 496 Fed Appx 3*.

8. —Retroactivity

District Court properly applied Rule 23 as amended in 1966 to pending cases where court had made no determination whether cases were or were not proper class actions before effective date of amendment. *Hohmann v. Packard Instrument Co. (7th Cir. Ill. July 17, 1968), 399 F2d 711, 12 Fed R Serv 2d (Callaghan) 383, Fed Sec L Rep (CCH) P92259*.

Application of Rule 23 as amended in 1966 was not feasible with respect to actions brought by plaintiffs to rescind sale of certain shares of stock and subsequent corporate merger, where plaintiffs' original action was in form of class action pursuant to Rule 23(a) prior to 1966 amendment, and plaintiffs admitted at hearing that they represented no one but themselves. *Polakoff v. Delaware Steeplechase & Race Asso. (D. Del. Dec. 28, 1966), 264 F Supp 915, 11 Fed R Serv 2d (Callaghan) 632*.

New standards for determining whether class action is maintainable under Rule 23 as amended in 1966 would be used in determining whether suit might be maintained as class action where no apparent injustice would result from application of amended rule. *Booth v. General Dynamics Corp. (N.D. Ill. Jan. 25, 1967), 264 F Supp 465, 10 Fed R Serv 2d (Callaghan) 663*.

Rule 23 as amended in 1966 would not be applied, but rule prior to 1966 amendment would, where (1) class action issue had already been subject to previous extensive discovery efforts, (2) issue had been briefed and argued twice before District Court and before Circuit Court, (3) 4 months elapsed between promulgation and effective date of amended rule, during which time parties failed to suggest its application although occasions did exist for such suggestion, and (4) maze of delays would result from allowing discovery under amended rule further postponing

consideration of merits of action filed more than 4 years earlier. *Nedd v. Thomas (M.D. Pa. 1969), 47 FRD 551, 13 Fed R Serv 2d (Callaghan) 799*.

Rule 23 as amended in 1966 would apply to action having class claim in first count where, before pleadings were amended, Rule was amended. *Ingalls Iron Works Co. v. Fehlhaber Corp. (S.D.N.Y. May 19, 1971), 327 F Supp 272*.

9. — —Discretion of court

In discretion of court, amended Rule 23 can be applied to actions pending when it becomes effective. *Esplin v. Hirschi (10th Cir. Utah Sept. 30, 1968), 402 F2d 94, 12 Fed R Serv 2d (Callaghan) 525, Fed Sec L Rep (CCH) P92276*, cert. denied, *(U.S. 1969), 394 US 928, 89 S Ct 1194, 22 L Ed 2d 459*.

It was within discretion of court upon invocative facts in case pending when 1966 amendment to Rule 23 went into effect, to proceed either under old or new rule. *Hirschi v. B. & E. Secur., Inc. (D. Utah 1966), 41 FRD 64, 10 Fed R Serv 2d (Callaghan) 653, Fed Sec L Rep (CCH) P91845*.

Court would have discretion to continue under Rule 23 prior to 1966 amendment or under Rule 23 as amended, actions brought for alleged violations of § 10(b) of Securities Exchange Act of 1934 (*15 USCS § 78j(b)*) and SEC Rule 10b-5, where actions were pending on effective date of Rule 23 amendment, and under circumstances court would follow and apply rule as amended. *Harris v. Jones (D. Utah 1966), 41 FRD 70, 10 Fed R Serv 2d (Callaghan) 658*.

10. —Binding effect of judgment

Rule 23 as amended in 1966 was intended to insure that judgment, whether favorable or not, would bind all class members who did not request exclusion from suit. *Eisen v. Carlisle & Jacquelin (U.S. May 28, 1974), 417 US 156, 94 S Ct 2140, 40 L Ed 2d 732* (criticized in *Howard v Securitas Sec. Servs., USA (2009, ND Ill) 2009 US Dist LEXIS 3913*) and (criticized in *Drennan v PNC Bank, NA (In re Comty. Bank of N. Va. & Guaranty Nat'l Bank of Tallahassee Second Mortg. Loan Litig.) (2010, CA3 Pa) 622 F3d 275*) and (criticized in *Hecht v United Collection Bureau (2011, DC Conn) 2011 US Dist LEXIS 39507*) and (criticized in *Wal-Mart Stores, Inc. v Dukes (2011, US) 131 S Ct 2541, 180 L Ed 2d 374, 112 BNA FEP Cas 769, 94 CCH EPD P 44193, 161 CCH LC P 35919, 79 FR Serv 3d 1460, 22 FLW Fed S 1167*) and (criticized in *In re Ford Motor Co. E-350 Van Prods. Liab. Litig. (2012, DC NJ) 2012 US Dist LEXIS 13887*).

Rule 23 as amended in 1966 radically alters treatment of spurious class actions, particularly in allowing non-appearing members to be bound by judgment and in providing, for that reason, for notice under Rule 23(c)(2), early determination of existence of class under Rule 23(c)(1), and requirement of adequate representation in all class actions under Rule 23(a)(4). *Lipsett v. United States (2d Cir. N.Y. Apr. 29, 1966), 359 F2d 956, 10 Fed R Serv 2d (Callaghan) 581*.

Purpose of 1966 amendment to Rule 23 was to eliminate much of confusion as to binding effect of judgments in class actions, and unworkable conceptual distinctions between "true," "hybrid," and "spurious" class actions. *Philadelphia Electric Co. v. Anaconda American Brass Co. (E.D. Pa. 1967), 42 FRD 324, 11 Fed R Serv 2d (Callaghan) 621, 1967 Trade Cas (CCH) P72175*.

11. —Intervention

Right to intervene after judgment is what 1966 amendments to Rule 23 were intended to prevent in (b)(3) class actions. *Sarasota Oil Co. v. Greyhound Leasing & Financial Corp. (10th Cir. Okla. Aug. 22, 1973), 483 F2d 450, 17 Fed R Serv 2d (Callaghan) 1177*.

Policy of 1966 amendment to Rule 23 is to prevent one way intervention and to prevent as much as possible solicitation of claims. *Biechele v. Norfolk & W. R. Co. (D. Ohio June 19, 1969), 309 F Supp 354*.

Since Connecticut class certification procedures were similar to those embodied in *Fed. R. Civ. P. 23* and Connecticut jurisprudence governing class actions was relatively undeveloped, trial court was permitted to look to federal case law interpreting *Fed. R. Civ. P. 23* for guidance in construing Connecticut class certification procedures; as result, it was permissible for trial court to consider operator's misleading communications to potential class members to determine that joinder of all of municipalities suing operator for unjust enrichment for imposing increased waste disposal fees on municipalities to fund revenue shortfall due to illegal loan was impossible or impractical. *Town of New Hartford v. Conn. Res. Recovery Auth. (Conn. May 19, 2009), 970 A2d 592*.

12. —Res judicata

Rule 23 amendments of 1966 eliminated distinctions between true-hybrid and spurious class actions and differing res judicata effect of each type, so that court, whether it be trial court making initial Rule 23(a)(4) determination or subsequent court considering collateral attack on judgment in class action, must stringently apply requirement of adequate representation. *Gonzales v. Cassidy (5th Cir. Tex. Feb. 15, 1973), 474 F2d 67, 17 Fed R Serv 2d (Callaghan) 285*.

Elimination of pre-existing 3 types of categories of class actions by Rule 23 as amended in 1966 was designed to clearly place all class actions within purview of rules of res judicata. *Koen v. Long (E.D. Mo. Aug. 4, 1969), 302 F Supp 1383, 13 Fed R Serv 2d (Callaghan) 471*, aff'd, *(8th Cir. Mo. June 30, 1970), 428 F2d 876*.

13. Nature of class action

Rule 23 of Federal Rules of Civil Procedure provides procedure—where Federal District Court has jurisdiction over claim of each individual member of class—by which court may exercise its jurisdiction over various individual claims in single proceeding. *Califano v. Yamasaki (U.S. June 20, 1979), 442 US 682, 99 S Ct 2545, 61 L Ed 2d 176*.

Far from being scourge of modern jurisprudence, class actions contribute to its salubrity and vitality, and modern manifestation of class action is efficacious jurisprudential tool, whose applicability is neither universal nor monocentric. *Jones v. Diamond (5th Cir. Miss. Sept. 26, 1975), 519 F2d 1090, 21 Fed R Serv 2d (Callaghan) 185*, disapproved, *Gardner v. Westinghouse Broadcasting Co. (U.S. June 21, 1978), 437 US 478, 98 S Ct 2451, 57 L Ed 2d 364*.

Class action is in nature of derivative suit, where member of class may proceed for benefit of all, where all have common interest. *Anderson v. Abbott (D. Ky. Aug. 8, 1945), 61 F Supp 888*.

Class action is method which Congress has established for vindication of public interest through private actions. *Gerstle v. Continental Airlines, Inc. (D. Colo. July 16, 1970), 50 FRD 213, 2 Empl Prac Dec (CCH) P10273, 14 Fed R Serv 2d (Callaghan) 342*, aff'd, *(10th Cir. Colo. Oct. 2, 1972), 466 F2d 1374, 5 Empl Prac Dec (CCH) P7998, 16 Fed R Serv 2d (Callaghan) 693*.

Class action is sophisticated joinder device which Rule 23 states is justified under certain circumstances to avoid multiplicity of litigation, to avoid risk of separate litigations producing inconsistent results for or against persons having same relationship to their adversary, and to provide mechanism for efficient litigation of related claims. *Schaffner v. Chemical Bank (S.D.N.Y. Mar. 10, 1972), 339 F Supp 329, 15 Fed R Serv 2d (Callaghan) 1394, Fed Sec L Rep (CCH) P93403, 1972 Trade Cas (CCH) P73944*.

Class action allowed under Rule 23 has as its roots practical considerations of efficiency in courts and fairness to participants. *J. M. Woodhull, Inc. v. Addressograph-Multigraph Corp. (S.D. Ohio 1974), 62 FRD 58, 18 Fed R Serv 2d (Callaghan) 512, 1974-1 Trade Cas (CCH) P74894*.

Class actions are relatively inexpensive, expeditious, and socially desirable way for few named plaintiffs, usually represented by highly professional public interest attorneys, to raise substantial questions concerning constitutional or statutory rights of large number of people and to secure comprehensive and just remedies where rights are

shown to be violated. *Watson v. Branch County Bank (W.D. Mich. Aug. 12, 1974), 380 F Supp 945*, rev'd, *(6th Cir. Mich. 1975), 516 F2d 902*.

14. —Semi-public remedy

Rule 23 class action as way of redressing group wrongs is semi-public remedy administered by lawyer in private practice; it is cross between administrative action and private litigation. *Dolgow v. Anderson (E.D.N.Y. 1968), 43 FRD 472, 11 Fed R Serv 2d (Callaghan) 565, Fed Sec L Rep (CCH) P92125*.

Foundation of class action is that it is semi-public remedy administered by lawyer in private practice, and is often only practical effectuation of remedial provisions of legislative policies. *Katz v. Carte Blanche Corp. (D. Pa. 1971), 53 FRD 539, 15 Fed R Serv 2d (Callaghan) 1169*, rev'd, *(3d Cir. Pa. Mar. 15, 1974), 496 F2d 747, 18 Fed R Serv 2d (Callaghan) 381*.

15. Substantive rights and effect thereon

Because Rules Enabling Act forbids interpreting *Fed. R. Civ. P. 23* to abridge, enlarge or modify any substantive right, *28 USCS § 2072(b)*, class cannot be certified on premise that defendant will not be entitled to litigate its statutory defenses to individual claims. *Wal-Mart Stores, Inc. v Dukes (2011, US) 131 S Ct 2541, 180 L Ed 2d 374, 112 BNA FEP Cas 769, 94 CCH EPD P 44193, 161 CCH LC P 35919, 79 FR Serv 3d 1460, 22 FLW Fed S 1167*, on remand, remanded *(2011, CA9) 659 F3d 801, 113 BNA FEP Cas 928* and (criticized in *Chen-Oster v Goldman, Sachs & Co. (2012, SD NY) 877 F Supp 2d 113, 116 BNA FEP Cas 755, 83 FR Serv 3d 64*) and (criticized in *Moore v Napolitano (2013, DC Dist Col) 926 F Supp 2d 8, 117 BNA FEP Cas 1220*) and (criticized in *Lanovaz v Twinings N. Am., Inc. (2014, ND Cal) 2014 US Dist LEXIS 174404*).

Pursuant to appeal under *28 USCS § 1453*, remand of customers' class action against franchisor of tax preparers was not appropriate because decertification of defendant class containing franchisor and its affiliates potentially enlarged liability of franchisor as to fraud claims, expansion of liability did not relate back to original action, and expansion thus permitted removal under Class Action Fairness Act of 2005 in that neither *Fed. R. Civ. P. 23* nor 735 ILCS 5/2-801 et seq., altered any substantive right under *28 USCS § 2072(b)*. *Marshall v. H&R Block Tax Servs., Inc. (7th Cir. Ill. Apr. 30, 2009), 564 F3d 826*.

Because private plaintiffs do not have right to bring pattern-or-practice claim of discrimination, there can be no entitlement to ancillary class action procedural mechanism pursuant to *Fed. R. Civ. P. 23*. *Parisi v. Goldman, Sachs & Co. (2d Cir. N.Y. Mar. 21, 2013), 710 F3d 483, 96 Empl Prac Dec (CCH) P44809*.

Rule 23 is only rule of procedure for enforcement of substantive rights. *Sperry Products, Inc. v. Association of American Railroads (D.N.Y. Jan. 12, 1942), 44 F Supp 660*, aff'd in part and rev'd in part, *(2d Cir. N.Y. Dec. 14, 1942), 132 F2d 408*.

Rule 23 does not expand party's substantive rights or alter basic jurisdictional requirements. *Weiner v. Bank of King of Prussia (E.D. Pa. Apr. 30, 1973), 358 F Supp 684, 17 Fed R Serv 2d (Callaghan) 1536, 1973-2 Trade Cas (CCH) P74845*.

Rule 23 may not abridge, enlarge, or modify any substantive right. *Leonard v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (S.D.N.Y. 1974), 64 FRD 432, 19 Fed R Serv 2d (Callaghan) 248, Fed Sec L Rep (CCH) P94814*.

Allowing state based *Fed. R. Civ. P. 23* class to proceed in conjunction with collective action under *29 USCS § 216* does not abridge, enlarge, or modify any substantive right, under *28 USCS § 2072*; therefore certifying *Fed. R. Civ. P. 23* class in existing FLSA action does not violate *28 USCS § 2072*. *Calderon v. GEICO Gen. Ins. Co. (D. Md. Feb. 14, 2012), 279 FRD 337*.

Plain language of Securities Act statute of repose, stating that in no event shall action be brought more than three years after relevant offering or sale date, imposes absolute bar and therefore was not subject to tolling where timely

filed putative class action had been dismissed; moreover, class action rule could not be read to require such tolling, as such interpretation would run afoul of prohibition against rules altering substantive rights. *John Hancock Life Ins. Co. U.S.A. v. JP Morgan Chase & Co. (S.D.N.Y. Mar. 29, 2013), 938 F Supp 2d 440*.

16. Relationship to other federal rules

Concurrent decision of administrative law judge and judicial officer that class action treatment of milk processors' action against Secretary of Agriculture is unauthorized by Department of Agriculture's rules of practice for review of proceedings under Agricultural Adjustment Act is not preempted by class action requirements of Rule 23. *Oak Tree Farm Dairy, Inc. v. Block (E.D.N.Y. Aug. 19, 1982), 544 F Supp 1351*.

On motion for class certification, evidentiary rules are not strictly applied, and courts can consider evidence that may not be admissible at trial. *Rockey v. Courtesy Motors, Inc. (W.D. Mich. Mar. 13, 2001), 199 FRD 578*.

District court fully applied admissibility standards of Federal Rules of Evidence (FRE) to class certification motion under *Fed. R. Civ. P. 23* because *Fed. R. Evid. 101* required that FRE always apply and exceptions in *Fed. R. Evid. 1101* did not provide otherwise. *Lewis v. First Am. Title Ins. Co. (D. Idaho Feb. 24, 2010), 265 FRD 536*.

Fed. R. Bankr. P. 3001(b) does not prohibit filing of class claim by putative class representative. *In re Kaiser Group Int'l, Inc. (Bankr. D. Del. May 21, 2002), 278 BR 58*.

17. —Discovery rules

Court has authority under Rule 23 distinct from that under rules of discovery. *Klein v. Henry S. Miller, Co. (N.D. Tex. 1978), 82 FRD 6, 27 Fed R Serv 2d (Callaghan) 398, 1980-1 Trade Cas (CCH) P63087*.

In purported class action for violations of California Labor Code, conversion and theft of labor, and unfair business practices under *Cal. Bus. & Prof. Code § 17200* et seq., plaintiff was entitled under *Fed. R. Civ. P. 37* to compel production of documents requested under *Fed. R. Civ. P. 34*; request for documents pertaining to putative class members' hours, wages, business-related expenses, repayment of wages, termination wages, and meal breaks was not premature because documents were relevant under *Fed. R. Civ. P. 26* to showing of numerosity and commonality for purposes of *Fed. R. Civ. P. 23(a)*. *Hill v. Eddie Bauer (C.D. Cal. Mar. 28, 2007), 242 FRD 556*.

Motion to compel consumer to produce certain products for inspection and testing was granted because discovery in class discovery period would assist company in addressing whether claims or defenses of representative party, here consumer, was typical of claims or defenses of class. *Coles v. Nyko Techs., Inc. (C.D. Cal. Nov. 26, 2007), 247 FRD 589*.

Insured who brought proposed class action against insurance company regarding payment of personal injury protection (PIP) benefits was not entitled under *Fed. R. Civ. P. 26* to production of all of company's PIP files over eight-year period, as request was significantly broader than necessary to determine whether proposed class met *Fed. R. Civ. P. 23* certification requirements. *Hart v. Nationwide Mut. Fire Ins. Co. (D. Del. July 20, 2010), 270 FRD 166, 77 Fed R Serv 3d (Callaghan) 156*.

18. —Local court rules

Strict compliance with local rule which sets time limit on application for class certification is unnecessary where plaintiffs move for class certification as soon as practicable in conformity with Rule 23. *Slanina v. William Penn Parking Corp. (W.D. Pa. May 17, 1984), 106 FRD 419, 36 Empl Prac Dec (CCH) P35217*.

District Court properly denies motion for class certification where motion is not made within 60 days of filing complaint in accordance with requirement of local rule. *Davis v. Buffalo Psychiatric Center (W.D.N.Y. Feb. 20, 1985), 613 F Supp 462, 40 Fed R Serv 2d (Callaghan) 1324*.

Motion for class certification under FRCP 23(c)(1) is denied, where complaint was filed October 14, 1994, but motion was not made until January 31, 1995, because D.C. District Court Rule 203(b) provides strict 90-day limit for certification motion and plaintiffs never moved for enlargement of time. Batson v. Powell (D.D.C. Jan. 11, 1996), 912 F Supp 565, 68 Empl Prac Dec (CCH) P44042.

19. —FRCP 12

While Fed R. Civ. P. 12(f) motion to strike class allegations could be treated as motion to deny class certification under Fed R. Civ. P. 23 and under Rule 23(d)(1)(D) court could order pleadings to be amended to eliminate allegations about representation of absent persons, and while Rule 23(c)(1)(A) also provided that court was to rule on class certification at early practicable time, whether individualized inquiry was necessary to determine if class members would not have bought defendant manufacturer's product but for alleged concealment depended on, for one thing, amount of ozone emitted and warnings that should have been disclosed; thus, discovery was warranted before deciding whether to dismiss plaintiff consumers' class allegations with regard to their fraud and fraudulent concealment claims. Bearden v. Honeywell Int'l, Inc. (M.D. Tenn. June 14, 2010), 720 F Supp 2d 932.

Motion to strike plaintiff consumers' allegations regarding class certification under Fed. R. Civ. P. 23 was premature as motion for class certification had not been considered yet. Rosales v. FitFlop USA, LLC (S.D. Cal. Feb. 8, 2012), 882 F Supp 2d 1168.

20. —FRCP 17

Federal Rule of Civil Procedure 17 requiring prosecution of actions in name of real party in interest applies to every action, including class actions under Rule 23. Clark v. Chase Nat'l Bank (D.N.Y. Apr. 30, 1942), 45 F Supp 820.

Where defendants, manufacturers/sellers/distributors of generic drug or chemicals used therein, argued ratification process was inadequate because it did not meet notice requirements in class action context, such argument was misplaced, because plaintiff insurers' ratification process was governed by Fed. R. Civ. P. 17(a) and not Fed. R. Civ. P. 23, and, as stated by court when it addressed issue previously, application of remedial provision of Fed. R. Civ. P. 17(a) was appropriate as requirements of rule were otherwise met, thus, remittitur of amounts awarded plaintiff health insurers on their antitrust claims was not proper regarding self-funded plans that opted to stay in litigation. In re Lorazepam & Clorazepate Antitrust Litig. (D.D.C. Jan. 24, 2008), 531 F Supp 2d 82, 2008-1 Trade Cas (CCH) P76222.

21. —FRCP 24

In action by minority shareholder against corporation and its directors claiming common-law fraud and securities fraud, there is no reason to permit non-profit corporation founded by plaintiff to appear as amicus curiae on behalf of those persons who have accepted defendant corporation's challenged tender offer, notwithstanding fact that objective of corporation is to undertake actions on behalf of persons of small or moderate means in ways that will increasingly assure that they fairly share in enjoyment of fruits of their labor, where class action device under Rule 23 and intervention under Rule 24 are possible means by which corporation or its members or constituents could appear. Linker v. Custom-Bilt Machinery, Inc. (E.D. Pa. June 28, 1984), 594 F Supp 894.

Because FRCP 23 grants no absolute right for class members to intervene, putative intervenor must satisfy requirements of FRCP 24 before he is permitted to intervene. In re NASDAQ Market-Makers Antitrust Litig. (S.D.N.Y. Nov. 9, 1998), 187 FRD 465, 1998-2 Trade Cas (CCH) P72337.

22. —FRCP 41

Reading Rules 23 and 41 together makes it clear that, although ordinary lawsuit requires only notice to court to effect its voluntary dismissal, class action cannot be dismissed or settled without approval of court. Baker v. America's Mortgage Servicing (7th Cir. Ill. June 23, 1995), 58 F3d 321, 31 Fed R Serv 3d (Callaghan) 1208.

Combination of *FRCP 41(a)(1)* and *FRCP 23(e)* takes away class action plaintiff's right under *FRCP 41(a)(1)* to voluntarily dismiss without approval of court. *In re Nazi Era Cases Against German Defendants Litig. (D.N.J. Dec. 5, 2000), 198 FRD 429*, dismissed, *(D.N.J. Mar. 1, 2001), 129 F Supp 2d 370*.

Second Circuit has specifically held that it is within district court's discretion to reserve decision on class certification motion pending disposition of motion to dismiss; Second Circuit's ruling logically must also apply to district court's discretion to reserve decision on class certification motion pending disposition of summary judgment motions. *Encarnacion ex rel. George v. Astrue (S.D.N.Y. June 22, 2007), 491 F Supp 2d 453*, aff'd, *(2d Cir. N.Y. June 4, 2009), 568 F3d 72, Unemployment Ins Rep (CCH) P14405C*.

23. —*FRCP 56*

It is reasonable for court to consider *FRCP 56* motion for summary judgment before ruling on motion for class certification when early resolution of motion for summary judgment seems likely to protect both parties and court from needless and further litigation. *Thomas v. Moore USA, Inc. (S.D. Ohio Sept. 23, 1999), 194 FRD 595*.

Although *FRCP 23(c)(1)* provides that court must determine whether class should be maintained as soon as practicable, trial court may decide motion for summary judgment prior to ruling on class certification motion. *Ramirez v. DeCoster (D. Me. Mar. 31, 2000), 194 FRD 348*.

Whether evidence adequately supports plaintiffs' claims is question properly addressed in motion for summary judgment, not in motion for decertification of class. *Williams v. Brown (N.D. Ill. Apr. 15, 2003), 214 FRD 484*.

Second Circuit has specifically held that it is within district court's discretion to reserve decision on class certification motion pending disposition of motion to dismiss; Second Circuit's ruling logically must also apply to district court's discretion to reserve decision on class certification motion pending disposition of summary judgment motions. *Encarnacion ex rel. George v. Astrue (S.D.N.Y. June 22, 2007), 491 F Supp 2d 453*, aff'd, *(2d Cir. N.Y. June 4, 2009), 568 F3d 72, Unemployment Ins Rep (CCH) P14405C*.

Defendant's motion to strike what it characterized as inadmissible statistical data and data comparison was unsuccessful because motion under *Fed. R. Civ. P. 23*, unlike motion under *Fed. R. Civ. P. 56*, was not dispositive, and admissibility standards for evidence were applied accordingly. *Parkinson v. Hyundai Motor Am. (C.D. Cal. Dec. 12, 2008), 258 FRD 580*.

In action in which inmate challenged county's strip search policy as unconstitutional, district court found it appropriate to defer inmate's motion for class certification under *Fed. R. Civ. P. 23* until after resolution of parties' motions for summary judgment under *Fed. R. Civ. P. 56* because only one subclass remained represented and inmate's case radically changed through summary judgment process. *Miller v. Washington County (D. Or. July 1, 2009), 650 F Supp 2d 1113*.

24. —*FRCP 68*

Unlike class action under *Fed. R. Civ. P. 23* requiring opt out of class members, offer of judgment under *Fed. R. Civ. P. 68* could moot FLSA collective action under *29 USCS §§ 206* and *216(b)* where no other employees had opted in; however, determination had to be made as to whether employee's motion for certification filed 13 months after original complaint was timely to relate back to original filing date in order to cure mootness issues under U.S. Const. art. III, § 2. *Sandoz v. Cingular Wireless LLC (5th Cir. La. Dec. 23, 2008), 553 F3d 913, 72 Fed R Serv 3d (Callaghan) 586, 157 Lab Cas (CCH) P35521*.

Unaccepted *Fed. R. Civ. P. 68* offer of judgment—for full amount of named plaintiff's individual claim and made before named plaintiff files *Fed. R. Civ. P. 23* motion for class certification—does not moot class action; if named plaintiff can still file timely motion for class certification, named plaintiff may continue to represent class until district court decides class certification issue. *Pitts v. Terrible Herbst, Inc. (9th Cir. Nev. Aug. 9, 2011), 653 F3d 1081, 80 Fed R Serv 3d (Callaghan) 243*.

Motion for class certification made during ten-day pendency of FRCP 68 offer of judgment precludes plaintiff from taking private settlement. *Asch v. Teller, Levit & Silvertrust, P.C. (N.D. Ill. Oct. 25, 2000), 200 FRD 399*.

Certification of class operates as material change in nature of litigation that extinguishes pending FRCP 68 offer of judgment against single plaintiff. *Kremnitzer v. Cabrera & Rephen, P.C. (N.D. Ill. Aug. 9, 2001), 202 FRD 239, 50 Fed R Serv 3d (Callaghan) 1198*.

After affirmative decision on class certification is reached, and same is denied, court may enter judgment pursuant to FRCP 68 offer of judgment over objections of individual plaintiff, when relief tendered moots controversy by offering full measure of relief sought, and thereby dismiss pending matter. *Schaake v. Risk Mgmt. Alternatives, Inc. (S.D.N.Y. Sept. 14, 2001), 203 FRD 108*.

All class actions in federal courts are governed by Fed. R. Civ. P. 23, which is in turn subject to provisions of Fed. R. Civ. P. 68. *Greif v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP (E.D.N.Y. Apr. 22, 2003), 258 F Supp 2d 157*).

Fed. R. Civ. P. 23 class actions are distinguishable from *29 USCS § 216(b)* collective actions in context of Fed. R. Civ. P. 68 offers of judgment mooting action; employee has no right to represent any other individuals unless they opt in to action, and where there are no other individuals for employee to represent, only employee's individual claims are at stake. *Louisdor v. Am. Telecomms., Inc. (E.D.N.Y. Mar. 24, 2008), 540 F Supp 2d 368*.

Defendants' Fed. R. Civ. P. 68 offer of judgment to plaintiff in putative class action under Fair Debt Collection Practices Act, 15 USCS §§ 1692 et seq., was improper attempt to "pick off" plaintiff as class representative; offer required plaintiff to choose between individual recovery twice that allowed under 15 USCS § 1692k(a) and risk of non-recovery if plaintiff pursued class action. *Smith v. NCO Fin. Sys. (E.D. Pa. May 22, 2009), 257 FRD 429*.

Holstein v. City of Chicago, 29 F.3d 1145 (7th Cir. 1994), includes no holding or even dicta requiring district courts to dismiss case as moot when plaintiff files class certification motion within Fed. R. Civ. P. 68 deadline; because there is no principled basis for distinguishing between motion filed just before offer of judgment and one filed before deadline for accepting expires, live controversy remains so long as court grants plaintiff's motion for class certification; therefore, in action under 47 USCS § 227, advertiser was unable to avoid potential liability on classwide claim by offering representative maximum amount that it could have obtained on its individual claim; lawsuit was not moot if representative showed it was entitled to class certification. *Wilder Chiropractic, Inc. v. Pizza Hut of S. Wis., Inc. (W.D. Wis. Dec. 6, 2010), 754 F Supp 2d 1009, 78 Fed R Serv 3d (Callaghan) 96*.

Bank was not entitled to Fed. R. Civ. P. 12(b)(1) dismissal of consumer's class complaint alleging violation of automated teller machine notice requirement under 15 USCS § 1693b(d)(3); bank's Fed. R. Civ. P. 68 offer of judgment did not moot claims as consumer met prerequisites for application of Fifth Circuit's "relation back" doctrine because she timely filed and diligently pursued Fed. R. Civ. P. 23 class certification motion and complaint presented live controversy when it was filed. *Mabary v. Hometown Bank, N.A. (S.D. Tex. June 27, 2011), 276 FRD 196*.

Court struck defendant's Fed. R. Civ. P. 68 offer of judgment in plaintiff's class action arising under Electronic Funds Transfer Act for violations of 15 USCS § 1693d(c)(3) and 12 CFR § 205.16(c) because pre-certification offer was restricted to plaintiff's single claim for statutory damages under 15 USCS § 1693m(a)(2)(A) and did not address class-action claim, and thus, offer of judgment was ineffective and had to be stricken to prevent it from undermining use of class action device under Fed. R. Civ. P. 23. *Johnson v. U.S. Bank Nat'l Ass'n (D. Minn. June 29, 2011), 276 FRD 330*).

25. —Other federal rules of civil procedure

District Court does not err in failing to consider request for class certification after it has ruled that shareholder lacks standing to maintain derivative action pursuant to Rule 23.1, where alleged breaches of fiduciary duty by

corporation's officers and directors do not give rise to direct cause of action. *Lewis v. Chiles (9th Cir. Or. Nov. 4, 1983), 719 F2d 1044, 37 Fed R Serv 2d (Callaghan) 1265*.

Civil class-action claim was stated under *Federal Rules of Civil Procedure, Rule 23*, even though complaint did not indisputably invoke Rule 23, where caption of amended complaint and subheading referred to class action and recited that both plaintiffs were typical of much larger class of women who have suffered at hands of individual defendants, as *Federal Rule of Civil Procedure 8* requires that complaints be construed liberally. *Roe v. Abortion Abolition Soc. (5th Cir. Tex. Mar. 9, 1987), 811 F2d 931*, cert. denied, *(U.S. Oct. 5, 1987), 484 US 848, 108 S Ct 145, 98 L Ed 2d 101*.

Fed. R. Civ. P. 42(a) leaves to district judge's discretion, and without any of *Fed. R. Civ. P. 23*'s procedures and safeguards, decision whether to consolidate multiple suits. *Blue Cross Blue Shield of Mass. v. BCS Ins. Co. (7th Cir. Ill. Dec. 16, 2011), 671 F3d 635*.

Although Rule 52 does not require it, when district court is presented with conflicting positions as to how to exercise its discretion in determining whether to certify class action, sound practice strongly suggests giving litigants and reviewing court at least minimum explanation of reasons for its decisions. *Consolidated Edison Co. of N.Y. v. Richardson (Fed. Cir.), 233 F3d 1376*, sub. op., *(Fed. Cir. Nov. 29, 2000), 2000 US App LEXIS 35446*.

Rule 54(b) is concerned with finality and appealability of judgments, not with their correctness, and does not supersede Rule 23. *Philadelphia Electric Co. v. Anaconda American Brass Co. (E.D. Pa. 1967), 42 FRD 324, 11 Fed R Serv 2d (Callaghan) 621, 1967 Trade Cas (CCH) P72175*.

Rule 60(b) and Rule 23 would have to be read and considered together where class members sought relief from final judgment and leave to file out-of-time request for exclusion from classes; too liberal application of Rule 60(b) in class actions would undermine finality of judgments entered therein and would discourage settlement of such actions. Re Four Seasons Secur. *In re Four Seasons Sec. Laws Litig. (W.D. Okla. 1974), 63 FRD 422, 19 Fed R Serv 2d (Callaghan) 395*.

Very existence of Rule 23 negatives idea that absent members of Rule 23(b)(2) class are indispensable under Rule 19(b), and in probably most Rule 23(b)(2) actions, no absent class member is even "necessary" under Rule 19(a). *Watson v. Branch County Bank (W.D. Mich. Aug. 12, 1974), 380 F Supp 945*, rev'd, *(6th Cir. Mich. 1975), 516 F2d 902*.

In view of provision of Rule 65(d) that injunctions shall be binding on those persons in active concert with party who receive notice, it is appropriate to certify defendants' class of all such persons for narrow purpose of effectuating preliminary injunction, notwithstanding named defendant's assertion that he has neither inclination nor resources to represent class members. *Clean-Up '84 v. Heinrich (M.D. Fla. Mar. 5, 1984), 582 F Supp 125*.

Essential purpose of Rule 23.2 was to abrogate common law rule whereby, in order for unincorporated association to sue or be sued, all of its members had to be named parties to action; in this sense, Rule 23.2 supplements Rule 17 by allowing unincorporated associations same legal status as person or corporation; Rule 23 therefore remains unsullied by Rule 23.2, and labor union or those representing union's membership must comply with its provisions when bringing class action suit. *Stolz v. United Brotherhood of Carpenters & Joiners, Local Union No. 971 (D. Nev. Oct. 15, 1985), 620 F Supp 396*.

Renewed motion for class certification is denied, even though court granted leave to amend original complaint of 2 limited partners to add third limited partner after statute of limitations had run, in action arising out of purchase of corporate general partner in business of acquiring and operating cable television systems, because *FRCP 15(c)* relation-back doctrine will not be extended so far as to allow added plaintiff, as new potential class representative asserting federal securities law violations, to renew *FRCP 23* motion for class certification previously denied due to original plaintiffs' claims not being typical of claims of proposed class. *Fleck v. Cablevision VII, Inc. (D.D.C. Nov. 24, 1992), 807 F Supp 824, 24 Fed R Serv 3d (Callaghan) 1464*.

FRCP 13 is not applicable in class actions. Fielder v. Credit Acceptance Corp. (W.D. Mo. Oct. 9, 1997), 175 FRD 313.

Individual who was denied intervention in class action does not have standing to bring FRCP 59(e) motion. In re NASDAQ Market-Makers Antitrust Litig. (S.D.N.Y. Feb. 10, 1999), 184 FRD 506, 1999-1 Trade Cas (CCH) P72464.

With respect to class action settlement, court-ordered deadline for filing proofs of claim may be subject to enlargement under FRCP 6(b)(2) if movant can demonstrate that delay was caused by excusable neglect. In re Cendant Corp., Prides Litig. (D.N.J. Oct. 20, 1999), 189 FRD 321, 45 Fed R Serv 3d (Callaghan) 487.

26. Relationship to federal laws

Rule 23 does not constitute exception to 28 USCS § 2283, which provides that court of United States may not grant injunction to stay proceedings in state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments, at least for actions brought under Rule 23(b)(3). In re Glenn W. Turner Enterprises Litigation (3d Cir. Pa. Aug. 4, 1975), 521 F2d 775, 21 Fed R Serv 2d (Callaghan) 374.

Absent provision in parties' arbitration agreement providing for class treatment of disputes, district court has no authority to certify class arbitration; section 4 of Federal Arbitration Act requires that court enforce arbitration agreement according to its terms, and FRCP 81(a)(3), which by its language only applies to judicial proceedings, does not provide district court with authority to reform parties' agreement and order arbitration panel to hear claims on class basis pursuant to Rule 23. Champ v. Siegel Trading Co. (7th Cir. Ill. May 18, 1995), 55 F3d 269, 31 Fed R Serv 3d (Callaghan) 1187, RICO Bus Disp Guide P8808, abrogated in part as stated in , *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp. (2d Cir. N.Y. Nov. 4, 2008), 548 F3d 85, 2008-2 Trade Cas (CCH) P76355* (criticized in Discover Bank v Superior Court (2005) 36 Cal 4th 148, 30 Cal Rptr 3d 76, 113 P3d 1100, 2005 CDOS 5684, 2005 Daily Journal DAR 7782) and (Abrogated in part as stated in *Stolt-Nielsen SA v AnimalFeeds Int'l Corp. (2008, CA2 NY) 548 F3d 85, 2008-2 CCH Trade Cases P 76355, 2008 AMC 2722*) and (Abrogated in part as stated in Price v NCR Corp. (2012, ND Ill) 908 F Supp 2d 935).

Congress did not intend Prison Litigation Reform Act, 42 USCS § 1997e, to alter class certification requirements under Fed. R. Civ. P. 23. Shook v. El Paso County (10th Cir. Colo. Oct. 18, 2004), 386 F3d 963, cert. denied, *(U.S. Apr. 18, 2005), 544 US 978, 125 S Ct 1869, 161 L Ed 2d 729*.

Under 28 USCS § 2072(b), fact that children, who alleged that city Department of Education and state Education Department violated their right under 20 USCS § 1412(a)(1)(A) to free appropriate public education by failing to implement Individualized Education Programs, chose to assert their claim in class action pursuant to Fed. R. Civ. P. 23 did not alter fact that access to free appropriate public education was right that was guaranteed to individual disabled children; Federal Rules of Civil Procedure could not abridge children's substantive rights. D.D. v. N.Y. City Bd. of Educ. (2d Cir. N.Y. Oct. 12, 2006), 465 F3d 503, amended, (2d Cir. Feb. 8, 2007), 480 F3d 138.

Where truck drivers claimed that investigation and security services company violated Fair Credit Reporting Act, 15 USCS §§ 1681-1681x, in its procurement and dissemination of their employment histories, denial of certification of class action pursuant to Fed. R. Civ. P. 23 was not abuse of discretion because determining accuracy of each driver's employment history report, essential element of 15 USCS § 1681e(b) claim, required particularized inquiry. Owner-Operator Indep. Drivers Ass'n v. USIS Commer. Serv. (10th Cir. Colo. Aug. 19, 2008), 537 F3d 1184.

Bar orders issued pursuant to 15 USCS § 78u-4, or Cal. Code Civ. Proc. § 877.6 could only bar claims for contribution and indemnity or disguised claims for such relief. Independent claims—those where injury was not non-settling defendant's liability to plaintiffs—could not be barred under either federal law or § 877.6; as such, bar orders did not pass muster under Private Securities Litigation Reform Act of 1995 or § 877.6, because they were impermissibly broad. In re Heritage Bond Litig. v. U.S. Trust Corp. (9th Cir. Cal. Oct. 1, 2008), 546 F3d 667, Fed Sec L Rep (CCH) P94862.

Application of *28 USCS § 1332(d)(4)(B)*, home state exception to federal jurisdiction under Class Action Fairness Act of 2005 (CAFA), *Pub. L. No. 109-2*, *119 Stat. 4*, did not, as argued by defendant retail chain, depend on broader assessment of claims brought by others who did not fall within complaint's class definition or of claims available to class against other possible defendants; thus, plaintiff class allegations which included only citizens of one state were not improperly limited; most natural reading of home state exception was that Congress meant § 1332(d)(4)(B) to be read in conjunction with federal class action rule, *Fed. R. Civ. P. 23*, or similar state statutes and rules of judicial procedure, and under Rule 23(c)(5), class could be divided into subclasses that were each treated as class under rule; thus, home state exception's use of plural "classes" did not indicate that Congress intended inquiry into what defendant termed broader "Article III case or controversy" because single complaint could contain multiple classes. *Grimsdale v. Kash N' Karry Food Stores, Inc. (In re Hannaford Bros. Customer Data Sec. Breach Litig.) (1st Cir. Me. May 1, 2009), 564 F3d 75*.

Where car dealership alleged that website operator was liable for defamation based on consumer posts on website, website operator was entitled to immunity under Communications Decency Act of 1996 because it was not information content provider since, inter alia, (1) allegations did not show that website operator developed content of posts, and (2) website operator's development of class-action lawsuits was not unlawful. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc. (4th Cir. Va. Dec. 29, 2009), 591 F3d 250*.

Where investors brought both class and individual claims alleging churning, unauthorized trading, and misrepresentation by brokerage and its employees, it was error to dismiss entire case for failure to satisfy *Fed. R. Civ. P. 23(b)(3)* without either staying individual claims pending arbitration or addressing their sufficiency under *15 USCS § 78u-4(b)*; however, class claims failed because they relied on individualized facts. *McCrary v. Stifel, Nicolaus & Co. (8th Cir. Mo. Aug. 6, 2012), 687 F3d 1052*.

Where Internet search company appealed district court's class certification of authors in copyright infringement case, holding issue of class certification in abeyance until company's fair use defense had been resolved would not prejudice interests of either party during projected proceedings before district court following remand. *Authors Guild, Inc. v. Google Inc. (2d Cir. July 1, 2013), 721 F3d 132*.

Injunction, where necessary to protect court's earlier orders, including preliminary approval of settlement of class action, is authorized under All Writs Act (*28 USCS § 1651(a)*), and such power extends to non-parties. *In re Synthroid Mktg. Litig. (N.D. Ill. Feb. 14, 2000), 197 FRD 607, 48 Fed R Serv 3d (Callaghan) 740*.

Although University of Pittsburgh Medical Center (UPMC) based its argument that class certification under *Fed. R. Civ. P. 23* was inappropriate solely on premise that Third Circuit's decision in *Hohider v. United Parcel Service, Inc., 574 F.3d 169* foreclosed class certification in cases brought by aggrieved employees or prospective employees under Americans with Disabilities Act (ADA), *42 USCS §§ 12101* et seq., and Rehabilitation Act of 1973, *29 USCS §§ 701* et seq., court found that UPMC's argument that Hohider categorically precluded class certification in all ADA and Rehabilitation Act cases, without reference to particular factual situations or class definitions at issue, simply painted with too broad of brush; therefore, court held that cases brought under ADA and Rehabilitation Act were not categorically beyond purview of *Fed. R. Civ. P. 23*, and because UPMC's argument was premised on overbroad reading of Hohider, without reference to factual circumstances of case, partial summary judgment motion was denied. *Chedwick v Univ. Pittsburgh Med. Ctr. (2009, WD Pa) 263 FRD 269, 22 AD Cas 967, 14* CCH Accommodating Disabilities Decisions P 14-37.

Consumer's motion for class certification was denied because neither language of Song-Beverly Credit Card Act nor its legislative history suggested that Act included online transactions; as such, consumer's claim under *Cal. Civ. Code § 1747.08* based on alleged improper acquisition of personal identifying information in consummation of online sales could not be sustained. *Saulic v. Symantec Corp. (C.D. Cal. Jan. 5, 2009), 596 F Supp 2d 1323*.

Showing required for conditional class certification of "opt in" class under Fair Labor Standards Act was less than showing required for class certification under *Fed. R. Civ. P. 23*, and court was required only to consider whether or

not potential opt-in plaintiffs were similarly situated to named plaintiffs. *Zivali v. AT&T Mobility LLC (S.D.N.Y. Aug. 21, 2009), 646 F Supp 2d 658*.

Class of owners of vehicles with allegedly design-flawed seatbacks was improper, as resolution of class claim that seatbacks should be more rigid would require jury in effect to overrule National Highway Transportation Safety Administration decision not to require stronger seatbacks, which had preemptive effect under *49 USCS § 30103(b)(1)*. *Lloyd v. GMC (D. Md. June 16, 2011), 275 FRD 224*.

Neither Financial Industry Reform and Recovery Act (FIRREA) nor Federal Rule of Civil Procedure pertaining to class actions authorized claims against FDIC to be filed on class-wide basis; further, Rules Enabling Act prohibited Federal Rules from expanding substantive rights. *In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig. (W.D. Pa. June 27, 2013), 954 F Supp 2d 360*.

27. —*29 USCS § 216*

In *29 USCS § 216(b)* opt-in collective action, looking to *Fed. R. Civ. P. 23* authorities for guidance did not show lack of comprehension of difference between Rule 23 and § 216(b) actions or run afoul of Cameron-Grant decision and reasoning and conclusion would be unchanged even with only § 216(b) authorities; thus, defendant's *Fed. R. Civ. P. 59(e)* and *60(b)* motion for reconsideration failed, as court was still convinced that defendant obtained stricken declarations upon which defendant sought reconsideration improperly and in bad faith. *Longcrier v. HL-A Co., Inc. (S.D. Ala. Dec. 9, 2008), 595 F Supp 2d 1218*.

Unlike class action brought pursuant to *Fed. R. Civ. P. 23*, collective action brought under *29 USCS § 216* may be brought only on behalf of those employees who affirmatively "opt in" by giving consent in writing to become party to action. *Karic v. Major Auto. Cos. (E.D.N.Y. July 20, 2011), 799 F Supp 2d 219*.

28. —*42 USCS § 405*

Where district court has jurisdiction over claims of members of class in accordance with requirements set out in *42 USCS § 405(g)*, it also has discretion under Rule 23 to certify class action for litigation of those claims. *Wright v. Califano (7th Cir. Ill. Aug. 14, 1979), 603 F2d 666*, cert. denied, *(U.S. June 9, 1980), 447 US 911, 100 S Ct 2999, 64 L Ed 2d 862*.

When court has jurisdiction over claims of member of class in accordance with requirements set out in *42 USCS § 405(g)* court also has discretion under Rule 23 to certify class action for litigation of those claims. *Holman v. Califano (M.D. Pa. 1979), 83 FRD 488*.

Since *42 USCS § 405(g)* does not forbid class relief, such relief is clearly appropriate to insure uniformity of relief in action by disability claimant challenging content of reconsideration notices sent to unsuccessful disability claimants. *Adams v. Califano (D. Md. Aug. 17, 1979), 474 F Supp 974*, aff'd, *(4th Cir. 1979), 609 F2d 505*, aff'd, *(4th Cir. Md. Feb. 27, 1981), 643 F2d 995*.

42 USCS § 405 does not bar class action for claims that would otherwise be maintainable as individual actions especially in light of fact that remedy class seeks would merely give plaintiff ability to obtain decision as to appeal from denial, reduction or termination of benefits more rapidly. *Cockrum v. Califano (D.D.C. May 31, 1979), 475 F Supp 1222*.

29. —Age Discrimination in Employment Act

Since provisions of Rule 23 are inapplicable and irrelevant to age discrimination cases, it would be inappropriate for court to order action brought under *29 USCS §§ 621* et seq. to be maintained as class action; to extent that plaintiffs secure filed written consents of eligible plaintiffs pursuant to *29 USCS § 216* class or quasi-class action may come into being de facto and assistance of court would be unnecessary. *Montalto v. Morgan Guaranty Trust Co. (S.D.N.Y. July 17, 1979), 83 FRD 150, 21 Empl Prac Dec (CCH) P30384*.

Class certification is appropriate in age discrimination suit against Federal Government since all-inclusive language of *29 USCS § 633a(f)* stating that all federal personnel actions "shall not be subject to, or affected by, any provision" of Age Discrimination in Employment Act clarifies that opt-in requirement of *29 USCS § 216(b)*, providing that no employee may become party plaintiff in suit against government unless he gives his consent in writing, does not apply to age discrimination class actions. *Moysey v. Andrus (D.D.C. Dec. 18, 1979), 481 F Supp 850, 21 Empl Prac Dec (CCH) P30488*.

Class action procedures of Rule 23 are not applicable to class actions brought to enforce rights under Age Discrimination in Employment Act (*29 USCS § 621*–34). *Allen v. Marshall Field & Co. (N.D. Ill. Jan. 27, 1982), 93 FRD 438*.

30. —Class Action Fairness Act

Order granting appellees' motions to remand professional association's action to state court (reasoning that complaint did not specifically define proposed class) was vacated and remanded because district court determined prematurely that it lacked Class Action Fairness Act jurisdiction; professional association's complaint plausibly alleged claims for class-wide relief, as it consistently alleged harm to dentists as professional group, it described association as representing "dentistry class" in Puerto Rico, it stated that its allegations were similar to those made in class action pending in other districts, and it sought class-wide relief, and whether or not association would succeed in satisfying requirements of *Fed. R. Civ. P. 23* was question for district court at class certification stage. *College of Dental Surgs. of P.R. v. Conn. Gen. Life Ins. Co. (1st Cir. P.R. Oct. 22, 2009), 585 F3d 33*.

Because parens patriae actions filed by state Attorneys General did not constitute class actions within meaning of Class Action Fairness Act of 2005, *Pub. L. No. 109-2*, *119 Stat. 4*, district court's remand order was affirmed; none of state statutes at issue (*Wash. Rev. Code § 19.86.080(1)* and *Cal. Bus. & Prof. Code §§ 16760(a)(1)*, 17204) contained typical class action requirements of showing numerosity, commonality, typicality, or adequacy of representation. *Wash. State v. Chimei Innolux Corp. (9th Cir. Cal. Oct. 3, 2011), 659 F3d 842, 2011-2 Trade Cas (CCH) P77615*.

Because plaintiffs' case was brought under Pa. R. Civ. P. 2152, which bore no resemblance to *Fed. R. Civ. P. 23* in that it allowed for suits by entities, not conglomerate of individuals, case did not meet statutory definition of "class action" for purposes of Class Action Fairness Act of 2005, *Pub. L. No. 109-2*, *119 Stat. 4*. *Erie Ins. Exch. v. Erie Indem. Co. (3d Cir. Pa. June 28, 2013), 722 F3d 154*.

Actions filed by Hawai'i Attorney General against financial institutions for alleged deceptive practices in connection with credit card debt protection products could not be removed under Class Action Fairness Act of 2005 (CAFA) because complaints unambiguously disclaimed class status; even if class action disclaimer might fail under state law, actions were not "class actions" for CAFA purposes because they were not filed under this rule or state law equivalent. *Hawaii ex rel. Louie v. HSBC Bank Nev., N.A. (9th Cir. Haw. Aug. 1, 2014), 761 F3d 1027*.

District court retained Class Action Fairness Act in 2005 jurisdiction over plaintiffs' case after class certification was denied; post-removal denial of certification was not meaningfully different from post-removal change of citizenship, and neither circumstance divested court of jurisdiction that was present at time of removal. *Samuel v. Universal Health Servs. (E.D. La. Aug. 2, 2011), 805 F Supp 2d 284*.

31. —Fair Labor Standards Act

Absent any claimant's opting in, Fair Labor Standards Act of 1938 (FLSA), *29 USCS § 216(b)*, suit became moot when respondent employee's individual claim against petitioner employer became moot, as she lacked any personal interest in representing others in action; while employee relied almost entirely upon cases that arose in context of *Fed. R. Civ. P. 23* class actions, those cases were inapposite, both because Rule 23 actions were fundamentally different from FLSA collective actions and because those cases were, by their own terms, inapplicable to facts of employee's suit. *Genesis HealthCare Corp. v. Symczyk (U.S. Apr. 16, 2013), 569 US 66, 133 S Ct 1523, 185 L Ed 2d 636*.

Because of fundamental, irreconcilable difference between class action that is described by Fed. R. Civ. P. 23 and that is provided for by *29 USCS § 216(b)* of Fair Labor Standards Act of 1938 (FLSA), 29 USCS §§ 201 et seq., it is crystal clear that *29 USCS § 216(b)* precludes pure Fed. R. Civ. P. 23 class actions in FLSA suits; for this reason, appellate courts have uniformly recognized that appropriate procedural vehicle for certifying class on FLSA claims is opt-in mechanism of *29 USCS § 216(b)*, not Fed. R. Civ. P. 23. Brown v. Money Tree Mortg., Inc. (D. Kan. Aug. 23, 2004), 222 FRD 676, 59 Fed R Serv 3d (Callaghan) 527.

Application to circulate notice of pendency to other persons similarly situated pursuant to *29 USCS § 216(b)* is not same as motion to maintain class action under Fed. R. Civ. P. 23, and determining that type of motion does not exceed magistrate judge's authority under *28 USCS § 636*. Patton v. Thomson Corp. (E.D.N.Y. Apr. 5, 2005), 364 F Supp 2d 263).

Employees' motion for certification and limited discovery in action under *29 USCS § 216(b)* was granted without consideration to prerequisites under Fed. R. Civ. P. 23, which could be addressed in later motion for "decertification" after discovery was complete and potentially interested employees had affirmatively "opted in" as was required under § 216(b). Clarke v. Convergys Customer Mgmt. Group, Inc. (S.D. Tex. May 13, 2005), 370 F Supp 2d 601.

Certification of putative class under *29 USCS § 216(b)* required potential class members to affirmatively "opt-in" to class, unlike "opt-out" procedure of Fed. R. Civ. P. 23, and further differed from Rule 23 in that certification of class would require two-step process; under § 216(b) interested parties could obtain conditional certification at early stage of proceedings, and employers could move for de-certification of class at close of discovery. Davis v. Novastar Mortg., Inc. (W.D. Mo. Nov. 8, 2005), 408 F Supp 2d 811.

Plaintiff's choice of forum in case brought under *29 USCS § 216(b)* is entitled to more deference than choice of forum in Fed. R. Civ. P. 23 national class action cases. Johnson v. VCG Holding Corp. (D. Me. Mar. 1, 2011), 767 F Supp 2d 208.

Unpublished decision: Employees were properly denied leave to amend to assert individual claims in now settled class action suit under N.Y. Lab. Law (NYLL) §§ 650 et seq. and collective action under 29 USCS §§ 201 et seq.; because settlement barred employees' effective request to bring individual claims in settled action from which employees sought to be entirely excluded, and resolution of NYLL claims through Fed. R. Civ. P. 23 did not bar representative plaintiffs' ability to also settle representative action under *29 USCS § 216(b)*. Morris v. Affinity Health Plan, Inc. (2d Cir. N.Y. Mar. 10, 2014), 558 Fed Appx 51.

Unpublished decision: Requirement that potential plaintiffs "opt-in" to collective action is primary feature that distinguishes FLSA collective actions from class actions that are subject to this rule, which requires putative class members to "opt out" if they do not wish to be bound by outcome of class action. Billingsley v. Citi Trends, Inc. (11th Cir. Ala. Mar. 25, 2014), 560 Fed Appx 914.

32. — —Simultaneous pursuit of both claims

Because there was no categorical rule against certifying Fed. R. Civ. P. 23(b)(3) state-law class action in proceeding that also included *29 USCS § 216(b)* Fair Labor Standards Act of 1938 collective action, it was error to deny class certification plaintiff employees' state-law claims against defendant employer under Illinois Minimum Wage Law, 820 ILCS 105/1 et seq., and Illinois Wage Payment and Collection Act, 820 ILCS 115/1 et seq. Ervin v. OS Rest. Servs. (7th Cir. Ill. Jan. 18, 2011), 632 F3d 971, 78 Fed R Serv 3d (Callaghan) 720.

District court erred in dismissing state law labor law violation claims based on perceived conflict between Fed. R. Civ. P. 23 and *29 USCS § 216(b)* because fact that Rule 23 class actions used opt-out mechanism while Fair Labor Standards Act collective actions used opt-in mechanism did not create conflict warranting dismissal of state law claims. Busk v. Integrity Staffing Solutions, Inc. (9th Cir. Nev. Apr. 12, 2013), 713 F3d 525, 163 Lab Cas (CCH) P36113, rev'd, (U.S. Dec. 9, 2014), — US —, 135 S Ct 513, 190 L Ed 2d 410.

Pursuant to exercise of supplemental jurisdiction under 28 USCS § 1367, automobile damage adjusters with overtime opt-out claims under N.Y. Lab. Law § 663 were permitted to proceed as Fed. R. Civ. P. 23(b)(3) class actions along with collective actions under FLSA opt-in claims under 29 USCS §§ 207 and *216(b)* because adjusters met requirements of Rule 23, N.Y. C.P.L.R. § 901, and N.Y. Lab. Law § 663 and claims arose from same facts as federal claims. *Lindsay v. Gov't Emples. Ins. Co. (D.D.C. July 3, 2008), 251 FRD 51*.

Plaintiffs could maintain class action to pursue claims of certain technicians who allegedly did not receive overtime pay despite working more than forty hours week because requirements were met for conditional certification of collective action pursuant to *29 USCS § 216(b)* and for class certification under Fed. R. Civ. P. 23(a) and (b)(3) for violations of Ohio Rev. Code Ann. § 4111.03. Laichev v. JBM, Inc. (S.D. Ohio June 19, 2008), 269 FRD 633.

Employees could pursue, in same suit, collective action under *29 USCS § 216(b)* of Fair Labor Standards Act (FLSA) and class action under Fed. R. Civ. P. 23 seeking wage payments under Iowa Code § 91A.3 of Iowa Wage Payment Collection Law; differences in opt-in procedure under FLSA and opt-out procedure under Rule 23 did not require dismissal or limitation of class action claim, especially because class action claim had independent jurisdictional basis under Class Action Fairness Act of 2005, *28 USCS § 1332(d)*. Bouaphakeo v. Tyson Foods, Inc. (N.D. Iowa July 3, 2008), 564 F Supp 2d 870).

Employer was not entitled to strike class action claims where employees' simultaneous pursuit of opt-in collective claims under *29 USCS § 216(b)* and state law opt-out Fed. R. Civ. P. 23 claims was not spurious and inherently incompatible; further, simultaneous pursuit of claims did not abridge substantive rights in contravention of 28 USCS § 2072. Misra v. Decision One Mortg. Co., LLC (C.D. Cal. June 23, 2008), 673 F Supp 2d 987.

Employee who asserted claims under 29 USCS §§ 206, 207 was granted conditional certification under *29 USCS § 216(b)*, but to extent that employee's claims under Pennsylvania Minimum Wage Act of 1968, as amended, 43 P.S. § 333.101 et seq., and Pennsylvania Wage Payment and Collection Act, 43 P.S. § 260.1 et seq., overlapped with FLSA claims, they could not proceed because permitting FLSA collective action to be litigated with Fed. R. Civ. P. 23 state-law class action would eviscerate § 216(b)'s opt-in requirement. Pereira v. Foot Locker, Inc. (E.D. Pa. Sept. 11, 2009), 261 FRD 60.

Where employees asserted Fair Labor Standards Act (FLSA) collective action claims, employees' state law class action claims were dismissed because court lacked original jurisdiction over state law class claims under Class Action Fairness Act, and court declined to exercise supplemental jurisdiction over state law class action claims since state law claims would substantially predominate over FLSA claims. In re Am. Family Mut. Ins. Co. Overtime Pay Litig. (D. Colo. July 28, 2009), 638 F Supp 2d 1290.

Where former sales representative was granted certification of collective action under *29 USCS § 216(b)* on her claim based on untimely overtime adjustment payments, district court found that Fed. R. Civ. P. 23 certification of sales representative's state law claims under Wage Deduction Statute, Ind. Code § 22-2-6-1 et seq., would be improper due to incompatibility between procedures of Rule 23 and collective actions. Powers v. Centennial Communs. Corp. (N.D. Ind. Dec. 14, 2009), 679 F Supp 2d 918, amended, (N.D. Ind. Feb. 26, 2010), 2010 US Dist LEXIS 18397.

Plaintiffs' motion for class certification for their state wage law claims was improper, as allowing Fed. R. Civ. P. 23 opt-out action to proceed in same lawsuit as opt-in Fair Labor Standards Act of 1938 (FLSA) action would allow plaintiffs to evade requirements of FLSA by permitting litigation through representative action and bringing unnamed plaintiffs into suit. Bell v. Citizens Fin. Group, Inc. (W.D. Pa. June 6, 2011), 2011 US Dist LEXIS 64629.

29 USCS § 216(b) was specifically designed to avoid litigation through representative action, and if court allowed employee to proceed in separate action that was in contravention of important policies underlying federal statute, court would still eviscerate purpose of § 216(b)'s opt-in requirement, just as much as in dual-filed action. Forcing plaintiff to perform one procedural step differently, by filing separate action rather than asserting same, related claim in another action, had no practical remedial effect and still undermined purposes of Fair Labor Standards Act (FLSA), 29 USCS §§ 201 et seq.; therefore, extension of inherent incompatibility doctrine to separately filed FLSA

and state wage and hour Fed. R. Civ. P. 23 claims was warranted, and that extension required dismissal of pending action since cause of action was not actionable in court because of its inherent incompatibility with federal FLSA scheme. Fisher v. Rite Aid Corp. (M.D. Pa. Feb. 16, 2011), 764 F Supp 2d 700, 78 Fed R Serv 3d (Callaghan) 1079, aff'd in part and rev'd in part, (3d Cir. Pa. Mar. 27, 2012), 675 F3d 249, 162 Lab Cas (CCH) P36007.

Contrary to employers argument, collective action under *29 USCS § 216(b)* could be accompanied by Fed. R. Civ. P. 23 class action asserting state law based claims; moreover, even if right to participate in FLSA collective action were substantive, employees had not established that right would be modified or abridged in any way by permitting state law opt-out class to proceed simultaneously; accordingly, 28 USCS § 2072 presented no barrier to proceeding with both claims in action. Butler v. DirectSat USA, LLC (D. Md. July 6, 2011), 800 F Supp 2d 662.

There is no conflict in allowing *29 USCS § 216* and Fed. R. Civ. P. 23 classes to proceed together. Calderon v. GEICO Gen. Ins. Co. (D. Md. Feb. 14, 2012), 279 FRD 337.

33. — —Standard or requirements for certification

To become party plaintiff under class action section of Fair Labor Standards Act (*29 USCS § 216(b)*), individual need only consent in writing and have that consent filed in court; there is no further need to comply with any requirements of class action which might be necessary under Rule 23. Riojas v. Seal Produce, Inc. (S.D. Tex. 1979), 82 FRD 613, 28 Fed R Serv 2d (Callaghan) 101, 86 Lab Cas (CCH) P33815.

Standard for class certification under Fed. R. Civ. P. 23 is not relevant to Fair Labor Standards Act (FLSA), 29 USCS §§ 201 et seq., collective action; unlike Fed. R. Civ. P. 23, *29 USCS § 216(b)* requires no showing of numerosity, typicality, commonality, or representativeness; as result, "similarly situated" standard for certifying *29 USCS § 216(b)* collective action is considerably more liberal than class certification under Fed. R. Civ. P. 23. Lynch v. United Servs. Auto. Ass'n (S.D.N.Y. Apr. 25, 2007), 491 F Supp 2d 357).

Although Eighth Circuit appeals court has not yet declared which approach it favors, in deciding whether plaintiffs are similarly situated for purposes of allowing conditional certification of class under *29 USCS § 216(b)*, district courts in Eighth Circuit use two-stage analysis articulated by Fifth Circuit appeals court, rather than approach used for class certification under Fed. R. Civ. P. 23; Western District of Arkansas, El Dorado Division, is convinced that more prudent approach is to use two-stage certification analysis that is used by majority of courts, including majority of Eighth Circuit district courts. Resendiz-Ramirez v. P & H Forestry, LLC (W.D. Ark. Sept. 27, 2007), 515 F Supp 2d 937.

Requirements for class action under Fed. R. Civ. P. 23 did not apply to certification of collective action under FLSA as FLSA similarly situated standard was considerably more liberal than Rule 23 class certification standard. Pippins v. KPMG LLP (S.D.N.Y. Jan. 3, 2012), 2012 US Dist LEXIS 949.

Collective action under *29 USCS § 216* was distinguishable in several ways from more common class action under Fed. R. Civ. P. 23 because it required class members to opt into case, rather than opt out; in addition, party seeking conditional certification of collective action did not need to demonstrate Rule 23 requirements of numerosity, commonality, typicality, and adequacy of representation. Alvarez v. IBM Rests., Inc. (E.D.N.Y. Mar. 15, 2012), 839 F Supp 2d 580.

Unpublished decision: Court denied motion to dismiss employee's action under FLSA because it was clear that requirements of pursuing *29 USCS § 216(b)* class action were independent of, and unrelated to, requirements for class action under Fed. R. Civ. P. 23. Souder v. Premier Auto. on Atlantic, LLC (M.D. Fla. Mar. 13, 2009), 2009 US Dist LEXIS 25591.

34. —Title VII

Title VII of Civil Rights Act of 1964 (*42 USCS § 2000e*) and Rule 23 should be construed so as to further strong public policy of eradicating all vestiges of racial discrimination in employment. Holmes v. Continental Can Co. (11th

Cir. Ala. June 9, 1983), 706 F2d 1144, 32 Empl Prac Dec (CCH) P33668, 36 Fed R Serv 2d (Callaghan) 817 (criticized in *Ansoumana v Gristede's Operating Corp. (2001, SD NY) 201 FRD 81, 143 CCH LC P 34267*) and (superseded by statute on other grounds as stated in *Cooper v Southern Co. (2001, ND Ga) 205 FRD 596*) and (criticized in *Eldridge v Provident Cos. (2005, Super Ct) 18 Mass L Rep 678, 2005 Mass Super LEXIS 35*).

Equal Employment Opportunity Commission does not have to comply with Rule 23 requirement in suit alleging that defendant company intentionally engaged in unlawful employment practices in violation of *42 USCS §§ 2000e-5* and *2000e-6* since to require EEOC to comply with rule when it seeks to obtain back wages would constitute serious interference with policy-making role that Congress delegated to EEOC in determining how to eradicate patterns and practices of discrimination and since, in recognition of EEOC's need to adequately represent public interest in any patterns and practices of employment discrimination, court cannot properly preclude it from seeking relief under § 2000e-5 for more persons aggrieved than charging parties. *EEOC v. Stroh Brewery Co. (E.D. Mich. Apr. 24, 1979), 83 FRD 17, 19 Empl Prac Dec (CCH) P9226, 27 Fed R Serv 2d (Callaghan) 1209*.

Rule 23 is inapplicable to EEOC class employment discrimination suit under *42 USCS § 2000e-5* since (1) it is inconsistent to allow EEOC class suits under *42 USCS § 2000e-6* independent of Rule 23, as is undisputed practice, while requiring compliance with Rule 23 for suits under *42 USCS § 2000e-5*; and (2) language of Rule 23 itself seems unsuitable for EEOC class employment discrimination suits. *EEOC v. Federal Reserve Bank (W.D. Tenn. Oct. 31, 1979), 84 FRD 337, 21 Empl Prac Dec (CCH) P30377, 29 Fed R Serv 2d (Callaghan) 67*.

Rule 23 does not suspend application of Title VII's jurisdiction requirement; therefore before applicant or deterred applicant will be eligible to participate in any class relief in action alleging sex discrimination in employment, she will have to prove that she was discriminated against within period commencing 300 days before class member first filed complaint with EEOC. *Christman v. American Cyanamid Co. (N.D. W. Va. Nov. 17, 1981), 92 FRD 441, 28 Empl Prac Dec (CCH) P32473, 33 Fed R Serv 2d (Callaghan) 737*.

Title VII of Civil Rights Act of 1964 grants Equal Employment Opportunity Commission authority to sue on behalf of aggrieved complainants, who are often described as "class;" however, such action does not arise under *Fed. R. Civ. P. 23* and class certification of type contemplated in Rule 23 class actions is not necessary. *EEOC v. TIC-The Indus. Co. (E.D. La. Nov. 21, 2002), 2002 US Dist LEXIS 22728*.

35. State laws, rules or procedures and effect thereon

Fed. R. Civ. P. 23(e) did not preclude application of Texas Unclaimed Property Act to unclaimed funds allocated to identified class members in case because rule did not directly conflict with Act, nor did it implicitly occupy field that Act sought to regulate; *Fed. R. Civ. P. 23(e)* merely empowered district court to approve settlement, but it did not mention district court's discretion (or even its authority) to extinguish right of recovery of identified class members through later cy pres order. *All Plaintiffs v. All Defendants (5th Cir. Tex. June 27, 2011), 645 F3d 329, 79 Fed R Serv 3d (Callaghan) 1149*.

Rule 23 does not have effect of changing substantive law of state. *Glover v. McFaddin (D. Tex. Nov. 10, 1948), 81 F Supp 426*.

Rooker-Feldman doctrine by which party dissatisfied with procedures or outcome of state litigation must raise any federal objections by appealing or petitioning for certiorari to U.S. Supreme Court but may not do so by bringing original action in Federal District Courts does not prohibit person from challenging in Federal District Court state high court's construction of state statute in different case, and therefore does not preclude state class action plaintiffs from joining federal class. *Bennett v. Tucker (N.D. Ill. Aug. 17, 1989), 127 FRD 501, 14 Fed R Serv 3d (Callaghan) 1447*, aff'd, *(7th Cir. Ill. Feb. 4, 1992), 956 F2d 138, 59 Empl Prac Dec (CCH) P41648*.

N.Y. C.P.L.R. § 901(b) applied to plaintiffs' Donnelly Act and related state claims, notwithstanding plaintiffs' arguments that it should be displaced by *Fed. R. Civ. P. 23* because their suit was being litigated in federal forum and § 901(b) was substantive rule. *Leider v. Ralfe (S.D.N.Y. Jan. 25, 2005), 387 F Supp 2d 283, 2005-1 Trade Cas (CCH) P74683*.

Concerning matters covered by Federal Rules of Civil Procedure, if rule on point is consonant with *28 USCS § 2072* and U.S. Constitution, Federal Rule applied regardless of contrary state law; thus, policyholders' claims that *La. Code Civ. Proc. 591* applied to their claim for class action certification rather than *Fed. R. Civ. P. 23* was denied. *In re Katrina Canal Breaches Consol. Litig. (E.D. La. Aug. 6, 2009), 2009 US Dist LEXIS 69708*.

Commonwealth of Virginia does not have procedure in state law that is comparable to class action procedure set forth in *Fed. R. Civ. P. 23*. *In re Fosamax Prods. Liab. Litig. (S.D.N.Y. Mar. 15, 2010), 694 F Supp 2d 253*, in part, *(S.D.N.Y. Mar. 26, 2010), 2010 US Dist LEXIS 33260*, aff'd, *(2d Cir. N.Y. May 1, 2012), 678 F3d 134, CCH Prod Liab Rep P18843*.

Antitrust suit brought against cable television providers by State of West Virginia satisfied definition of "class action" under *28 USCS § 1332(d)(1)(B)* because *W. Va. Code § 47-18-17* was sufficiently similar to *Fed. R. Civ. P. 23*; § 47-18-17 provided procedural protections for consumers represented by State. *West Virginia ex rel. McGraw v. Comcast Corp. (E.D. Pa. Mar. 31, 2010), 705 F Supp 2d 441, 2010-1 Trade Cas (CCH) P76975*, overruled as stated in , *In re Std. & Poor's Rating Agency Litig. (S.D.N.Y. June 3, 2014), — F Supp 2d —, 23 F Supp 3d 378* (criticized in *Illinois v AU Optronics Corp. (2011, ND Ill) 794 F Supp 2d 845, 2011-1 CCH Trade Cases P 77520*) and (criticized in *South Carolina v LG Display Co. (2011, DC SC) 2011-2 CCH Trade Cases P 77656*) and (criticized in *LG Display Co. v Madigan (2011, CA7 Ill) 665 F3d 768, 2011-2 CCH Trade Cases P 77686*) and (criticized in *West Virginia ex rel. Morrisey v Pfizer, Inc. (2013, SD W Va) 969 F Supp 2d 476, 2013-2 CCH Trade Cases P 78457*) and (Overruled as stated in *In re Std. & Poor's Rating Agency Litig. (2014, SD NY) 23 F Supp 3d 378*).

Because indirect purchaser restrictions of Illinois Antitrust Act are "intertwined" with underlying substantive right, application of *Fed. R. Civ. P. 23* would abridge, enlarge or modify Illinois' substantive rights, and therefore Illinois' restrictions on indirect purchaser actions must be applied in federal court; accordingly, indirect purchasers of prescription drug could not add state law antitrust claim under Illinois Antitrust Act. *In re Wellbutrin XL Antitrust Litig. (E.D. Pa. Dec. 21, 2010), 756 F Supp 2d 670, 2011-2 Trade Cas (CCH) P77582*.

In proposed class action case where proposed class challenged various aspects of mortgage servicer's force-placed insurance (FPI) practices, class certification was not warranted because choice-of-law provisions contained in contracts were enforceable and would thereby bar uniform claim under this California code section. *Gustafson v. BAC Home Loans Servicing, LP (C.D. Cal. Nov. 4, 2013), 294 FRD 529, 86 Fed R Serv 3d (Callaghan) 1398*.

Although federal cases interpreting Rule 23 are persuasive, they are not binding on state courts absent impairment of constitutional right. *Rosack v. Volvo of America Corp. (Cal. App. 1st Dist. May 18, 1982), 1982 Trade Cas (CCH) P65145, 1982-83 Trade Cas (CCH) P65145*, cert. denied, *(U.S. Feb. 28, 1983), 460 US 1012, 103 S Ct 1253, 75 L Ed 2d 482*.

Rule 23, as such, does not bind California state courts. *Cartt v. Superior Court (Cal. App. 2d Dist. July 25, 1975)*.

Since state class action statute is similar to *Rule 23 of USCS Rules of Civil Procedure*, reference may be had to federal precedents when deciding whether case should be certified as class action under state law. *Governors Grove Condominium Asso. v. Hill Development Corp. (Conn. Super. Ct. Jan. 31, 1979), 404 A2d 131*.

Unpublished decision: In Telephone Consumer Protection Act (TCPA), *47 USCS § 227*, based on unsolicited faxes sent by defendant, language of § 227(b)(3) did not require application of *N.Y. C.P.L.R. § 901(b)* regarding class actions under current precedent, so *Fed. R. Civ. P. 23* alone governed whether claim could be brought as class action. *Bais Yaakov of Spring Valley v. Peterson's Nelnet, LLC (D.N.J. Oct. 17, 2012), 2012 US Dist LEXIS 150210*.

Unpublished decision: In class action alleging violations of Telephone Consumer Protection Act (TCPA) in which marketer moved to dismiss amended complaint and appellate court had directed district court to assess private-right-of action clause taking Shady Grove and Mims decisions into consideration, whether private right of action existed in first place under TCPA did not depend on state law; state-law limitations embodied in *N.Y. C.P.L.R. §*

901(b) had no application in present federal-question case in federal court. Landsman & Funk, P.C. v. Skinder-Strauss Assocs. (D.N.J. Dec. 19, 2012), 2012 US Dist LEXIS 183249.

36. —Consent provisions

Since Ohio Rev. Code Ann. § 4111.10 does not include consent provision like Ohio Rev. Code Ann. § 4111.14(K)(2), plaintiff may maintain class action for violations of § 4111.10 under Fed. R. Civ. P. 23. Laichev v. JBM, Inc. (S.D. Ohio June 19, 2008), 269 FRD 633.

37. —Penalties

Prohibition of N.Y. C.P.L.R. 901(b) against class actions seeking statutory penalties did not apply in federal action based on diversity of citizenship to recover statutory interest for overdue insurance benefits, since Fed. R. Civ. P. 23 provided categorical rule that class action could be maintained if action satisfied criteria of Rule 23, and nature of claim asserted or relief sought had no bearing upon whether class treatment was available under Rule 23. Shady Grove Orthopedic Assocs., P.A. v Allstate Ins. Co. (2010) 559 US 393, 130 S Ct 1431, 176 L Ed 2d 311, 76 FR Serv 3d 397, 22 FLW Fed S 196, on remand, remanded (2010, CA2) 380 Fed Appx 96 and (criticized in *In re Lithium Ion Batteries Antitrust Litig. (2014, ND Cal) 2014-2 CCH Trade Cases P 78927*).

Fundraising program developer was granted judgment on pleadings as to claim for civil penalties under California's Private Attorney General's Act, Cal. Lab. Code §§ 2698 et seq., where former employee could not meet requirements of Fed. R. Civ. P. 23. Fields v. QSP, Inc. (C.D. Cal. June 4, 2012), 2012 US Dist LEXIS 78001).

38. —Statutes of limitation

Product liability claims against manufacturer of L-tryptophan, nutritional supplement, by plaintiff who allegedly contracted eosinophilia myalgia syndrome from it, were not tolled by her membership in putative federal class action in another state, despite well-established federal practice on class-action tolling, since Texas rule clearly conflict with federal practice, is means of enforcing its statute of limitations, and is matter of considerable importance to Texas as reflecting deliberate policy choice by its legislature. Vaught v Showa Denko K.K. (1997, CA5 Tex) 107 F3d 1137, CCH Prod Liab Rep P 14881, 37 FR Serv 3d 134, corrected (1997, CA5 Tex) 1997 US App LEXIS 12786 and reh, en banc, den *(1997, CA5 Tex) 114 F3d 1185* and cert den *(1997) 522 US 817, 118 S Ct 67, 139 L Ed 2d 29* and (criticized in Dow Chem. Corp. v Blanco (2013, Del) 67 A3d 392).

Rule 23 does not implicitly contain equitable tolling rule and thereby trump state rule against such tolling; hence plaintiff's case was properly dismissed on ground that statute of limitations in their action was not equitably tolled during pendency of federal class actions against some of same defendants. Wade v. Danek Med., Inc. (4th Cir. Va. July 2, 1999), 182 F3d 281, CCH Prod Liab Rep P15557 (criticized in Torkie-Tork v Wyeth (2010, ED Va) 739 F Supp 2d 887) and (criticized in Dow Chem. Corp. v Blanco (2013, Del) 67 A3d 392).

Certified class action to which employee had belonged tolled one-year statute of limitations in La. Civ. Code Ann. art. 3492 for his claims that employer denied him promotion based on race discrimination, which claims were filed on March 19, 2003, and arose as early as 1993, until August 30, 2004, which was when Eighth Circuit affirmed order dismissing June 17, 1994, class claims on merits, because employee was entitled to assume that class representatives continued to represent him, as member, and protect his interests in appealing order. Taylor v. UPS, Inc. (5th Cir. La. Dec. 30, 2008), 554 F3d 510, 91 Empl Prac Dec (CCH) P43420.

39. Miscellaneous

Continued jurisdiction under *28 USCS § 1332(d)* did not depend on class certification; if defendant properly removed putative class action at beginning, district court's subsequent denial of Fed. R. Civ. P. 23 class certification did not divest district court of jurisdiction over cases removed under § 1332(d), and it was not to remand case to state court. United Steel v. Shell Oil Co. (9th Cir. Cal. Apr. 21, 2010), 602 F3d 1087, 159 Lab Cas (CCH) P35740.

Rule 23 is not interpreted so as to deprive person of individual claim if such claim would have existed in absence of rule. *Lyon v. Atlantic C. L. R. Co. (D.S.C. Jan. 3, 1964), 224 F Supp 1014, 49 Lab Cas (CCH) P18836*.

Drafters of Rule 23 did not intend to create right to class actions simply because opinion in one suit might be cited as precedent in another, and if such were case, then almost every action would be susceptible of being brought as class action. *William Goldman Theatres, Inc. v. Paramount Film Distributing Corp. (E.D. Pa. 1969), 49 FRD 35, 14 Fed R Serv 2d (Callaghan) 79, 1970 Trade Cas (CCH) P73211*.

Rule 23 was not promulgated to create vehicle for centralization of state causes of action in federal forum. *Hobbs v. Northeast Airlines, Inc. (E.D. Pa. 1970), 50 FRD 76, 14 Fed R Serv 2d (Callaghan) 62*.

Theory that in some circumstances "economic reality" dictates that claims be presented in class action or not at all does not look to assets of particular plaintiffs or individual class members, but rather looks to value of their potential damage claims. *Chmieleski v. City Products Corp. (D. Mo. 1976), 71 FRD 118, 22 Fed R Serv 2d (Callaghan) 66, 1976-2 Trade Cas (CCH) P61220* (criticized in *United Steel v Kelsey-Hayes Co. (2013, ED Mich) 290 FRD 77*).

Unpublished decision: Applicants' motion for certification of class of plaintiffs that had been denied police officer positions with Port Authority of New York and New Jersey was denied as premature because there were issues of law remaining that related to complaint and that needed to be addressed after additional briefing on motion to dismiss. *Griswold v. Port Auth. of N.Y. & N.J. (D.N.J. Sept. 14, 2009), 2009 US Dist LEXIS 84129*.

II. PURPOSE OF RULE AND CLASS ACTIONS

40. Generally

One of purposes of class action is to achieve economies of time and effort. *Buford v. American Finance Co. (N.D. Ga. Oct. 1, 1971), 333 F Supp 1243, 15 Fed R Serv 2d (Callaghan) 792*.

Rule 23 is designed to aid in more efficient administration of justice by trying many causes of action at once. *Albertson's, Inc. v. Amalgamated Sugar Co. (D. Utah 1973), 62 FRD 43, 18 Fed R Serv 2d (Callaghan) 1208, 1974 Trade Cas (CCH) P74875, 1974-1 Trade Cas (CCH) P74875*, aff'd in part, vacated in part, *(10th Cir. Utah Oct. 2, 1974), 503 F2d 459, 19 Fed R Serv 2d (Callaghan) 258, 1974-2 Trade Cas (CCH) P75261*.

Rule 23 was enacted for purpose of saving courts and enabling similar actions by similar persons for similar remedies to be administered and determined in simple, orderly, and economical fashion. *Kekich v. Travelers Indem. Co. (D. Pa. 1974), 64 FRD 660*.

Rule 23 is designed to provide remedies for abuses in unique manner. *Miller v. Mackey International, Inc. (S.D. Fla. 1976), 70 FRD 533, 23 Fed R Serv 2d (Callaghan) 337*.

Rule 23 is key building block in federal courts' continuing effort to make civil procedural system more responsive to needs of contemporary litigation. *In re Federal Skywalk Cases (W.D. Mo. Jan. 25, 1982), 93 FRD 415, 33 Fed R Serv 2d (Callaghan) 520*, vacated, *(8th Cir. Mo. June 7, 1982), 680 F2d 1175, 34 Fed R Serv 2d (Callaghan) 176*.

Class actions have two primary purposes: (1) to accomplish judicial economy by avoiding multiple suits, and (2) to protect rights of persons who might not be able to present claims on individual basis. *Haley v. Medtronic, Inc. (C.D. Cal. Dec. 12, 1996), 169 FRD 643*.

41. Prevention of inconsistent or varying adjudications

Purposes of Rule 23 are to avoid multiplicity of suits, provide common binding adjudication, and prevent inconsistent or varying adjudications. *Mungin v. Florida E. C. R. Co. (M.D. Fla. Aug. 11, 1970), 318 F Supp 720, 14 Fed R Serv 2d (Callaghan) 1613, 65 Lab Cas (CCH) P11684*, aff'd, *(5th Cir. Fla. Apr. 19, 1971), 441 F2d 728, 66 Lab Cas (CCH) P11989*; *Hernandez v. Motor Vessel Skyward (D. Fla. 1973), 61 FRD 558, 18 Fed R Serv 2d*

(Callaghan) 1164, aff'd, *(5th Cir. Fla. 1975), 507 F2d 1278*, aff'd, *(5th Cir. Fla. 1975), 507 F2d 1279*, disapproved, *In re Northern Dist. of California, Dalkon Shield IUD Products Liability Litigation (9th Cir. Cal. June 18, 1982), 693 F2d 847, 34 Fed R Serv 2d (Callaghan) 646*, disapproved as stated in *In re Bendectin Products Liability Litigation (6th Cir. Ohio Oct. 26, 1984), 749 F2d 300, 40 Fed R Serv 2d (Callaghan) 1*.

Avoidance of multiplicity of suits, and prevention of inconsistent or varying adjudications are benchmarks of valid class action. *Hernandez v. Motor Vessel Skyward (D. Fla. 1973), 61 FRD 558, 18 Fed R Serv 2d (Callaghan) 1164*, aff'd, *(5th Cir. Fla. 1975), 507 F2d 1278*, aff'd, *(5th Cir. Fla. 1975), 507 F2d 1279*, disapproved, *In re Northern Dist. of California, Dalkon Shield IUD Products Liability Litigation (9th Cir. Cal. June 18, 1982), 693 F2d 847, 34 Fed R Serv 2d (Callaghan) 646*, disapproved as stated in *In re Bendectin Products Liability Litigation (6th Cir. Ohio Oct. 26, 1984), 749 F2d 300, 40 Fed R Serv 2d (Callaghan) 1*.

42. Prevention of multiple suits

Purpose to be served by class action is to prevent multiplicity of suits based on wrong common to all, and if class action is denied simply because all of allegations of class do not fit together like pieces in jigsaw puzzle, much of utility of Rule 23 would be destroyed. *Green v. Wolf Corp. (2d Cir. N.Y. Dec. 9, 1968), 406 F2d 291, 12 Fed R Serv 2d (Callaghan) 545, Fed Sec L Rep (CCH) P92321*, cert. denied, *(U.S. 1969), 395 US 977, 89 S Ct 2131, 23 L Ed 2d 766*.

Purposes of Rule 23 are to avoid multiplicity of suits, provide common binding adjudication, and prevent inconsistent or varying adjudications. *Mungin v. Florida E. C. R. Co. (M.D. Fla. Aug. 11, 1970), 318 F Supp 720, 14 Fed R Serv 2d (Callaghan) 1613, 65 Lab Cas (CCH) P11684*, aff'd, *(5th Cir. Fla. Apr. 19, 1971), 441 F2d 728, 66 Lab Cas (CCH) P11989*; *Hernandez v. Motor Vessel Skyward (D. Fla. 1973), 61 FRD 558, 18 Fed R Serv 2d (Callaghan) 1164*, aff'd, *(5th Cir. Fla. 1975), 507 F2d 1278*, aff'd, *(5th Cir. Fla. 1975), 507 F2d 1279*, disapproved, *In re Northern Dist. of California, Dalkon Shield IUD Products Liability Litigation (9th Cir. Cal. June 18, 1982), 693 F2d 847, 34 Fed R Serv 2d (Callaghan) 646*, disapproved as stated in *In re Bendectin Products Liability Litigation (6th Cir. Ohio Oct. 26, 1984), 749 F2d 300, 40 Fed R Serv 2d (Callaghan) 1*.

Purpose to be served by class action is opportunity it affords to prevent multiplicity of suits based on common wrong to all. *Northern Acceptance Trust 1065 v. AMFAC, Inc. (D. Haw. 1971), 51 FRD 487, 14 Fed R Serv 2d (Callaghan) 1372, Fed Sec L Rep (CCH) P92939*; *Carlisle v. LTV Electrosystems, Inc. (D. Tex. 1972), 54 FRD 237, 15 Fed R Serv 2d (Callaghan) 1549*.

Purpose of Rule 23 is to reduce multiple litigation of same issues. *Schrader v. Selective Service System Local Board (W.D. Wis. Jan. 12, 1971), 329 F Supp 966*, cert. denied, *Schrader v. Selective Service System Local Bd. (U.S. 1972), 409 US 1085, 93 S Ct 689, 34 L Ed 2d 672*.

Avoidance of multiplicity of suits, and prevention of inconsistent or varying adjudications are benchmarks of valid class action. *Hernandez v. Motor Vessel Skyward (D. Fla. 1973), 61 FRD 558, 18 Fed R Serv 2d (Callaghan) 1164*, aff'd, *(5th Cir. Fla. 1975), 507 F2d 1278*, aff'd, *(5th Cir. Fla. 1975), 507 F2d 1279*, disapproved, *In re Northern Dist. of California, Dalkon Shield IUD Products Liability Litigation (9th Cir. Cal. June 18, 1982), 693 F2d 847, 34 Fed R Serv 2d (Callaghan) 646*, disapproved as stated in *In re Bendectin Products Liability Litigation (6th Cir. Ohio Oct. 26, 1984), 749 F2d 300, 40 Fed R Serv 2d (Callaghan) 1*.

Rule 23 is designed to avoid multiplicity of lawsuits while protecting substantive rights of plaintiffs and defendants. Re Four Seasons Secur. *In re Four Seasons Sec. Laws Litig. (W.D. Okla. 1974), 63 FRD 422, 19 Fed R Serv 2d (Callaghan) 395*.

43. Provision of common, final judgment

Purposes of Rule 23 are to avoid multiplicity of suits, provide common binding adjudication, and prevent inconsistent or varying adjudications. *Mungin v. Florida E. C. R. Co. (M.D. Fla. Aug. 11, 1970), 318 F Supp 720, 14*

Fed R Serv 2d (Callaghan) 1613, 65 Lab Cas (CCH) P11684, aff'd, *(5th Cir. Fla. Apr. 19, 1971), 441 F2d 728, 66 Lab Cas (CCH) P11989*.

Purpose of class action is to enable court to determine rights of numerous class of individuals by one common final judgment. *Suchem, Inc. v. Central Aguirre Sugar Co. (D.P.R. 1971), 52 FRD 348, 15 Fed R Serv 2d (Callaghan) 924, 15 Fed R Serv 2d (Callaghan) 924, 15 Fed R Serv 2d (Callaghan) 946, 15 Fed R Serv 2d (Callaghan) 946*, disapproved, *Curley v. Brignoli, Curley & Roberts Assoc. (2d Cir. N.Y. Sept. 20, 1990), 915 F2d 81, 17 Fed R Serv 3d (Callaghan) 1460*.

One purpose of class action is to reach judgment that will be as binding on class as any adjudication in rem. *Professional Adjusting Systems, Inc. v. General Adjustment Bureau, Inc. (S.D.N.Y. 1974), 64 FRD 35, 19 Fed R Serv 2d (Callaghan) 105, 1974-2 Trade Cas (CCH) P75183*.

Purpose of class action and class certification under Rule 23 is to ward off collateral attacks on class judgments and to deny success of those attacks. *Clark v. South Cent. Bell Tel. Co. (W.D. La. Sept. 17, 1976), 419 F Supp 697*.

44. Remedy for small claims

Class suit is designed to provide small claimants with method of obtaining redress for claims which would otherwise be too small to warrant individual litigation. *West Virginia v. Chas. Pfizer & Co. (2d Cir. N.Y. Mar. 29, 1971), 440 F2d 1079, 14 Fed R Serv 2d (Callaghan) 1360, 1971 Trade Cas (CCH) P73540*, cert. denied, *(U.S. Dec. 1, 1971), 404 US 871, 92 S Ct 81, 30 L Ed 2d 115*, disapproved, *Illinois Brick Co. v. Illinois (U.S. June 9, 1977), 431 US 720, 97 S Ct 2061, 52 L Ed 2d 707*; *Collins v. Bolton (N.D. Ill. June 27, 1968), 287 F Supp 393, 12 Fed R Serv 2d (Callaghan) 442*; *Welmaker v. W. T. Grant Co. (N.D. Ga. Dec. 11, 1972), 365 F Supp 531, 18 Fed R Serv 2d (Callaghan) 280*, disapproved, *McGowan v. King, Inc. (5th Cir. Miss. Mar. 15, 1978), 569 F2d 845*; *Shulman v. Ritzenberg (D.D.C. 1969), 47 FRD 202, 13 Fed R Serv 2d (Callaghan) 543*; *Lamb v. United Sec. Life Co. (S.D. Iowa 1972), 59 FRD 25, 16 Fed R Serv 2d (Callaghan) 38, Fed Sec L Rep (CCH) P93489*; *Boston Pneumatics, Inc. v. Ingersoll-Rand (E.D. Pa. 1974), 65 FRD 61, 20 Fed R Serv 2d (Callaghan) 145, 1974-2 Trade Cas (CCH) P75421*.

One of basic rationales underlying class action mechanism is that it will afford large numbers of claimants with similar but individually small claims access to courts. *Katz v. Carte Blanche Corp. (D. Pa. 1971), 53 FRD 539, 15 Fed R Serv 2d (Callaghan) 1169*, rev'd, *(3d Cir. Pa. Mar. 15, 1974), 496 F2d 747, 18 Fed R Serv 2d (Callaghan) 381*.

Rule 23 invokes liberal policy to encourage suits to redress rights where claims would otherwise be too small to warrant individual litigation, but such policy is not to be construed as means of converting what should be ordinary and simple lawsuits between two litigants into class action with all problems and expense inherent in such suits. *Free World Foreign Cars, Inc. v. Alfa Romeo, S.p.A. (S.D.N.Y. 1972), 55 FRD 26, 16 Fed R Serv 2d (Callaghan) 75, 1972 Trade Cas (CCH) P73925*.

Facilitation of litigation by small claimants with inadequate means is one of aims and benefits, but not sole purpose of Rule 23. *New York v. General Motors Corp. (S.D.N.Y. 1973), 60 FRD 393, 17 Fed R Serv 2d (Callaghan) 869, 1973 Trade Cas (CCH) P74683, 1973-2 Trade Cas (CCH) P74683*, rev'd, *(2d Cir. N.Y. June 28, 1974), 501 F2d 639, 1974-2 Trade Cas (CCH) P75139*.

Rules 23 and 23.1 are designed in part to permit claimants with small loss to assert valid claims which they could not otherwise afford to litigate. *Oppenlander v. Standard Oil Co. (D. Colo. 1974), 64 FRD 597, 18 Fed R Serv 2d (Callaghan) 962, Fed Sec L Rep (CCH) P94416*.

Purpose of Rule 23 is to provide device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as group. *Kesler v. Hynes & Howes Real Estate, Inc. (S.D. Iowa 1975), 66 FRD 43, 20 Fed R Serv 2d (Callaghan) 104, Fed Sec L Rep (CCH) P95092*.

Rule was originally designed to protect small or relatively small claimants, each of whom shared common complaint under common set of circumstances against common defendant or group of defendants, but whose individual claims might not amount to very much and would never be presented in court except through aggregation by means of class action. *San Antonio Tel. Co. v. American Tel. & Tel. Co. (W.D. Tex. 1975), 68 FRD 435, 1975-2 Trade Cas (CCH) P60421*.

Rule 23 was intended to open up federal courts to plaintiffs with small but valid claims. *Cosgrove v. First & Merchants Nat'l Bank (E.D. Va. 1975), 68 FRD 555, 20 Fed R Serv 2d (Callaghan) 1230*.

45. —Particular cases

Decertification of consumers' suit alleging violation of Electronic Funds Transfer Act, *15 USCS § 1693b*, was not warranted on basis that individual damages were small because small amount of individual recovery actually justified litigation on class basis, and if distribution of damages to class members would provide no meaningful relief, cy pres decree could provide solution. *Hughes v. Kore of Ind. Enter. (7th Cir. Ind. Sept. 10, 2013), 731 F3d 672, 86 Fed R Serv 3d (Callaghan) 647*.

One of purposes of class section is to provide remedy for those who have been injured by fraudulent course of conduct but who, because of their economic situation or ignorance, are unable to protect themselves by separate lawsuits. *Moscarelli v. Stamm (E.D.N.Y. July 23, 1968), 288 F Supp 453, 12 Fed R Serv 2d (Callaghan) 532, Fed Sec L Rep (CCH) P92254*, disapproved, *McGinn v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (8th Cir. Minn. June 22, 1984), 736 F2d 1254*.

Primary purposes of class action device are to give small investors reasonable opportunity to vindicate their claims in manner which would not place undue financial burden upon them. *In re Caesars Palace Sec. Litigation (S.D.N.Y. May 23, 1973), 360 F Supp 366, 18 Fed R Serv 2d (Callaghan) 195, 18 Fed R Serv 2d (Callaghan) 195, 18 Fed R Serv 2d (Callaghan) 251, 18 Fed R Serv 2d (Callaghan) 251, Fed Sec L Rep (CCH) P94005*, disapproved, *Davis v. Avco Financial Services, Inc. (6th Cir. Ohio July 10, 1984), 739 F2d 1057, Fed Sec L Rep (CCH) P91569*.

One of purposes of class action in antitrust suit is to enable plaintiff with small claims to have their day in court. *J. M. Woodhull, Inc. v. Addressograph-Multigraph Corp. (S.D. Ohio 1974), 62 FRD 58, 18 Fed R Serv 2d (Callaghan) 512, 1974-1 Trade Cas (CCH) P74894*.

Unpublished decision: Pension plan participants won class certification per *Fed. R. Civ. P. 23* for counts of their complaint asserting breach of duty of prudence imposed by Employment Retirement Income Security Act, *29 USCS § 1109*, although definition of class was narrowed to exclude certain employees and although one of three proposed representatives was deemed to be inadequate based on confusion that he expressed as to his claims therein, because satisfaction of all of Rule 23 criteria was demonstrated. *In re Merck & Co. (D.N.J. Feb. 9, 2009), 2009 US Dist LEXIS 10243*.

46. Miscellaneous

Rule 23 was intended to prevent plaintiff assuming to represent class from securing benefit to individuals on dismissing action without advance notice to all whom he assumed to represent. *Partridge v. St. Louis Joint Stock Land Bank (8th Cir. Mo. July 24, 1942), 130 F2d 281*.

Class certification for plaintiffs' state law claims was not improper because district court was not required to determine that every class member had suffered damages as prerequisite to class certification. *Mims v. Stewart Title Guar. Co. (5th Cir. Tex. Dec. 9, 2009), 590 F3d 298, 75 Fed R Serv 3d (Callaghan) 358*.

Development of class suit principle was for benefit of those claimants who, having good cause of action in themselves, could not avail themselves of it because of requirement of joining of others whom it was impracticable to join, and its purpose was not to restrict his remedy and deprive him of individual cause of action theretofore enjoyed. *Giesecke v. Denver Tramway Corp. (D. Del. Jan. 14, 1949), 81 F Supp 957*.

It is not purpose of class action to save every suit from dismissal because it is too insignificant to receive its own day in court. *Bailey v. Sabine River Authority (D. La. 1971), 54 FRD 42, 15 Fed R Serv 2d (Callaghan) 1404*.

Rule 23 is not intended to permit private litigant to enhance his own bargaining power by claim that he is acting for class of litigants, nor is purpose of Rule to reap golden harvest of fees for lawyers who bring class actions. *Steinmetz v. Bache & Co. (S.D.N.Y. 1976), 71 FRD 202, 23 Fed R Serv 2d (Callaghan) 84, Fed Sec L Rep (CCH) P95528*.

To require plaintiffs bringing class action to add plaintiff from each state in defendant internet provider's service area in order to survive motion to dismiss would be inefficient and contrary to purposes of *Fed. R. Civ. P. 23*. *Vernon v. Qwest Communs. Int'l, Inc. (W.D. Wash. July 16, 2009), 643 F Supp 2d 1256*.

III. GENERAL CONSIDERATIONS FOR RULE 23 ACTIONS

A. General Applicability and Propriety

1. In General

47. Generally

Federal Rule of Civil Procedure governing class actions should be construed to permit class suit where several persons jointly act to injury of many persons so numerous that their voluntarily, unanimously joining in suit is concededly improbable and impracticable. *Weeks v. Bareco Oil Co. (7th Cir. Ill. Dec. 22, 1941), 125 F2d 84*.

No implied class certification doctrine can take place of, or be deemed substitute for, appropriate grant of class certification; instead, requirements and findings of *Fed. R. Civ. P. 23* must be met. *Brown v. Phila. Hous. Auth. (3d Cir. Pa. Nov. 19, 2003), 350 F3d 338, 57 Fed R Serv 3d (Callaghan) 21*.

Merits of class members' substantive claims are often highly relevant when determining whether to certify class; more importantly, it is not correct to say district court may consider merits to extent that they overlap with class certification issues, rather district court must consider merits if they overlap with *Fed. R. Civ. P. 23(a)* requirements. *Ellis v. Costco Wholesale Corp. (9th Cir. Cal. Sept. 16, 2011), 657 F3d 970, 94 Empl Prac Dec (CCH) P44282, 80 Fed R Serv 3d (Callaghan) 832*.

Rule relating to class actions applies to all actions whether denominated legal or equitable before 1937. *Smith v. Abbate (S.D.N.Y. Dec. 13, 1961), 201 F Supp 105, 5 Fed R Serv 2d (Callaghan) 321*.

To be viable, class action must offer economy of effort and uniformity of result without imposing undue debilitation of procedural or substantive safeguards for members of class or for persons opposing class. *Hernandez v. Motor Vessel Skyward (D. Fla. 1973), 61 FRD 558, 18 Fed R Serv 2d (Callaghan) 1164*, aff'd, *(5th Cir. Fla. 1975), 507 F2d 1278*, aff'd, *(5th Cir. Fla. 1975), 507 F2d 1279*, disapproved, *In re Northern Dist. of California, Dalkon Shield IUD Products Liability Litigation (9th Cir. Cal. June 18, 1982), 693 F2d 847, 34 Fed R Serv 2d (Callaghan) 646*, disapproved as stated in *In re Bendectin Products Liability Litigation (6th Cir. Ohio Oct. 26, 1984), 749 F2d 300, 40 Fed R Serv 2d (Callaghan) 1*.

Use of class action is best served when initially viewed as device to be used only in extraordinary circumstances, and even after threshold determination is made that class action is appropriate device, inquiry should proceed to determine if under circumstances it is most appropriate device. *Stuart v. Hewlett-Packard Co. (E.D. Mich. Feb. 6, 1975), 66 FRD 73, 9 Empl Prac Dec (CCH) P9993, 19 Fed R Serv 2d (Callaghan) 1346*.

In applying prerequisites and conditions set forth in *FRCP 23* for purpose of determining whether to grant class action status, trial court may apply realism and good sense, and take into consideration procedural fairness. *Zapata v. IBP, Inc. (D. Kan. May 15, 1996), 167 FRD 147*.

Whether case should be allowed to proceed as class action involves intensely practical considerations; each case must be decided on its own facts, on basis of practicalities and prudential considerations. *K.L. by Dixon v. Valdez (D.N.M. June 26, 1996), 167 FRD 688*, aff'd, dismissed, in part, *(10th Cir. N.M. Aug. 12, 1999), 186 F3d 1280, 7 Accom Disabilities Dec (CCH) P7-032, 44 Fed R Serv 3d (Callaghan) 179*.

In addition to specifications of *FRCP 23*, certain implied requirements exist; specifically, there must be identifiable class and plaintiff or plaintiffs must be members of such class. *Chisolm v. TranSouth Fin. Corp. (E.D. Va. May 12, 2000), 194 FRD 538*.

Court has independent duty to determine propriety of class certification, and is not limited to arguments made by parties. *Daniels v. City of N.Y. (S.D.N.Y. Jan. 25, 2001), 198 FRD 409, 49 Fed R Serv 3d (Callaghan) 936*.

In determining propriety of class action, question is not whether plaintiff or plaintiffs have stated cause of action or will prevail on merits, but rather whether requirements of *Fed. R. Civ. P. 23* are met. *Bynum v. District of Columbia (D.D.C. Mar. 31, 2003), 214 FRD 27*.

Before engaging in analysis required by *Fed. R. Civ. P. 23*, question of whether class has been adequately defined should be considered; in order for party to represent class, class sought to be represented must be adequately defined and clearly ascertainable. vague class definition portends significant manageability problems for court. *Kelecseny v. Chevron, U.S.A., Inc. (S.D. Fla. Nov. 25, 2009), 262 FRD 660*.

Definition of class must be accurately delineated in order for class to be certified. *Kelecseny v. Chevron, U.S.A., Inc. (S.D. Fla. Nov. 25, 2009), 262 FRD 660*.

48. Discretion of court, generally

Trial court has broad discretion in deciding whether to certify class, and even if prerequisites of *FRCP 23(a)* and *(b)* are satisfied, court need not certify class. *Brown v. Blue Cross & Blue Shield (E.D. Mich. Apr. 19, 1996), 167 FRD 40*.

There is broad judicial discretion in determining whether to allow certification of class action. *Ruiz v. Stewart Assocs. (N.D. Ill. June 17, 1996), 167 FRD 402*.

District court enjoys broad discretion in certifying class actions, but must exercise this discretion within framework of *FRCP 23*. *Yadlosky v. Grant Thornton L.L.P. (E.D. Mich. Mar. 21, 2000), 197 FRD 292, Fed Sec L Rep (CCH) P90920*.

Although district court has broad discretion in certifying class actions, it must exercise that discretion within frame work of *Fed. R. Civ. P. 23*. *Abby v. City of Detroit (E.D. Mich. Oct. 29, 2003), 218 FRD 544, 57 Fed R Serv 3d (Callaghan) 659*.

When in doubt, court should err in favor of maintenance of class action; however, this doctrine should not be extended to limit sound discretion of trial courts in cases where discretion may be key to realistic administration of *Fed. R. Civ. P. 23*, particularly with respect to determination of most fair and efficient procedure. *Robinson v. Gillespie (D. Kan. Oct. 16, 2003), 219 FRD 179*, dismissed, *(D. Kan. Sept. 22, 2004), 2004 US Dist LEXIS 21645*.

49. Test of propriety

Test of propriety of class action complaint was not whether each plaintiff might suffer from improper usages alleged in complaint; propriety of alleged usages could best be determined in class action, even though specific relief might depend on facts in individual case. *Wallace v. McDonald (E.D.N.Y. Feb. 27, 1973), 369 F Supp 180*.

Before plaintiff moves for class certification, defendant may test propriety of action by motion for denial of class certification; however, even where defendant moves for denial of class certification before plaintiff has sought

certification, burden of establishing propriety of class action remains with plaintiff. *Parker v. Time Warner Entertainment Co., L.P. (E.D.N.Y. Jan. 9, 2001), 198 FRD 374*, vacated, *(2d Cir. N.Y. June 2, 2003), 331 F3d 13, 55 Fed R Serv 3d (Callaghan) 791*.

50. Manageability

For court to refuse to certify class on basis of speculation as to merits of cause or because of vaguely perceived management problems is counter to policy which had originally led to Rule 23 and to its thoughtful revision, and also to discount too much power of court to deal with class suit flexibly, in response to difficulties as they arise. *Yaffe v. Powers (1st Cir. Mass. Jan. 26, 1972), 454 F2d 1362, 15 Fed R Serv 2d (Callaghan) 993*, disapproved, *Gardner v. Westinghouse Broadcasting Co. (U.S. June 21, 1978), 437 US 478, 98 S Ct 2451, 57 L Ed 2d 364*.

Determination of manageability of class actions is, once Rule 23 is properly applied, matter for trial court's discretion, and such is true for all class actions. *King v. Kansas City Southern Industries, Inc. (7th Cir. Ill. June 19, 1975), 519 F2d 20, 20 Fed R Serv 2d (Callaghan) 593, Fed Sec L Rep (CCH) P95213*.

Once court is convinced that plaintiff's claims are of substantial merit, and that class action device is most practicable method of vindication, it must not allow encountered procedural difficulties to obviate its responsibility to adjudicate those claims. *Neely v. United States (3d Cir. Pa. Dec. 15, 1976), 546 F2d 1059, 22 Fed R Serv 2d (Callaghan) 765*.

Class action may present severe problems of manageability which may make pursuit of remedy by class action vehicle impractical, and when party representing public interest, such as Equal Employment Opportunity Commission, has been allowed to intervene on basis of its statutory authority, court should look to that party, with its expertise and resources, as viable alternative to coping with manageability problems inherent in class action vehicle. *Stuart v. Hewlett-Packard Co. (E.D. Mich. Feb. 6, 1975), 66 FRD 73, 9 Empl Prac Dec (CCH) P9993, 19 Fed R Serv 2d (Callaghan) 1346*.

Although finding of manageability is often viewed as separate requirement for class action determination, it is actually one of nonexclusive factors which is to be taken into account in making required findings of predominance and superiority under Rule 23(b)(3). *Windham v American Brands, Inc. (1975, DC SC) 68 FRD 641, 1975-2 CCH Trade Cases P 60530*, revd on other grounds *(1976, CA4 SC) 539 F2d 1016, 1976-2 CCH Trade Cases P 60976*, different results reached on reh on other grounds *(1977, CA4 SC) 565 F2d 59, 1977-2 CCH Trade Cases P 61670, 24 FR Serv 2d 326*, cert den *(1978) 435 US 968, 98 S Ct 1605, 56 L Ed 2d 58* and (criticized in *In re Mercedes-Benz Antitrust Litig. (2003, DC NJ) 213 FRD 180, 60 Fed Rules Evid Serv 1530*).

Notice required by Rule 23(c)(2) is factor which may properly be considered in weighing feasibility of management of proposed class action. *Robertson v. NBA (S.D.N.Y. Feb. 14, 1975), 389 F Supp 867, 19 Fed R Serv 2d (Callaghan) 982, 76 Lab Cas (CCH) P10729, 1975-1 Trade Cas (CCH) P60168*.

51. —Particular cases

Federal District Court did not abuse discretion in denying class action status in action brought for violation of Investment Company Act, Securities Exchange Act, and SEC Rules and Regulations, and for defendants' alleged breach of common law fiduciary obligations to mutual funds and their shareholders, where action would not best further policy of preventing shareholders and directors of investment adviser from utilizing their position to extract profits from buyer which may be conditional on favorable treatment to successor and to future detriment of funds, and where procedural difficulties of class action were serious, involving mammoth task of sorting out shareholders possessing particular type of claim. *King v. Kansas City Southern Industries, Inc. (7th Cir. Ill. June 19, 1975), 519 F2d 20, 20 Fed R Serv 2d (Callaghan) 593, Fed Sec L Rep (CCH) P95213*.

District Court's order denying class status to action brought to vacate, annul and set aside judgments and sentences of conviction under Federal wagering tax statutes and to order repayment of fines, penalties, and costs, based in part on government's assertion of possible applicability of Federal Set Off Statute [*31 USCS § 227*], would

be remanded for reconsideration by Court of Appeals where (1) to extent that argument was predicated on possible burden to Comptroller General, it was irrelevant, and (2) to extent that argument was predicated on possible interjection of individual issues by virtue of varying amounts and kinds of set-offs, District Court should be aware that essential relevance of possible future problems comes later in proceedings, if and when they arise; before denial of class certification on unmanageability grounds, hard data should be presented to District Court as to actual difficulty—or ease—involved in determining class membership and managing proceeding. *Neely v. United States (3d Cir. Pa. Dec. 15, 1976), 546 F2d 1059, 22 Fed R Serv 2d (Callaghan) 765*.

District court does not abuse its discretion in denying class certification where providing requested relief at level of specificity required by *Fed. R. Civ. P. 65(d)* would render class action unmanageable, either because of difficulties in determining relevant aggregate characteristics of class or because factual differences between class members require different standards of conduct for undefined groups within class. *Shook v. Bd. of County Comm'rs (10th Cir. Colo. Aug. 29, 2008), 543 F3d 597, 71 Fed R Serv 3d (Callaghan) 744*.

Once criteria of Rule 23(a) and (b)(2) were met in action for determination that minimum wage and overtime compensation provisions of Fair Labor Standards Act of 1938 (*29 USCS §§ 206*–*207*) apply to patient-workers of non-Federal institutions for mentally retarded and mentally ill, administrative difficulty would not be justification for denial of class action. *Souder v. Brennan (D.D.C. Dec. 7, 1973), 367 F Supp 808, 72 Lab Cas (CCH) P32999*.

In action sought to be maintained as class action to obtain damages and injunctive relief against defendants who allegedly released large amounts of insoluble contamination into atmosphere over city, unmanageability of claims required denial of certification as class action where there were considerable evidentiary problems necessitating that plaintiffs would have to individually establish liability of each defendant and respective roles of defendants vis-a-vis each other, and where there was immense physical task of calculating damage. *Boring v. Medusa Portland Cement Co. (M.D. Pa. 1974), 63 FRD 78*, disapproved, *Sterling v. Velsicol Chemical Corp. (6th Cir. Tenn. May 24, 1988), 11 Fed R Serv 3d (Callaghan) 213*.

Action on behalf of all black employees of nation's largest auto maker alleging discrimination in employment could not be maintained as class action because nationwide scope of class would create unmanageable difficulty; complete adjudication of plaintiff's claims would require joining as parties defendant many UAW local unions which are not now before court, and proof applicable to one of facilities would have little or no relation to proof applicable to another; class action as envisioned by plaintiff would require large number of separate trials, rather than unified proceeding contemplated under Rule 23. *Wilson v. General Motors Corp. (S.D. Ind. 1975), 21 Fed R Serv 2d (Callaghan) 730*.

Action brought for alleged violation of federal securities law and SEC Rule in connection with franchise agreements for leasing of motor vehicles was not maintainable as class action where certification as class action would overburden court's resources and, rather than acting as instrument of convenience, would create judicial monster. *Gatzke v. Owen (N.D. Miss. 1975), 69 FRD 412, 21 Fed R Serv 2d (Callaghan) 716, Fed Sec L Rep (CCH) P95434*.

Motion for class certification under *FRCP 23* is denied, where motion proposes statewide class of all persons who have been or will be terminated or denied medical benefits by state without receiving written notices adequately setting out reasons for terminations or denials and descriptions of their appeal rights, because such class would be vague and unmanageable, and state has agreed to more timely and efficient remedy of prospective relief to Medicaid recipients faced with termination of eligibility. *Rodriguez by & Through Corella v. Chen (D. Ariz. Feb. 6, 1996), 985 F Supp 1189*.

In tort suit brought by users of Paxil against manufacturer, class certification was inappropriate because, due to problems with complexity, bifurcation, and individual issues, users failed to demonstrate that manageable trial plan existed that would make class action lawsuit feasible. *In re Paxil Litig. (CD Cal 2003), 212 FRD 539*.

Consumers' renewed motion for class certification was denied where in contrast to almost 900 related personal injury actions that had been filed, consumers' action was only federal case seeking purely economic damages, and

thus, considerations of manageability argued strongly against certification. *In re Phenylpropanolamine (PPA) Prods. Liab. Litig. (W.D. Wash. Feb. 7, 2003), 214 FRD 614* (criticized in *Anderson Contr., Inc. v DSM Copolymers, Inc. (2009, Iowa) 776 NW2d 846, 2010-1 CCH Trade Cases P 76881*).

Class certification was denied in action alleging violations of *42 USCS § 256b* because county alleged not single, uniform breach but rather overcharges on numerous drugs by dozen different manufacturers, all acting independently and breadth of proposed class and vast factual permutations involved posed major concerns about case manageability. *County of Santa Clara v. Astra USA, Inc. (N.D. Cal. May 5, 2008), 257 FRD 207*.

In this action brought under Florida's Deceptive and Unfair Trade Practices Act, plaintiffs' motions for class certification were denied because (1) certifying this class would result in huge and unreasonably expensive and time-consuming undertaking to determine individualized circumstances that would burden court, defendants, and third-parties; and (2) reasonableness conclusion depended on numerous individualized inquiries that would fly in face of requirement that individual issues not predominate over those common to class. *Adelson v. U.S. Legal Support, Inc. (In re Motions to Certify Classes Against Court Reporting Firms for Charges Relating to Word Indices) (S.D. Fla. May 27, 2010), 715 F Supp 2d 1265*, aff'd, *(11th Cir. Fla. Aug. 31, 2011), 439 Fed Appx 849*.

Unpublished decision: District court did not abuse its discretion in denying class certification on due process and inadequate representation grounds; notice would have been extremely difficult, if not impossible, for proposed class of all California residents whose images appeared in defendant corporation's photography archive. *Alberghetti v. Corbis Corp. (9th Cir. Cal. Aug. 27, 2012), 476 Fed Appx 154*.

52. — —Multiple states' laws involved

Class certification under *FRCP 23* is denied, where that could involve 51 trespass statutes, 51 sets of property laws, 51 statutes of limitations, and individual by individual review of each plaintiff's claim against creators of fiber optic network, who allegedly exceeded bounds of utility easements, because court cannot see satisfactory manner in which to manage such litigation, given massive choice-of-law problem. *Oxford v. Williams Cos. (E.D. Tex. Feb. 6, 2001), 137 F Supp 2d 756*.

In action in which plaintiff purchasers brought claims against defendant corporation for violations of all of fifty states' and District of Columbia's consumer fraud and/or deceptive trade practices acts, breach of express warranty, and unjust enrichment, plaintiffs' motion for class certification was denied because classes proposed by plaintiffs were too indefinite and overbroad, or were unmanageable and individual issues of law clearly predominated over common issues, making nationwide class unmanageable. *In re McDonald's French Fries Litig. (N.D. Ill. May 6, 2009), 257 FRD 669*.

53. Conflicting or antagonistic interests

Before action may properly proceed as class action, District Court must determine that class, as defined, does not contain members with significantly conflicting interest, and District Court's responsibility to guard against conflicts of interest does not cease with initial grant of class action designation, but continues throughout proceeding. *Handwerger v. Ginsberg (2d Cir. N.Y. July 16, 1975), 519 F2d 1339, 20 Fed R Serv 2d (Callaghan) 625, Fed Sec L Rep (CCH) P95241*.

If interests of one group are antagonistic to or potentially conflicting with interests of another, former cannot represent latter in class action suit. *Burwell v. Eastern Airlines, Inc. (E.D. Va. Oct. 9, 1975), 68 FRD 495, 20 Fed R Serv 2d (Callaghan) 1226*.

Dispute within class over whether action should be pursued does not preclude class certification, as long as views of dissenting class members are adequately represented. *Christman v. Brauvin Realty Advisors, Inc. (N.D. Ill. Jan. 21, 1999), 191 FRD 142*.

54. Community or public interest

Even if plaintiffs in action against lending institutions for alleged breach of contract, unjust enrichment, usury, violation of Truth in Lending Act, and violation of Sherman Act had been able to meet provisions of Rule 23, it was possible that interest of community would be sufficient, in itself, to preclude class action, where large class action recovery could have deleterious effect on area lending market at time when community could least afford it. *Graybeal v. American Sav. & Loan Asso. (D.D.C. 1973), 59 FRD 7, 17 Fed R Serv 2d (Callaghan) 314, 1973-1 Trade Cas (CCH) P74469*.

Class consisting of anyone residing or owning property in village was certified because alleged arsenic contamination affected entire village, constituted standardized conduct, and established common nucleus of facts. *Ludwig v. Pilkington N. Am., Inc. (N.D. Ill. Nov. 3, 2003), 2003 US Dist LEXIS 19814*.

In action for price fixing filed by car purchasers against car dealerships and others in geographic area, where purchasers sought class certification, court considered public interest in litigation and fact that if certification was not granted case would probably not proceed. *In re Mercedes-Benz Antitrust Litig. (D.N.J. Feb. 19, 2003), 213 FRD 180, 2003-1 Trade Cas (CCH) P73964, 60 Fed R Evid Serv (CBC) 1530*.

55. Propinquity

Rule 23 of Federal Rules of Civil Procedure does not limit geographical scope of class action that is brought in conformity with Rule; scope of injunctive relief is dictated by extent of violation established, not by geographical extent of plaintiff class; when asked to certify nationwide class, Federal District Court must take care to ensure that nationwide relief is appropriate in case before it, and that certification of such class would not improperly interfere with litigation of similar issues in other judicial districts. *Califano v. Yamasaki (U.S. June 20, 1979), 442 US 682, 99 S Ct 2545, 61 L Ed 2d 176*.

There is no propinquity requirement in Rule 23, and although fact that class is widespread geographically and named plaintiffs are from very limited segment of class might bear on their ability to adequately represent class, it has nothing to do with court's jurisdiction to entertain relief with respect to matters which affect class. *Rosado v. Wyman (E.D.N.Y. Oct. 27, 1970), 322 F Supp 1173, 14 Fed R Serv 2d (Callaghan) 842*, aff'd, *(2d Cir. N.Y. Dec. 21, 1970), 437 F2d 619, 14 Fed R Serv 2d (Callaghan) 1073*.

Rule 23 sets no geographical or numerical limit as such on scope of class. *Percy v. Brennan (S.D.N.Y. Nov. 8, 1974), 384 F Supp 800, 8 Empl Prac Dec (CCH) P9799, 19 Fed R Serv 2d (Callaghan) 659*.

56. Defendant classes

If general and specific requirements of Rule 23 can be met, fact that class is defendant class is not independent ground for opposing maintenance of class action. *Research Corp. v. Pfister Associated Growers, Inc. (N.D. Ill. June 16, 1969), 301 F Supp 497, 13 Fed R Serv 2d (Callaghan) 492, 1969 Trade Cas (CCH) P72971* (ovrld on other grounds by *Felzen v Andreas (1998, CA7 Ill) 134 F3d 873, 39 FR Serv 3d 852*).

Rule 23 sets forth requirements which must be met for class certification, making no distinction between plaintiff and defendant classes. *Lynch Corp. v. MII Liquidating Co. (D.S.D. 1979), 82 FRD 478, 29 Fed R Serv 2d (Callaghan) 322*.

In defendant class actions, it is preferable and perhaps even necessary to certify class under either Rule 23(b)(1) or Rule 23 (b)(2) rather than under Rule 23(b)(3), to avoid possibility that defendant class members may opt out of class as is allowed under Rule 23 (b)(3) *Oneida Indian Nation v. New York (N.D.N.Y. Mar. 5, 1980), 85 FRD 701*.

Before defendant class will be certified, requisite juridical link must inhere in specific conduct at issue, not in some irrelevant aspect of proposed class members' relationship. *Coleman v. McLaren (N.D. Ill. July 14, 1983), 98 FRD 638, 38 Fed R Serv 2d (Callaghan) 910*.

Although defendant class certification occurs relatively infrequently, there is no question but that procedure is available where all requirements of Rule 23 are met. *Northwestern Nat'l Bank v. Fox & Co. (S.D.N.Y. May 14, 1984), 102 FRD 507, 39 Fed R Serv 2d (Callaghan) 390*.

It is simply untenable to apply market share liability, with its requirement of narrowest possible geographic market, to class action consisting of members whose activities cover entire state. *Kelecseny v. Chevron, U.S.A., Inc. (S.D. Fla. Nov. 25, 2009), 262 FRD 660*.

57. —Due process concerns

Where relief sought was essentially monetary in nature, due process did not allow non-named class plaintiffs' claims under *Fed. R. Civ. P. 23(b)(2)*, in original suit to be precluded in absence of notice of litigation; however, judgment granting summary judgment in favor of government on claims was affirmed as binding precedent. *Beer v. United States (Fed. Cir. Feb. 17, 2012), 671 F3d 1299*, vacated, in part, *(Fed. Cir. May 18, 2012), 468 Fed Appx 995*.

Defendant class differs in vital respects from class of plaintiffs and raises immediate due process concerns; defendant class should be certified only after careful attention to safeguards of adequacy or representation and notice. *Marchwinski v. Oliver Tyrone Corp. (W.D. Pa. Jan. 18, 1979), 81 FRD 487, 20 Empl Prac Dec (CCH) P30093, 1979-2 Trade Cas (CCH) P62872*.

Defendant class may be certified if maintenance of class action is not contrary to due process; defendant class should not be certified unless each named plaintiff has colorable claim against each defendant class member; defendant class should not be certified under Rule 23(b)(3) without clear showing that common questions do in fact predominate over individual issues; requirement that each named plaintiff must have claim against each defendant may be waived where defendant members are related by conspiracy or some legal relationship which links all defendants in way such that single resolution of dispute is preferred to multiplicity of similar actions. *Thillens, Inc. v. Community Currency Exchange Asso. (N.D. Ill. Apr. 14, 1983), 97 FRD 668, 36 Fed R Serv 2d (Callaghan) 657, 1983-2 Trade Cas (CCH) P65579* (criticized in *Popoola v MD-Individual Practice Ass'n (2005, DC Md) 230 FRD 424*).

Due process concerns not inherent in plaintiff class action arise when defendant class is to be certified; these concerns arise because plaintiff initially selects representatives of defendant class and because representative thus selected is more often than not unwilling to undertake representation, but concerns are necessarily resolved when court determines adequacy of representation under Rule 23(a)(4). *McBirney v. Autrey (N.D. Tex. May 31, 1985), 106 FRD 240, 1 Fed R Serv 3d (Callaghan) 1486, Fed Sec L Rep (CCH) P92256*.

Because certification of defendant class raises due process issues not encountered in context of plaintiff class, defendant class generally should not be certified unless each member of plaintiff class has claim against each member of defendant class; however, this requirement may be waived where members of proposed defendant class are related by juridical link (some independent legal relationship which relates all defendants in way such that single resolution of dispute is preferred to multiplicity of similar actions). *Monaco v. Stone (E.D.N.Y. Mar. 10, 1999), 187 FRD 50*.

58. —Elections and voting

In action brought by black citizens of Alabama against county officials across state alleging that officials appoint disproportionately too few black persons as poll officials in violation of Voting Rights Act of 1965, court would certify defendant class where class, consisting of approximately 198 officials, is too numerous for joinder, and where claim of diminished black voter access to polls due to underrepresentation of black poll officials is based on statewide circumstances, so that any defenses to claim would be state-wide, and would be common and typical for all members of class; further, court is convinced that there is adequate representation for class and that relief described by court is for most part appropriate and applicable to defendant class as whole. *Harris v. Graddick (M.D. Ala. Aug. 1, 1984), 593 F Supp 128*, disapproved, *Chisom v. Roemer (5th Cir. La. Aug. 19, 1988), 853 F2d 1186*.

Defendant classes of (1) appellate court judges, (2) city-only circuit court judges, (3) suburb-only circuit court judges, (4) county-wide circuit court judges, and (5) candidates in next judicial election are certified pursuant to Rule 23(b)(3) in Voting Rights Act (*42 USCS §§ 1973* et seq.) challenge to county judicial election systems, where all sitting judges are necessary parties to lawsuit, because notice should be sent to each member of defendant classes to inform them of their 3 options regarding participation in case, since some individual judges or candidates may have conflicts of interest or desire to be individually represented by counsel. *Williams v. State Bd. of Elections (N.D. Ill. Aug. 30, 1988), 696 F Supp 1574*.

59. —Securities, stocks and bonds

District Court will not certify defendant class of underwriters in action brought by purchasers of stock pursuant to § 12(2) of Securities Act of 1933 (*15 USCS § 77l*(2)) unless important legal relationship uniting defendant underwriters and justifying class treatment is shown to exist; defendant class may not be certified simply on ground that underwriters distributed identical printed matter to securities purchasers. *Akerman v. Oryx Communications, Inc. (S.D.N.Y. Sept. 20, 1984), 609 F Supp 363, Fed Sec L Rep (CCH) P91680*, aff'd in part, *(2d Cir. N.Y. Jan. 26, 1987), 810 F2d 336, 6 Fed R Serv 3d (Callaghan) 1136, Fed Sec L Rep (CCH) P93101*.

In class action alleging violations of federal securities laws as well as common law fraud and negligent misrepresentation, where named plaintiff sought to certify class of defendant underwriters, District Court held that certification of defendant class pursuant to Rule 23(b)(3) was desirable and court was not persuaded by defendants' argument that "opt out" provision would render certification meaningless, since plaintiffs indicated they would not hesitate to join each underwriter as named defendant if court did not certify class and since defendants would not necessarily gain financial benefit by opting out since by remaining in lawsuit they could retain some control of litigation at minimal cost. *In re Lilco Sec. Litigation (E.D.N.Y. Aug. 25, 1986), 111 FRD 663, Fed Sec L Rep (CCH) P92911*.

60. —Other particular cases

Spectator who is injured at theatrical event may bring action against class of defendants consisting of individual members of unincorporated association which sponsored event, where defendant class representative will fairly and adequately protect interest of class members, court will insure that all defendants are given adequate notice of action and opportunity to present individual defenses, and any defendant who is denied due process will be entitled to have adverse judgment set aside or reversed on appeal. *Kerney v. Ft. Griffin Fandangle Asso. (5th Cir. Tex. Aug. 22, 1980), 624 F2d 717, 30 Fed R Serv 2d (Callaghan) 79* (criticized in *Richmond v Chater (1996, CA7 Ill) 94 F3d 263, 51 Soc Sec Rep Serv 563, CCH Unemployment Ins Rep P 15605B*).

Where in action under Rule 23 court limits plaintiff class to those persons for whom cause of action arose during certain time period, defendant class is not automatically limited to those persons acting within corresponding time period. *In re Nissan Motor Corp. Antitrust Litigation (S.D. Fla. Apr. 25, 1977), 430 F Supp 231, 1977-1 Trade Cas (CCH) P61410*.

In class action challenging constitutionality of state "head shop" law, defendants may be certified upon stipulation of parties as class representatives for state sheriffs and attorneys seeking to enforce law, where defendant class certification is only for limited purpose of restraint by injunction. *Florida Businessmen for Free Enterprise v. Florida (N.D. Fla. Sept. 30, 1980), 499 F Supp 346*, aff'd, *(11th Cir. Fla. Apr. 23, 1982), 673 F2d 1213*.

In action by plaintiffs alleging that commissioner of New York Department of Social Services (DSS) directed local DSS agencies to deduct payments made under Home Energy Assistance Program (HEAP) from amount of "additional fuel allowances" that qualified recipients should receive, all in violation of New York law, where plaintiffs sought to certify defendant class pursuant to Rule 23 consisting of all County Commissioners of Social Services Districts in New York state with proposed representatives, District Court found that one named defendant was adequate representative of proposed class in spite of fact that named defendant presented unique defense by claiming that his office ignored state's instructions since District Court found that no conflicts existed between named defendant and remainder of defendant class. *DeAllaume v. Perales (S.D.N.Y. Apr. 25, 1986), 110 FRD 299*.

Where representative of plaintiff class attempted to certify defendant class pursuant to Rule 23 in action alleging that members of defendant class failed to pay members of plaintiff music publisher class for defendants' reproductions of music without obtaining proper licenses, District Court dismissed class action allegations in complaint since defendant's industry-wide policy of circumventing uniform statutory scheme for copyright licensing did not fall within juridical link exception to typicality requirement, which was not otherwise satisfied. *Angel Music, Inc. v. ABC Sports, Inc. (S.D.N.Y. Aug. 8, 1986), 112 FRD 70*.

Fact that each member of plaintiff class, those persons who are judgment debtors and are subject to having their wages garnished through CPLR §§ 5230 and 5231, cannot maintain action against each member of proposed defendant class, "enforcement officer class," consisting of those empowered to enforce income executions upon earnings of judgment debtors, does not preclude certification of defendant class where members of proposed defendant class are related by "judicial link," since all members of proposed class are related in such way that single resolution of plaintiffs' claims is preferable to countless number of similar actions. *Follette v. Vitanza (N.D.N.Y. Mar. 27, 1987), 658 F Supp 492*, modified, *(N.D.N.Y. Apr. 24, 1987), 658 F Supp 514, 107 Lab Cas (CCH) P34976*.

Heirs who claimed ownership of art collection that was expropriated from their ancestor in Austria during World War II were not entitled to *Fed. R. Civ. P. 23* certification of defendant class and subclasses consisting of individuals, museums, art dealers, and others involved with artworks that were part of ancestor's estate; class and subclasses were not ascertainable, and Rule 23(a) prerequisites of numerosity, typicality, and adequate representation were not met. *Bakalar v. Vavra (S.D.N.Y. July 28, 2006), 237 FRD 59*.

Certification of defendant class is not unnecessary where hundreds of individual state actors, properly accustomed to exercising their prosecutorial discretion, might choose to disregard non-binding ruling from federal court. *Tex. Med. Providers Performing Abortion Servs. v. Lakey (W.D. Tex. Aug. 30, 2011), 806 F Supp 2d 942*, vacated, in part, *(5th Cir. Tex. Jan. 10, 2012), 667 F3d 570*.

61. Court of Federal Claims

Although existence of power in Court of Claims to adopt rule equivalent to Rule 23 would not mean that court had to or should do so, and although practice in class suits, including prescription of standards for giving actions such characterization was still flexible and open in forum, Court of Claims, in determining whether action might proceed as class suit, would use some of criteria of Rule 23. *Quinault Allottee Asso., etc. v. United States (Ct. Cl. Jan. 21, 1972), 453 F2d 1272, 15 Fed R Serv 2d (Callaghan) 1010*.

Rule 23 is not binding on United States Court of Claims, and although such court regards "requirements" of Rule 23 as merely "criteria," such does not diminish their persuasiveness in appropriate cases. *Crone v. United States (Ct. Cl. July 9, 1976), 538 F2d 875, 21 Fed R Serv 2d (Callaghan) 1291*.

62. Burden of proof

In U.S. Circuit Court for Second Circuit, preponderance of evidence standard applies to evidence proffered to establish requirements of *Fed. R. Civ. P. 23*. *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc. (2d Cir. N.Y. Oct. 14, 2008), 546 F3d 196, Fed Sec L Rep (CCH) P94878*).

Decision to certify class calls for findings by court, not merely "threshold showing" by party, that each requirement of *Fed. R. Civ. P. 23* is met; factual determinations supporting Rule 23 findings must be made by preponderance of evidence. *In re Hydrogen Peroxide Antitrust Litig. (3d Cir. Pa. Dec. 30, 2008), 552 F3d 305, 2008-2 Trade Cas (CCH) P76453* (criticized in *Fogarazzo v Lehman Bros. (2009, SD NY) 263 FRD 90*) and (criticized in *Jackson v Unocal Corp. (2011, Colo) 262 P3d 874, 175 OGR 313*) and (criticized in *Gooch v Life Investors Ins. Co. of Am. (2012, CA6 Tenn) 672 F3d 402, 81 FR Serv 3d 832, 2012 FED App 39P*) and (criticized in *Kamakahi v Am. Soc'y for Reprod. Med. (2015, ND Cal) 2015-1 CCH Trade Cases P 79060*).

Burden of establishing propriety of class certification falls on moving party. *Briggs v. Brown & Williamson Tobacco Corp. (E.D. Va. May 19, 1976), 414 F Supp 371, 12 Empl Prac Dec (CCH) P11036*.

Before plaintiff moves for class certification, defendant may test propriety of action by motion for denial of class certification; however, even where defendant moves for denial of class certification before plaintiff has sought certification, burden of establishing propriety of class action remains with plaintiff. *Parker v. Time Warner Entertainment Co., L.P. (E.D.N.Y. Jan. 9, 2001), 198 FRD 374*, vacated, *(2d Cir. N.Y. June 2, 2003), 331 F3d 13, 55 Fed R Serv 3d (Callaghan) 791*.

In putative class action, party seeking class certification bears burden of proof of showing propriety of class action. *Abby v. City of Detroit (E.D. Mich. Oct. 29, 2003), 218 FRD 544, 57 Fed R Serv 3d (Callaghan) 659*.

63. Relief sought

Depending on precise terms of relief sought, injunction class action suit governed by *Fed. R. Civ. P. 23(b)(2)* might avoid adequacy issues that class action suit for damages, which would be governed by *Fed. R. Civ. P. 23(b)(3)*, would present; it's easier for named plaintiff to prove he's adequate class representative in injunctive action because usually there is less variance in injunctive relief sought for members of class than in damages sought. *Randall v. Rolls-Royce Corp. (7th Cir. Ind. Mar. 30, 2011), 637 F3d 818, 79 Fed R Serv 3d (Callaghan) 84, 161 Lab Cas (CCH) P35889*.

Rule 23 is not intended to apply where injunctive relief and damages sought as to various members of class is diverse. *William Goldman Theatres, Inc. v. Paramount Film Distributing Corp. (E.D. Pa. 1969), 49 FRD 35, 14 Fed R Serv 2d (Callaghan) 79, 1970 Trade Cas (CCH) P73211*.

Class action is especially efficacious in actions where there is common question of law and relief is sought with respect to class as whole. *Poe v. Menghini (D. Kan. Mar. 13, 1972), 339 F Supp 986, 16 Fed R Serv 2d (Callaghan) 1020*.

Class action is not appropriate where same relief could be afforded without its use. *Flores v. Kelley (D. Ind. 1973), 61 FRD 442*.

64. Miscellaneous

Operation of Rule 23 is confined to suits of civil nature in federal courts and has no application to class actions in administrative proceeding where court proceeding has yet to be initiated. *Pennsylvania by Sheppard v. Nat'l Ass'n of Flood Insurers (3d Cir. Pa. June 13, 1975), 520 F2d 11, 20 Fed R Serv 2d (Callaghan) 601*, overruled in part, *Pennsylvania v. Porter (3d Cir. Pa. July 30, 1981), 659 F2d 306, 9 Fed R Evid Serv (CBC) 1062*.

Where there is possible variance in factual situations, and where statute may be unconstitutional as applied to certain members of purported class and yet may be constitutional as applied to others, class action treatment may be inappropriate. *Bond v. Dentzer (N.D.N.Y. Apr. 16, 1971), 325 F Supp 1343*.

Numerosity requirement of Rule 23(a)(1) is important consideration, but other factors, including nature of cause of action and location of members of class bear on propriety of class action; where identity or location of many class members is unknown and total membership of group is indeterminable at time of institution of action, class action is appropriate. *Davy v. Sullivan (M.D. Ala. Feb. 16, 1973), 354 F Supp 1320, 17 Fed R Serv 2d (Callaghan) 1157*.

Litigation on behalf of national class over nationally employed policy affecting all class members in similar fashion is well-suited to class action adjudication. *Burwell v. Eastern Airlines, Inc. (E.D. Va. Oct. 9, 1975), 68 FRD 495, 20 Fed R Serv 2d (Callaghan) 1226*.

Sixth Circuit has conclusively rejected view of Seventh Circuit that class certification is mandatory if requisites of Rule 23 are met. *Drumright v. Padzieski (E.D. Mich. Aug. 22, 1977), 436 F Supp 310*.

Financial ability of named plaintiffs is generally irrelevant to issue of propriety of class certification; requiring proof of vast financial resources from putative class representative contravenes policy underlying Rule 23 to enable individuals of modest means to vindicate legal rights. Klein v Checker Motors Corp. (1979, ND Ill) 27 Fed Rules Serv 2d 1375.

"Agreeing" to litigate on classwide basis is not available litigation option; class certification is reserved to court and court alone. *Fanning v. AcroMed Corp. (In re Orthopedic Bone Screw Prods. Liab. Litig.) (E.D. Pa. Oct. 17, 1997), 176 FRD 158*, aff'd, *(3d Cir. Pa. Nov. 24, 2003), 350 F3d 360, CCH Prod Liab Rep P16822, 57 Fed R Serv 3d (Callaghan) 274*.

In ruling on motion for class certification, courts do not look to whether plaintiffs have stated claim or will prevail on merits of case, but whether they have met requirements of *Fed. R. Civ. P. 23*. *Almendares v. Palmer (N.D. Ohio July 16, 2004), 222 FRD 324*.

To deny class action simply because all of allegations of class do not fit together like pieces in jigsaw puzzle would destroy much of utility of *Fed. R. Civ. P. 23*; therefore, it seems beyond peradventure that Second Circuit's general preference is for granting, rather than denying, class certification. *Cortigiano v. Oceanview Manor Home for Adults (E.D.N.Y. Apr. 4, 2005), 227 FRD 194, 61 Fed R Serv 3d (Callaghan) 456*.

2. Particular Cases

a. In General

65. Abortion

Action by physicians and abortion clinic seeking declaratory judgment as to constitutionality of state abortion clinic law and rules promulgated thereunder is clearly appropriate for Rule 23 class action treatment. *Florida Women's Medical Clinic v. Smith (S.D. Fla. Aug. 31, 1979), 478 F Supp 233*.

Class certification is granted for physicians, health care providers and facilities which provide abortion services since, in cases which involve sensitive and highly personal matters, reasons for certification become more substantial and class action assures anonymity and prevents chilling effect associated with public exposure concerning abortions, and also provides fluid membership which guarantees case or controversy. *Reproductive Health Services v. Webster (W.D. Mo. Mar. 17, 1987), 662 F Supp 407*, aff'd in part and rev'd in part, *(8th Cir. Mo. July 13, 1988), 851 F2d 1071*.

Plaintiffs challenging constitutionality, of Missouri abortion statute are granted class certification where (1) number of health care providers, facilities and pregnant females in state is sufficiently numerous, (2) issues are sufficiently common to members of class, (3) claims of representative parties are typical of class, (4) there are no apparent conflicts with interests of named plaintiffs and rest of class, and (5) case is appropriate for Rule 23(b)(2) class as defendant has acted on grounds generally applicable to all members of class and final injunctive and declaratory relief would be appropriate remedy. *Reproductive Health Services v. Webster (W.D. Mo. Mar. 17, 1987), 662 F Supp 407*, aff'd in part and rev'd in part, *(8th Cir. Mo. July 13, 1988), 851 F2d 1071*.

In case challenging informed-consent-to-abortion provisions, court certified plaintiff class consisting of all medical providers who performed abortion services in Texas currently and/or in future and defendant class consisting of all county and district attorneys in State of Texas with authority to prosecute misdemeanors. *Tex. Med. Providers Performing Abortion Servs. v. Lakey (W.D. Tex. Aug. 30, 2011), 806 F Supp 2d 942*, vacated, in part, *(5th Cir. Tex. Jan. 10, 2012), 667 F3d 570*.

66. Admiralty and maritime

Action to recover salvage award was properly brought by shipowner on its own behalf and on behalf of master and crew of vessel, and action was not subject to Rule 23. *St. Paul Marine Transp. Corp. v. Cerro Sales Corp. (9th Cir. Haw. Sept. 13, 1974), 505 F2d 1115, 19 Fed R Serv 2d (Callaghan) 231*.

Class action might be permissible in admiralty action, even though at time suit was brought there was no admiralty rule similar to Rule 23, in light of provisions of Rule 1 that Federal Rules govern procedure in District Courts in all suits of civil nature whether cognizable as cases at law, or in equity, or in admiralty, with exception stated in Rule 81. *Fowles v. American Export Lines, Inc. (S.D.N.Y. June 13, 1969), 300 F Supp 1293*, aff'd, *(2d Cir. N.Y. Nov. 3, 1971), 449 F2d 1269*.

67. Airports and aircraft, generally

Court did not abuse its discretion in refusing to certify proposed class of over 300,000 persons in airport-noise case since, like other airport-noise cases in which courts have routinely declined to certify classes, magnitude of any effect on residential owners depends on topography, flight patterns, and many other variables, and homeowners who want to sell to businesses may benefit from extra flights and so oppose homeowners differently situated. *Bieneman v. Chicago (7th Cir. Ill. Dec. 13, 1988), 864 F2d 463, 12 Fed R Serv 3d (Callaghan) 807*, cert. denied, *(U.S. May 22, 1989), 490 US 1080, 109 S Ct 2100, 104 L Ed 2d 661*.

Rule 23 was not promulgated for purpose of creating vehicle for state causes of action against airline and aircraft manufacturer in federal forum. *Hobbs v. Northeast Airlines, Inc. (E.D. Pa. 1970), 50 FRD 76, 14 Fed R Serv 2d (Callaghan) 62*.

68. Aliens and immigration

Alien's motion for certification of class consisting of aliens detained under *8 USCS §§ 1226*, *1225(b)*, or *1231(a)* for prolonged period without bond hearing should have been granted because class members shared common question, whether their detentions violated due process, and other requirements of *Fed. R. Civ. P. 23* were met. *Rodriguez v. Hayes (9th Cir. Cal. Jan. 4, 2010), 591 F3d 1105*.

Rule 23 is device sufficiently subtle for use in cases involving immigration matters. *Fernandez-Roque v. Smith (N.D. Ga. Apr. 28, 1982), 539 F Supp 925*.

69. Antitrust

Congress has given private citizens rights of action for injunctive relief and damages for antitrust violations without regard to amount in controversy, and Rule 23 provides for class actions which may enhance efficacy of private actions by permitting citizens to combine their limited resources to achieve more powerful litigation posture. *Hawaii v. Standard Oil Co. (U.S. Mar. 1, 1972), 405 US 251, 92 S Ct 885, 31 L Ed 2d 184* (criticized in *In re Mental Health of K.G.F. (2001) 2001 MT 140, 306 Mont 1, 29 P3d 485*).

Rule 23 was not intended to permit redress for all wrongs committed under antitrust laws, and basic requirements of Rule 23 must be established before there can be class certification. *Philadelphia v. American Oil Co. (D.N.J. 1971), 53 FRD 45, 15 Fed R Serv 2d (Callaghan) 289, 1971 Trade Cas (CCH) P73625*.

Rule 23 provides small claimants with forum in which to seek redress for alleged large scale anti-trust violations. *Cotchett v. Avis Rent A Car System, Inc. (S.D.N.Y. 1972), 56 FRD 549, 16 Fed R Serv 2d (Callaghan) 1023, 1972 Trade Cas (CCH) P74244*.

There is no judicial policy which removes antitrust suits as matter of course from within province of Rule 23. *San Antonio Tel. Co. v. American Tel. & Tel. Co. (W.D. Tex. 1975), 68 FRD 435, 1975-2 Trade Cas (CCH) P60421*.

Class action lawsuit may be most fair and efficient means of enforcing law where anti-trust violations have been continuous, widespread, and detrimental to as yet unidentified consumers and is often only way in which

consumers would know of their rights at all, let alone have forum for their vindication, hence this view dictates that any doubts are to be resolved in favor of granting certification where classes' interests coincide with public interest. *Coleman v. Cannon Oil Co. (M.D. Ala. Jan. 30, 1992), 141 FRD 516*.

Because of important role that class actions play in private enforcement of antitrust statutes, courts should resolve doubts about whether class should be created in favor of certification. *In re Industrial Diamonds Antitrust Litig. (S.D.N.Y. July 10, 1996), 167 FRD 374, 36 Fed R Serv 3d (Callaghan) 744, 1996-2 Trade Cas (CCH) P71548*.

70. —Price-fixing

Antitrust price-fixing cases are particularly suitable for class action treatment, in spite of fact that injury and amount of damages may require individual proof by class members. *Alabama v. Blue Bird Body Co. (M.D. Ala. 1976), 71 FRD 606, 1976-2 Trade Cas (CCH) P61089*, aff'd in part and rev'd in part, *(5th Cir. Ala. May 22, 1978), 573 F2d 309, 25 Fed R Serv 2d (Callaghan) 622, 1978-1 Trade Cas (CCH) P62041*.

Antitrust actions, which allege that number of people have been injured by price fixing conspiracy, are particularly appropriate for class action treatment, since aggregate injury typically is great, but cost of litigation makes separate prosecution of individual claims economically unfeasible. *Law v. NCAA (D. Kan. May 10, 1996), 167 FRD 178, 1996-2 Trade Cas (CCH) P71517*.

Class of customers charging antitrust violations such as price-fixing by ready-mix concrete sellers under § 1 of Sherman Act, *15 USCS § 1*, and claiming damages under §§ 4 and 16 of Clayton Act, *15 USCS §§ 15* and *26*, won class certification because they established existence of all of elements detailed in *Fed. R. Civ. P. 23(a)* and *(b)* including numerosity, commonality, typicality and adequacy. *In re Ready-Mixed Concrete Antitrust Litig. (S.D. Ind. Sept. 9, 2009), 261 FRD 154, 74 Fed R Serv 3d (Callaghan) 702, 2009-2 Trade Cas (CCH) P76745, 80 Fed R Evid Serv (CBC) 864*.

In antitrust action involving allegations of price-fixing conspiracy in market for titanium dioxide (TiO2), plaintiffs' motion for class certification was granted under *Fed. R. Civ. P. 23*, because they sufficiently pled numerosity as to purchasing from defendant suppliers and sufficiently alleged multi-year price-fixing conspiracy that led to all class members being subjected to artificially inflated prices for TiO2. *In re Titanium Dioxide Antitrust Litig. (D. Md. Aug. 28, 2012), 284 FRD 328, 2012-2 Trade Cas (CCH) P78044*.

71. —Treble damages

In antitrust suits in which individual claims are substantial, treble damage provisions apply, and attorneys' fees are available, class action certification is not necessary to success of suit. *Yanai v. Frito Lay, Inc. (N.D. Ohio 1973), 61 FRD 349, 18 Fed R Serv 2d (Callaghan) 1031, 1974-2 Trade Cas (CCH) P75300*.

Court rejects contention that *USCS Rules of Civil Procedure, Rule 23* cannot be applied to antitrust treble damage actions. *In re Folding Carton Antitrust Litigation (N.D. Ill. 1977), 75 FRD 727, 23 Fed R Serv 2d (Callaghan) 1033, 1977-2 Trade Cas (CCH) P61596*.

In multidistrict antitrust litigation involving 6 parens patriae actions and 2 private treble damages actions against automobile distributorships, temporary settlement class will be determined in parens patriae actions between purchases of certain 1980 automobiles in mid-Atlantic region who are not natural persons who have since moved from such region or previously opt out of action where class fulfills all requisites of class action rule. *In re Mid-Atlantic Toyota Antitrust Litigation (D. Md. May 27, 1983), 564 F Supp 1379, 1983-1 Trade Cas (CCH) P65409*.

In multidistrict antitrust litigation involving 6 parens patriae actions and 2 private treble damages actions against automobile distributorships, temporary settlement class will be determined in parens patriae actions between purchases of certain 1980 automobiles in mid-Atlantic region who are not natural persons who have since moved from such region or previously opt out of action where class fulfills all requisites of class action rule. *In re Mid-Atlantic Toyota Antitrust Litigation (D. Md. May 27, 1983), 564 F Supp 1379, 1983-1 Trade Cas (CCH) P65409*.

72. —Other particular cases

District court did not abuse its discretion in denying class certification in antitrust action which presented clear choice between "test case" and class action in view of plaintiff's manifested intention to continue her litigation in face of denial of class certification; since complaint requested injunctive relief, plaintiff's success on merits would obtain for potential class members prospective relief available through class action mechanism as well as eliminating any violation of antitrust laws, and res judicata effect of finding that defendant's conduct was illegal would leave potential class members in position to avail themselves of damage remedy. *Bogus v. American Speech & Hearing Asso. (3d Cir. Pa. July 19, 1978), 582 F2d 277, 25 Fed R Serv 2d (Callaghan) 1431, 1978-2 Trade Cas (CCH) P62162*.

Antitrust plaintiffs who sought class certification pursuant to *Fed. R. Civ. P. 23* advanced theory of impact on indirect purchasers that was both novel and complex; therefore, district court was required to engage in searching inquiry into viability of that theory and existence of facts necessary for theory to succeed. *Brown v. Am. Honda (In re New Motor Vehicles Canadian Exp. Antitrust Litig.) (1st Cir. Me. Mar. 28, 2008), 522 F3d 6, 2008-1 Trade Cas (CCH) P76100*, overruled in part as stated in , *Astrazeneca AB v. UFCW (In re Nexium Antitrust Litig.) (1st Cir. Mass. Jan. 21, 2015), 777 F3d 9, 90 Fed R Serv 3d (Callaghan) 1100, 2015- Trade Cas (CCH) P79035* (criticized in *Dukes v Wal-Mart Stores, Inc. (2010, CA9 Cal) 603 F3d 571, 109 BNA FEP Cas 15, 93 CCH EPD P 43872, 76 FR Serv 3d 928*) and (criticized in *Cancino v Yamaha Motor Corp., U.S.A. (2010, SD Ohio) 2010 US Dist LEXIS 76645*) and (Overruled in part as stated in *Astrazeneca AB v UFCW (In re Nexium Antitrust Litig.) (2015, CA1 Mass) 777 F3d 9, 113 USPQ2d 1719, 2015 CCH Trade Cases P 79035*) and (criticized in *Kamakahi v Am. Soc'y for Reprod. Med. (2015, ND Cal) 2015-1 CCH Trade Cases P 79060*).

Notwithstanding contention that it would be unjust to allow class action for penalty because it would bankrupt defendant and overcompensate class, plaintiffs would be entitled to class action treatment under state civil anti-monopoly statute authorizing recovery for actual damages and, in addition thereto, sum of $500. *Alabama Optometric Asso. v. Alabama State Bd. of Health (M.D. Ala. July 26, 1974), 379 F Supp 1332, 1974-2 Trade Cas (CCH) P75226*.

Highly individualized proof generally required to meet requirements of § 2(a) of Robinson-Patman Act (*15 USCS § 13(a)*) and § 4 of Clayton Act (*15 USCS § 15*) presents barrier to class certification under Rule 23. *O'Connell v. Citrus Bowl, Inc. (E.D.N.Y. Sept. 9, 1983), 99 FRD 117, 1983-2 Trade Cas (CCH) P65703*.

District Court properly denies motion to certify plaintiff class consisting of all persons who receive home delivery of newspaper published by defendant in antitrust action premised upon defendant's refusal to provide subscribers with home delivery of its daily newspapers unless subscribers also purchase Sunday edition, where, because charge for allegedly tied product (i.e., Sunday edition) is not equal to or greater than its fair market value, injury in fact must be premised upon showing that plaintiffs are being forced to pay for unwanted product, and where subscribers who desire to obtain Sunday edition are likely to perceive package price as benefit, retention of which might be threatened by successful prosecution of action. *Cutler v. Lewiston Daily Sun (D. Me. June 17, 1985), 611 F Supp 746, 1985-2 Trade Cas (CCH) P66657*.

Buyers' motion for class certification in their antitrust action brought under §§ 1 and 2 of Sherman Act, *15 USCS §§ 1* and *2*, and *§§ 4* and *16* of Clayton Act, *15 USCS §§ 15(a)* and *26*, was granted because buyers had set forth sufficient evidence and plausible theory to show they could be able to prove by class-wide evidence that one of manufacturer's artificial absence from U.S. market did impact all buyers of microcrystalline cellulose. *In re Microcrystalline Cellulose Antitrust Litig. (E.D. Pa. Aug. 13, 2003), 218 FRD 79*.

Indirect purchasers of prescription drug were allowed to amend their complaint to add claim under New York's Donnelly Act. *N.Y. Gen. Bus. Law § 340(6)* did not act to bar indirect purchaser liability where there was pending direct purchaser federal antitrust litigation; furthermore, given stage of discovery, and fact that defendants had not yet filed their oppositions to class certification, amendment would not unfairly prejudice defendants. *In re Wellbutrin XL Antitrust Litig. (E.D. Pa. Dec. 21, 2010), 756 F Supp 2d 670, 2011-2 Trade Cas (CCH) P77582*.

In antitrust suit, widespread injury to class under Fed. R. Civ. P. 23 could not be proven through common evidence; some shoppers might have paid more for their products than they would have without merger of stores, while others might have paid less—depending upon what mix of products each purchased; determining what proportion of shoppers suffered net harm due to price movements caused by merger therefore required analysis of each putative class member's purchases during class period and amount by which price of each product changed as result of merger. Kottaras v. Whole Foods Mkt., Inc. (D.D.C. Jan. 30, 2012), 281 FRD 16, 81 Fed R Serv 3d (Callaghan) 921, 2012-1 Trade Cas (CCH) P77793.

73. Bankruptcy

First opportunity claimant has to move to invoke Rule 23 occurs when objection is made to proof of claim; prior to that, invocation of Rule 23 procedures would not be right because there is neither adversary proceeding nor contested matter. In re Charter Co. (1989, CA11 Fla) 876 F2d 866, 19 BCD 1008, CCH Bankr L Rptr P 73248, 99 ALR Fed 839, cert dismd *(1990) 496 US 944, 110 S Ct 3232, 110 L Ed 2d 678* and (criticized in Kahler v FirstPlus Fin., Inc. (In re FirstPlus Fin., Inc.) (2000, BC ND Tex) 248 BR 60, 36 BCD 1) and (criticized in In re Ephedra Prods. Liab. Litig. (2005, SD NY) 329 BR 1) and (criticized in In re Musicland Holding Corp. (2007, BC SD NY) 362 BR 644, 47 BCD 259) and (criticized in In re Motors Liquidation Co. (2011, BC SD NY) 447 BR 150, 54 BCD 59).

In appropriate situations, class action may be maintained in bankruptcy proceeding; however, creditor of bankrupt seeking order impressing trust on assets of debtor, which it purchased out of funds received from donors who purchased annuity contract, is not able to proceed by way of class action because class action would result in direct conflict with Bankruptcy Act which requires that creditors file proof of claim in order to participate; permitting one party representing class to file single claim on behalf of all members of class would, in effect, allow such creditors to participate and to share in distribution without fulfilling statutory requirements. Re Society of Divine Savior (1971, ED Wis) 15 Fed Rules Serv 2d 294.

State court certified class still had to comply with Fed. R. Civ. P. 23; while no pre- or postpetition class was certified as to debtor, even if such class had been certified by South Carolina court, such conditional class still had to comply with Rule 23 standards. In re W.R. Grace & Co. (D. Del. Nov. 13, 2008), 398 BR 368.

Fed. R. Bankr. P. 7023 authorized bankruptcy court to hear class action adversary proceeding filed by discharged Chapter 13 debtors against mortgage lender accused of illegal postpetition fee collection practices because Fed. R. Civ. P. 23 was incorporated into Bankruptcy Code; therefore, withdrawal of reference under *28 USCS § 157(d)* was inappropriate. Rodriguez v. Countrywide Home Loans, Inc. (S.D. Tex. Dec. 3, 2009), 421 BR 341.

Creditor of debtor may bring class or representative form of action in adversary proceeding in Bankruptcy Court. In re Grosso (Bankr. N.D.N.Y. Mar. 16, 1981), 9 BR 815.

District court potentially had jurisdiction under *28 USCS § 1334* over class action that debtors were attempting to assert against creditor for alleged violation of *11 USCS § 362* because alleged violation under *11 USCS § 362* arose under provisions of United States Bankruptcy Code; however, debtors would first need to establish standing based on allegations of actual damages caused by alleged violations of stay. Alcantara v. Citimortgage, Inc. (In re Alcantara) (Bankr. M.D. Fla. Apr. 9, 2008), 389 BR 270.

Bankruptcy court certified debtors' adversary proceeding against credit union, alleging that credit union violated 11 USCS § 524 when it incorrectly reported debts discharged in bankruptcy on debtors' credit reports in attempt to collect debts, and refused to correct reports it filed, as class action under Fed. R. Civ. P. 23; credit union allegedly engaged in same conduct with respect to all class members, i.e., knowingly misreporting credit status of debts in attempt to collect them postdischarge, and debtors satisfied requirement that they show numerosity, commonality, typicality, and adequacy of representation. Montano v. First Light Fed. Credit Union (In re Montano) (Bankr. D.N.M. Oct. 15, 2008), 398 BR 47.

Where South African residents, who alleged that debtors aided and abetted perpetrators of apartheid, sought class certification, certification was not appropriate due in part to concerns as to adverse effect that consideration of

claims would have on debtors' other creditors, by reason of delay in seeking class certification and further delay and burdens on bankruptcy system that would be occasioned by need to consider and/or estimate their claims. *In re Motors Liquidation Co. (Bankr. S.D.N.Y. Jan. 28, 2011), 447 BR 150*.

Plaintiff debtors had been charged attorneys' fees and filing fees for filing of allegedly insufficient or fraudulent affidavits in support of motions for relief from stay, certification of classes was warranted under *Fed. R. Civ. P. 23*; relief could be granted under pursuant to *11 USCS § 105*. *Brannan v. Wells Fargo Home Mortg., Inc. (In re Brannan) (Bankr. S.D. Ala. Jan. 8, 2013), 485 BR 443*.

74. —Discretion of court

Court has discretion under *Fed. R. Bankr. P. 9014* to find that likely total benefit to class members would not justify cost to estate of defending class action under *Fed. R. Civ. P. 23*. *In re Ephedra Prods. Liab. Litig. (S.D.N.Y. Aug. 8, 2005), 329 BR 1*.

In those cases in which *Fed. R. Civ. P. 23* determination is not made timely in another court, bankruptcy court, in its discretion under *Fed. R. Bankr. P. 9014*, must first decide whether *Fed. R. Bankr. P. 7023* should be invoked to permit court and then decide whether, under Rule 7023, class should be certified and whether putative representatives are appropriate to act as fiduciaries for their class; in non-certified class cases before court, concerns for prejudice to debtor or its other creditors, prejudice to putative class members, efficient estate administration, conduct in bankruptcy case of putative class representatives, and status of proceedings in other courts favored denial of request to make Rule 7023 applicable to allow certification and representation analysis. *In re Craft (Bankr. N.D. Tex. Jan. 26, 2005), 321 BR 189*.

Fed. R. Bankr. P. 9014 gives bankruptcy judges discretion to apply *Fed. R. Bankr. P. 7023*—and thereby *Fed. R. Civ. P. 23*, class action rule—to any stage in contested matters; where two classes of plaintiffs brought rate related claims against Chapter 11 debtor, city-regulated utility, court declined to apply *Fed. R. Bankr. P. 7023* to certify two classes because dispute was already before proper administrative body and in state court. *In re Entergy New Orleans, Inc. (Bankr. E.D. La. Oct. 13, 2006), 353 BR 474*.

75. —Proof of claim

Rule 23 does not generally apply to "contested matter" such as filing of, or objection to, proof of claim under bankruptcy laws. *In re GAC Corp. (11th Cir. Fla. Aug. 2, 1982), 681 F2d 1295, 34 Fed R Serv 2d (Callaghan) 662*.

Class actions may exist within bankruptcy so as to allow person to file proof of claim representative of others similarly situated since Bankruptcy Rule 9014 allows bankruptcy judges to apply Bankruptcy Rule 7023, and thereby *Federal Rules of Civil Procedure Rule 23*. *In re American Reserve Corp. (7th Cir. Ill. Feb. 18, 1988), 840 F2d 487, Bankr L Rep (CCH) P72205, 10 Fed R Serv 3d (Callaghan) 868* (criticized in *Kahler v FirstPlus Fin., Inc. (In re FirstPlus Fin., Inc.) (2000, BC ND Tex) 248 BR 60, 36 BCD 1*).

Recognizing class proofs of claim has salutary effect of putting trustees and other parties on notice of representative claimants' intent to pursue class action in bankruptcy case, allowing them to agree or disagree through objections; representative claimants can then, upon indication of objection, file *Fed. R. Bankr. P. 9014* motion to authorize application *Fed. R. Bankr. P. 7023*; if motion is granted, procedure set forth in *Fed. R. Civ. P. 23* would become applicable; if bankruptcy court denies motion, it should then establish reasonable time within which individual putative class members are allowed to file individual proofs of claim. *Gentry v. Siegel (4th Cir. Va. Feb. 2, 2012), 668 F3d 83, Bankr L Rep (CCH) P82227*.

Several factors inform court's decision whether to extend application of *Fed. R. Civ. P. 23* to proof of claim: these include (1) whether class was certified pre-petition, (2) whether members of putative class received notice of bar date, and (3) whether class certification will adversely affect administration of case; in addition, (i) latter often centers on (a) timing of motion for certification, and (b) whether plan has been negotiated, voted on or confirmed, (ii) first two considerations, i.e., pre-petition certification and notice of bar date, are critical; for this reason, putative

members of uncertified class who received actual notice of bar date but did not file timely claims are least favored candidates for class action treatment. *In re Musicland Holding Corp. (Bankr. S.D.N.Y. Mar. 13, 2007), 362 BR 644*.

Allowing former employees of bankruptcy debtor who sought unpaid vacation time to file class proof of claim would not adversely affect administration of bankruptcy estate since liquidation trustee knew that employees intended to pursue claims, liability was conceded, and proceeding as class claim to determine amount owed to each employee was most expeditious administration of estate. *In re MF Global, Inc. (Bankr. S.D.N.Y. July 17, 2014), 512 BR 757*.

Unpublished decision: Bankruptcy court did not err in disallowing claimants' asbestos property damage claims against debtors because although law firm had authority to act on claimants' behalf in class action pursuant to *Fed. R. Civ. P. 23*, such authority did not imply any authorization to file individual proofs of claim on claimants' behalf in bankruptcy proceedings. *In re W. R. Grace & Co. (3d Cir. Del. Mar. 11, 2009), 316 Fed Appx 134*.

Unpublished decision: Where more than year had passed after class proof of claim was filed and claimant had yet to move for application of *Fed. R. Civ. P. 23* pursuant to *Fed. R. Bankr. P. 7023*, court exercised its discretion to deny application of Rule 7023 and granted Chapter 11 debtors' motion to expunge purported class proofs of claim pursuant to *11 USCS § 502(b)* and *Fed. R. Bankr. P. 3007*; claimant did not allege any facts adequate to provide justification for her delay in bringing motion for class certification, and most importantly, debtors and their creditors would be prejudiced because claims were not insignificant and would undoubtedly upset administration of confirmed plan of reorganization. *Rodriguez v. Tarragon Corp. (In re Tarragon Corp.) (Bankr. D.N.J. Sept. 24, 2010), 2010 Bankr LEXIS 3410*.

76. Consumers and their protection

Even if it were not necessary to consider individual evidence of annuities purchasers' reliance and injury, claim under California's Unfair Competition Law (UCL) could not succeed without common evidence of misconduct; thus, to extent that individual evidence was necessary to show that insurance company's practices were actually unlawful, unfair, or fraudulent, class certification was inappropriate; whatever prong of UCL purchasers based their claims upon, allegedly wrongful conduct primarily involved deception, misrepresentation, and false regulatory filings and issues of individual reliance would therefore be relevant to establishing liability. *Avritt v. Reliastar Life Ins. Co. (8th Cir. Minn. Aug. 12, 2010), 615 F3d 1023*.

Court affirmed dismissal of plaintiff's Telephone Consumer Protection Act (TCPA) action for lack of jurisdiction because TCPA used state law to define federal cause of action, and when state refused to recognize that cause of action, there remained nothing to which any grant of federal court jurisdiction could attach; Congress intended to give states fair measure of control over solving problems that TCPA addressed, and ability to define when class cause of action would lie was part of that control. *Holster v. Gatco, Inc. (2d Cir. Aug. 24, 2010), 618 F3d 214*, cert. denied, *(U.S. Apr. 25, 2011), 563 US 969, 131 S Ct 2151, 179 L Ed 2d 952*, overruled in part as stated in , *Giovanniello v. ALM Media, LLC (2d Cir. Conn. Aug. 8, 2013), 726 F3d 106*, abrogated as stated in , *Bank v. Independence Energy Group LLC (2d Cir. Dec. 3, 2013), 736 F3d 660, 87 Fed R Serv 3d (Callaghan) 64*.

Motion for reconsideration of class certification of action brought under Florida Deceptive and Unfair Trade Practices Act (FDUTPA), *Fla. Stat. § 501.201* et seq., was denied because customers bore and carried their burden of proof regarding maintenance of class action, and at no time did court improperly shift burden of proof to bank; issue of whether payment protection program was worthless predominated over individual inquires. *Spinelli v. Capital One Bank (M.D. Fla. Aug. 20, 2009), 265 FRD 598*.

Class action limitations in *Ohio Rev. Code Ann. § 1345.09(B)*—which it is equally applicable to subsection (A)—are substantive in nature; because application of *Fed. R. Civ. P. 23* would abridge, enlarge, or modify Ohio's rights and remedies by permitting class actions even when requirements in *Ohio Rev. Code Ann. § 1345.09* are not satisfied, it is ultra vires under Rules Enabling Act, and *Fed. R. Civ. P. 23* does not preempt *Ohio Rev. Code Ann. § 1345.09*. *McKinney v. Bayer Corp. (N.D. Ohio Sept. 30, 2010), 744 F Supp 2d 733*.

77. —Products liability

Ninth Circuit law does not prohibit nationwide class certification in mass products liability litigation; despite problems that might arise in such cases, class adjudication of certain issues may be more efficient than individualized litigation, and current legal developments could make class litigation more manageable. *Valentino v. Carter-Wallace, Inc. (9th Cir. Cal. Oct. 7, 1996), 97 F3d 1227, 35 Fed R Serv 3d (Callaghan) 731* (criticized in *Blain v Smithkline Beecham Corp. (2007, ED Pa) 240 FRD 179, CCH Prod Liab Rep P 17674*) and (criticized in *Parkhurst v D.C. Water & Sewer Auth. (2013, Dist Col Super Ct) 2013 DC Super LEXIS 4*).

Requirements of Rule 23 cannot be met despite allegation by plaintiff, printing industry employee, that named chemical manufacturers represent class of defendants who placed products in stream of commerce which caused plaintiff to contract cancer, where plaintiff is unable to say which of named defendants supplied such products to his places of employment or how many members of putative class supplied such products. *Klein v. Council of Chemical Assos. (E.D. Pa. Apr. 3, 1984), 587 F Supp 213, CCH Prod Liab Rep P10432* (criticized in *United States ex rel. Atkinson v Pa. Shipbuilding Co. (2000, ED Pa) 2000 US Dist LEXIS 12081*).

Products liability actions can be certified as class actions when requirements of *FRCP 23* have been met. *In re Telectronics Pacing Sys. (S.D. Ohio Nov. 17, 1995), 164 FRD 222*.

In this products liability action, consumers' motion for class certification was not appropriate where (1) revised definition submitted by consumers failed to provide objective basis to determine several facts significant to establishing membership, including whether cookware item in fact contained defendant's non-stick coating; and (2) fact that vast majority of plaintiffs must rely on memory to establish crucial facts would prevent parties and court from ever being able to establish membership with objective certainty. *In re Teflon Prods. Liab. Litig. (S.D. Iowa Dec. 5, 2008), 254 FRD 354, 72 Fed R Serv 3d (Callaghan) 340*.

While need for warning might exist, method to achieve that warning was not through certification of proposed class; failure to warn could only damage individual plaintiff if that plaintiff was not already aware of danger. Information about possible dangers of using ethanol-blended gasoline was available from variety of sources: signs at marina fuel stations, internet, boat user manuals and brochures, Coast Guard publications, advice from marine mechanics, and general word of mouth in boating industry; each individual proposed class member would need to be questioned as to whether he or she had ever been exposed to any of these sources of information—because proposed class was so broad, injunctive relief sought would not automatically flow to class as whole. *Kelecseny v. Chevron, U.S.A., Inc. (S.D. Fla. Nov. 25, 2009), 262 FRD 660*.

Motion for class certification was granted because number of homes with product that owners claimed existed in remaining counties, satisfied requirement of numerosity; owners satisfied both commonality requirement of *Fed. R. Civ. P. 23(a)(2)* and predominance and superiority requirements of Rule 23(b)(3) and typicality was satisfied because claims arose out of common course of conduct on part of companies with regard to their development, manufacture, marketing, and distribution of product. *Brunson v. Louisiana-Pacific Corp. (D.S.C. Feb. 8, 2010), 266 FRD 112*.

Parents who purchased infant powder formula that was recalled after manufacturer detected presence of common warehouse beetle and its larvae in powdered formula produced at one of its plants did not meet requirements imposed by *Fed. R. Civ. P. 23* for having lawsuit they filed under *N.Y. Gen. Bus. Law § 349* and New Hampshire Consumer Protection Act, N.H. Rev. Stat. Ann. ch. 358A, certified as class action; most consumers who purchased formula that was recalled would not have suffered injury because beetle parts were found in only one out of every 625 containers that were tested, and claims asserted by parents who sued manufacturer and sought class certification had legal and factual issues unique to them that were likely to distract from their representation of class. *Pagan v. Abbott Labs., Inc. (E.D.N.Y. Oct. 20, 2012), 287 FRD 139, 83 Fed R Serv 3d (Callaghan) 1465*.

78. —Telephone Consumer Protection Act

Congress has not provided limitations or restrictions on ability of plaintiff to bring class action suit under *47 USCS § 227*, and thus, court was unable and unwilling to impose such limitation sua sponte. *Gene & Gene, LLC v. Biopay, LLC (M.D. La. Dec. 20, 2006), 240 FRD 239*, rev'd, *(5th Cir. La. Aug. 14, 2008), 541 F3d 318*.

79. Contracts and breach thereof

Denial of class action to farms asserting invalidity of hedge-to-arrive contracts was not abuse of discretion where case had been pending for several years before plaintiffs moved for class certification, plaintiffs' counsel was incapable of representing class adequately, each class member had sufficiently large stake to be able to afford to litigate individually, and because complaints alleged fraud, issues common to class were unlikely to predominate. *Nagel v. ADM Investor Servs. (7th Cir. Ill. June 7, 2000), 217 F3d 436*.

Purchaser of cellular telephone insurance sufficiently stated misrepresentation claims under *Cal. Bus. & Prof. Code §§ 17200* and 17500 regarding receipt of refurbished phones as replacements to permit certification of class of California purchasers that had not released their claims in prior settlement and met requirements of *Fed. R. Civ. P. 23(a)* and *23(b)(3)*. *Cole v. Asurion Corp. (C.D. Cal. Apr. 19, 2010), 267 FRD 322*.

In action by Superbowl ticketholders seeking class certification for ticketholders who were delayed access to seats, certification was not warranted on their breach of contract claims because issue of damages predominated over common issues surrounding contract interpretation and breach, and class action was not superior method for adjudicating issues due to individualized damages involved. *Simms v. Jones (N.D. Tex. July 9, 2013), 296 FRD 485*, in part, *(N.D. Tex. July 10, 2013), 2013 US Dist LEXIS 189697*, aff'd, *(5th Cir. Tex. Sept. 9, 2016), 836 F3d 516, 95 Fed R Serv 3d (Callaghan) 1372*.

In action by Superbowl ticketholders seeking class certification for ticketholders who were moved to other seats or who had obstructed view seats, certification was not warranted on breach of contract claims because ascertaining liability and calculating damages would require individualized inquiries due to individual circumstances and location of each seat. *Simms v. Jones (N.D. Tex. July 9, 2013), 296 FRD 485*, in part, *(N.D. Tex. July 10, 2013), 2013 US Dist LEXIS 189697*, aff'd, *(5th Cir. Tex. Sept. 9, 2016), 836 F3d 516, 95 Fed R Serv 3d (Callaghan) 1372*.

Breach of contract is legal wrong that may be redressed in class action under proper circumstances. *Grubbs v. Rine (Ohio C.P. Feb. 12, 1974), 315 NE2d 832*.

80. Driver's Privacy Protection Act

In case brought under Driver's Privacy Protection Act, *18 USCS §§ 2721–2725*, in which Florida-licensed driver moved for class certification, requirements for certification under *Fed. R. Civ. P. 23(a)* were met, and case could be certified under Rule 23(b)(2). *Welch v. Theodorides-Bustle (N.D. Fla. Nov. 17, 2010), 273 FRD 692*.

81. Education matters

Handicapped children are certified as class, where children brought action to enforce right to receive free, appropriate public education, there are several hundred children involved, all have been placed by juvenile courts and challenge administrative procedures for provision of special education, representatives have common goals and objectives with class, and attorneys are qualified. *Edward B. v. Brunelle (D.N.H. June 5, 1986), 662 F Supp 1025*, disapproved as stated in *Hebert v. Manchester, Sch. Dist. (D.N.H. Sept. 29, 1993), 833 F Supp 80*.

82. Fair Debt Collection Practices Act

There was no persuasive reason to require nationwide class, rather than certifying state-wide class, in debtor's action under Fair Debt Collection Practices Act given Act's damage cap of $500,000 in class actions which would reduce individual debtors' recovery in nationwide class action; if debt collector is sued in one state but continues to violate statute in another state, it ought to be possible to challenge such continuing violations, and there was no evidence of multiple or serial class actions to recover for same action charged in this case, so it was premature to rule on propriety of multiple class actions. *Mace v. Van Ru Credit Corp. (7th Cir. Ill. Mar. 17, 1997), 109 F3d 338*.

District court erred in denying consumer's motion to certify class in her action alleging that debt collector violated Fair Debt Collection Practices Act by suing her after statute of limitations contained in Uniform Commercial Code,

810 ILCS 5/2-725, had run because all of class members had been sued more than four years after their debts accrued. *Phillips v. Asset Acceptance, LLC (7th Cir. Ill. Dec. 2, 2013), 736 F3d 1076, 87 Fed R Serv 3d (Callaghan) 287*.

District court properly denied certification to debt collector victim class because only proposed representative class member was not adequate class representative for Fair Debt Collection Practices Act violation claim. *Grandalski v. Quest Diagnostics Inc. (3d Cir. N.J. Sept. 11, 2014), 767 F3d 175, 89 Fed R Serv 3d (Callaghan) 1185*.

In case alleging illegal debt collection practices class would not be certified as to request for injunctive relief since Fair Debt Collection Practices Act specifically reserved availability of injunctive relief for Federal Trade Commission. *Zanni v. Lippold (C.D. Ill. Feb. 3, 1988), 119 FRD 32*.

Debtor's claims that credit agencies' privacy notice allegedly violated Fair Debt Collection Practices Act (FDCPA), *15 USCS § 1692e*, were certified under *Fed. R. Civ. P. 23* because, inter alia, notices were sent to more than 56,000 delinquent accounts, whether agencies' privacy notice violated FDCPA was issue common to all putative class members, and debtor also satisfied typicality and adequacy requirements. *Hernandez v. Midland Credit Mgmt. (N.D. Ill. June 27, 2006), 236 FRD 406*.

Because collections firm filed 341 lawsuits which were similar to suit filed against consumer, there were common legal questions regarding whether firm's conduct of filing collection actions on purported debts to which it did not have lawful title, among other things, violated Fair Debt Collection Practices Act, *15 USCS §§ 1692* et seq., Illinois Collection Agency Act, 225 ILCS 425 et seq., and Illinois Consumer Fraud Act, 815 ILCS 505 et seq., and other requirements of *Fed. R. Civ. P. 23(a)* and *(b)* were met, consumer's class was certified. *Randolph v. Crown Asset Mgmt., LLC (N.D. Ill. Dec. 11, 2008), 254 FRD 513*.

Once it was decided on merits that law firm violated Fair Debt Collection Practices Act (FDCPA), *15 USCS §§ 1692* et seq., it was not appropriate for action to then proceed as class action under *Fed. R. Civ. P. 23*. Plaintiffs waived any right they might have had to prosecute case as class action by jumping directly to final determination of merits of their case when there was no obligation for them to do so. *Owens v. Hellmuth & Johnson (D. Minn. May 1, 2008), 550 F Supp 2d 1060*.

Consumers' class action was certified under *Fed. R. Civ. P. 23* to include umbrella class not only limited to consumers as defined under *15 USCS § 1692a*, but was broadened to include consumers under *15 USCS § 1692k*, and two subclasses were certified for FDCPA claims and California Unfair Competition Law claims, which were narrowed to class related to consumer debts under *15 USCS § 1692a(5)* and *Cal. Bus. & Prof. Code § 17204*. *Carrizosa v. Stassinos (N.D. Cal. Mar. 30, 2009), 669 F Supp 2d 1081*.

Class was certified and preliminary approval of settlement was granted in representative's Fair Debt Collection Practices Act, *15 USCS §§ 1692* et seq., claim against collector because action met *Fed. R. Civ. P. 23* requirements of numerosity, common questions, typicality, adequacy of representation, and predominance; issues as to identical or similar voicemails from collector predominated over issue of identity of those who received voicemail; settlement did not appear to be collusive, but looked to be result of serious negotiations. *Passafiume v. NRA Group, LLC (E.D.N.Y. Nov. 30, 2010), 274 FRD 424*.

In action under Fair Debt Collection Practices Act, *15 USCS § 1692g*, consumer was allowed to certify class because class could have been definite enough, even accounting for human error, consumer showed administratively feasible way to identify putative class members, and consumer satisfied requirements of *Fed. R. Civ. P. 23(a)* and *23(b)(3)* because consumer showed that commonality, numerosity, and typicality requirements were met because they all involved relatively simple question of whether class members received attempt at debt collection before receiving debt validation letter, and consumer was adequate representative for class because facts in his case mirrored class definition. *Johnson v. Midland Credit Mgmt. Inc. (N.D. Ohio Nov. 29, 2012), 89 Fed R Evid Serv (CBC) 1391, 2012 US Dist LEXIS 170420*.

In action under 15 USCS § 1681c(a)(2), materiality was not impediment to certifying class action pursuant to Fed. R. Civ. P. 23, because § 1681c(a)(2) was more properly analogous to 15 USCS § 1692e(11) than it was to Fair Debt Collection Practices Act anti-fraud provisions, because § 1681c(a)(2) was not anti-fraud statute, and therefore materiality was not issue. Massey v. On-Site Manager, Inc. (E.D.N.Y. Aug. 23, 2012), 285 FRD 239.

In action under 15 USCS § 1681c(a)(2), for purposes of certifying class action pursuant to Fed. R. Civ. P. 23, "trigger" date for Fair Credit Reporting Act reporting purposes for bankruptcy debtors was earliest possible date on which it was clear that debtor was properly in bankruptcy. Massey v. On-Site Manager, Inc. (E.D.N.Y. Aug. 23, 2012), 285 FRD 239.

Certification of class to address equitable relief sought by plaintiffs was appropriate because neither injunctive nor declaratory relief is available; every potential class member's claim arose out of defendants' uniform, widespread practice of filing automatically-generated, form affidavits of merit based on "personal knowledge" and, in many instances, affidavits of service, to obtain default judgments against debtors in state court. Sykes v. Mel Harris & Assocs. LLC (S.D.N.Y. Sept. 4, 2012), 285 FRD 279, aff'd, (2d Cir. Feb. 10, 2015), 780 F3d 70, 90 Fed R Serv 3d (Callaghan) 1793.

83. —Collection letters

Because it was unclear if district court concluded alleged Fair Debt Collection Practices Act violation was based on content of defendant debt collector's letter or letter's transmission to plaintiff non-debtor class representative's employer due to error as to real debtor's identity, and whether it considered 15 USCS § 1692k(c)'s defense elements in finding that letter was not sent in error, class certification was vacated; unique defense had bearing on both typicality and adequacy of class representative under Fed. R. Civ. P. 23(a). Beck v. Maximus, Inc. (3d Cir. Pa. Aug. 4, 2006), 457 F3d 291.

While collection letter sent to consumer "in care of" her employer could have been clearer, it was not false, deceptive, or misleading, under 15 USCS § 1692e; but sending it to her workplace per se violated 15 USCS § 1692c and district court needed to reconsider class certification on issue and proper lodestone calculation. Evon v. Law Offices of Sidney Mickell (9th Cir. Cal. Aug. 1, 2012), 688 F3d 1015, 83 Fed R Serv 3d (Callaghan) 96.

Pursuant to Fed. R. Civ. P. 23, debtor was entitled to certification of class consisting of all debtors who received letter within certain time period from debt collector stating that unless debt was paid within 30 days, it would be placed on their personal credit report records because (1) claim for violation of Fair Debt Collection Practices Act, 15 USCS §§ 1692 et seq., was properly subject of class action, (2) debtor proposed properly defined class limited to those debtors who received same form letter within certain time period, and (3) debtor was member of proposed class. Mann v. Acclaim Fin. Servs. (S.D. Ohio Apr. 29, 2003), 232 FRD 278.

Debtor alleged that corporation's standardized debt collection letters violated Fair Debt Collection Practices Act (FDCPA), 15 USCS §§ 1692 et seq., in numerous ways including, inter alia, by falsely representing that corporation "will" take legal action by certain date in absence of debtor response; debtor also alleged that letters were sent to hundreds, if not thousands, of people, and that class action litigation would be superior method of resolving potential FDCPA claims; thus, debtor's class was certified under Fed. R. Civ. P. 23. Jordan v. Commonwealth Fin. Sys. (E.D. Pa. July 27, 2006), 237 FRD 132.

Court granted debtor's motion for class certification pursuant to Fed. R. Civ. P. 23 in his action against creditor brought under Fair Debt Collection Practices Act (FDCPA), 15 USCS §§ 1692 et seq., because (1) numerosity requirement was satisfied by creditor's admission that debt collection letter forming basis of his claim was sent to at least 100 individuals; (2) commonality and typicality requirements were met as claims of putative class members (including debtor) would center upon whether creditor's collection letters violated FDCPA, as determined by standard of unsophisticated consumer; (3) debtor could provide fair and adequate protection of interests of putative class, and debtor's counsel were highly experienced attorneys, with significant history of class action litigation experience between them; (4) given alignment of interests between debtor and putative class members, there was no apparent conflict between them; and (5) debtor demonstrated that common questions of law and fact

predominated in case over individual issues and that debtor's arguments were sufficient to meet his burden of demonstrating that class action was superior to other available methods for fairly and efficiently adjudicating this case. *Acik v. I.C. Sys. (N.D. Ill. June 11, 2008), 251 FRD 332*.

84. Federal Tort Claims Act

In suit under Federal Tort Claims Act in which plaintiffs sought to assert claims on behalf of themselves and class of unnamed persons who suffered personal injury and property damage as result of flood, action could not be maintained on behalf of unnamed members of class who presented no administrative claim and court had no jurisdiction over such unnamed members as administrative exhaustion requirement of *28 USCS § 2675(a)* had not been met; Rule 23 could not be utilized to avoid jurisdictional prerequisites required of each member of class, and allowing this group of claimants to proceed by class action would have improperly extended court's jurisdiction through procedural device of Rule 23(b)(3). *Lunsford v. United States (D.S.D. Aug. 30, 1976), 418 F Supp 1045, 22 Fed R Serv 2d (Callaghan) 1308*, aff'd, *(8th Cir. S.D. Dec. 31, 1977), 570 F2d 221, 24 Fed R Serv 2d (Callaghan) 809*.

Actions under Federal Tort Claims Act (*28 USCS §§ 2671* et seq.) are not inherently class-based; purported class of "all Churches and Missions of Church of Scientology located in United States" is not entitled to certification as either Rule 23(b)(1), (2), or (3) class action for damages against various public officers of United States under Federal Tort Claims Act where each alleged class member has not exhausted his or her administrative remedies pursuant to *28 USCS § 2675(a)*; proper exhaustion by one class member does not obviate need for other class members to exhaust, in order for court to have jurisdiction over entire class. *Founding Church of Scientology, Inc. v. Director, FBI (D.D.C. Oct. 19, 1978), 459 F Supp 748, 26 Fed R Serv 2d (Callaghan) 933*.

85. Fraud, generally

It is especially true that fraud case may be unsuited for treatment as class action if there was material variation in representations made or in kinds or degrees of reliance by persons to whom they were addressed where alleged misrepresentations include oral statements to some or all members of class, which must, of necessity, differ from person to person. *Crasto v. Estate of Kaskel (S.D.N.Y. 1974), 63 FRD 18, 18 Fed R Serv 2d (Callaghan) 1010, Fed Sec L Rep (CCH) P94524*.

Certification of class action for fraud may be precluded by residence of members of proposed class in different states, each with its own common law of fraud. *McHan v. Grandbouche (D. Kan. Mar. 29, 1983), 99 FRD 260, 36 Fed R Serv 2d (Callaghan) 1227*.

Causes of action based on fraud are highly individualistic and are, therefore, often particularly ill-suited to class resolution. *Anderberg v. Masonite Corp. (N.D. Ga. Aug. 20, 1997), 176 FRD 682*.

Class certification under *Fed. R. Civ. P. 23(a)* and *(b)(3)* was appropriate as to vehicle purchasers' claims against automobile company for unjust enrichment and violation of New Jersey Consumer Fraud Act, *N.J. Stat. Ann. § 56:8-1* et seq.; New Jersey law applied to both claims, which arose from company's alleged failure to disclose impending obsolescence of emergency response system contained in purchasers' vehicles, so virtually all of legal and factual issues were common to class. *In re Mercedes-Benz Tele Aid Contract Litig. (D.N.J. Apr. 24, 2009), 257 FRD 46*, modified, *(D.N.J. Mar. 15, 2010), 267 FRD 113*, abrogated in part as stated in , *Maloney v. Microsoft Corp. (D.N.J. Nov. 21, 2011), 2011 US Dist LEXIS 134841*.

Plaintiffs did not meet their burden to certify their cases as class action because plaintiffs' allegations were predicated on claims of fraud and individual showings of proof were appropriate; requiring each individual plaintiff to detail any relevant omissions and misrepresentations pertinent to them alone would result in more desirable individualized treatment; amount-in-controversy would likely ensure both that individual plaintiffs obtained adequate representation, and also permit many of proposed class members to proceed in federal court on basis of diversity if they so desired. *Bacon v. Stiefel Labs., Inc. (S.D. Fla. July 21, 2011), 275 FRD 681, Fed Sec L Rep (CCH) P96361*.

In action by Superbowl ticketholders seeking class certification for ticketholders who were had obstructed view seats, certification was not warranted on fraudulent inducement claims because materiality of omission of "restricted view" language on tickets differed between tickets due to variance in alleged obstructions, and different ticketholders had different expectations, such that individualized considerations predominated over common issues. *Simms v. Jones (N.D. Tex. July 9, 2013), 296 FRD 485*, in part, *(N.D. Tex. July 10, 2013), 2013 US Dist LEXIS 189697*, aff'd, *(5th Cir. Tex. Sept. 9, 2016), 836 F3d 516, 95 Fed R Serv 3d (Callaghan) 1372*.

86. Habeas corpus

Although usual habeas corpus case relates only to individual petitioner and to his unique problem, there may be cases, where relief sought can be of immediate benefit to large and amorphous group, and in such cases class action may be appropriate. *Mead v. Parker (9th Cir. Wash. July 20, 1972), 464 F2d 1108, 16 Fed R Serv 2d (Callaghan) 1029*.

Although class action device should not be imported into collateral actions, at least in its full vigor as contemplated by Rule 23, and although precise provisions of Rule 23 do not apply to habeas corpus proceedings, procedure analogous to class action could be employed in habeas corpus proceeding involving class of young adult misdemeanants held in custody of state of New York. *United States ex rel. Sero v. Preiser (2d Cir. N.Y. Nov. 6, 1974), 506 F2d 1115, 19 Fed R Serv 2d (Callaghan) 1439*, cert. denied, *(U.S. Apr. 14, 1975), 421 US 921, 95 S Ct 1587, 43 L Ed 2d 789*.

Although Rule 23 does not apply to habeas corpus proceedings, representative procedure analogous to class action provided for in Rule 23 may be appropriate in habeas corpus action under some circumstances, and such procedure was appropriate in habeas corpus proceeding brought with respect to parole board's alleged failure to hold meaningful parole hearings. *Bijeol v. Benson (7th Cir. Ind. Apr. 15, 1975), 513 F2d 965, 20 Fed R Serv 2d (Callaghan) 376*.

Representative habeas corpus proceeding is merely analogous to Rule 23 class action, and provisions of Rule 23 need not be complied with precisely. *United States ex rel. Morgan v. Sielaff (7th Cir. Ill. Nov. 22, 1976), 546 F2d 218*.

Petition for writ of habeas corpus may be brought as class action. *Adderly v. Wainwright (M.D. Fla. 1972), 58 FRD 389, 17 Fed R Serv 2d (Callaghan) 845*.

Under some circumstances class action may be appropriate in habeas corpus proceedings. *Burgener v. California Adult Authority (N.D. Cal. Jan. 26, 1976), 407 F Supp 555, 21 Fed R Serv 2d (Callaghan) 1109*.

Although representative action had been permitted in habeas corpus proceeding, such action was not appropriate in habeas corpus proceeding where some, if not all, members of class would have to make showing of prejudice in order to receive relief sought, such showing involving unique set of facts for each person. *Walton v. Wright (W.D. Wis. Jan. 28, 1976), 407 F Supp 783*.

Although where necessary and appropriate procedures analogous to class action have been fashioned in habeas corpus cases, Rule 23 is technically not applicable to petitions for habeas corpus relief. *Geraghty v. United States Parole Com. (M.D. Pa. Feb. 24, 1977), 429 F Supp 737, 23 Fed R Serv 2d (Callaghan) 275*, rev'd, *(3d Cir. Pa. Mar. 9, 1978), 579 F2d 238, 25 Fed R Serv 2d (Callaghan) 352*.

While precise class action provisions of Rule 23 do not apply to habeas corpus proceedings, federal court may permit multi-party habeas corpus actions similar to class actions when nature of claim so requires; considerations of judicial economy and fairness argue persuasively for construction of procedure analogous to class action to be employed by incarcerated persons sharing certain complaints about legality of their imprisonment. *Bertrand v. Sava (S.D.N.Y. Apr. 5, 1982), 535 F Supp 1020, 35 Fed R Serv 2d (Callaghan) 118*, rev'd, *(2d Cir. N.Y. June 25, 1982), 684 F2d 204*.

87. Insurance, generally

District court properly found class certification was not appropriate as annuities purchasers' claims involved number of individual issues that could not be resolved on class-wide basis, including whether company misled purchasers about its interest-crediting practices and whether purchasers relied upon any such misrepresentations; district court did not abuse its discretion in finding purchasers' theories of liability could not be supported solely with reference to class-wide proof; resolution of purchasers' claims would require numerous individual determinations regarding company's representations and each purchaser's reliance, and class was therefore not cohesive enough to satisfy *Fed. R. Civ. P. 23(b)(2)*. *Avritt v. Reliastar Life Ins. Co. (8th Cir. Minn. Aug. 12, 2010), 615 F3d 1023*.

District court did not abuse its discretion in deciding that class was not fail-safe and in finding that class definition was administratively feasible; insureds' classes included both those entitled to relief and those not and further, insurance companies' other argument—that they were not ultimately liable for many of class members, even if they were incorrectly charged—proved point that this was not proscribed fail-safe class; insurance companies policy records were in form compatible with geocoding software, thus class was administratively feasible using geocoding software program and manual review. *Young v. Nationwide Mut. Ins. Co. (6th Cir. Ky. Sept. 5, 2012), 693 F3d 532*.

Because named insureds alleged that geocoding verification procedures would have prevented their tax misassignment, insureds satisfied elements of both commonality and typicality. *Young v. Nationwide Mut. Ins. Co. (6th Cir. Ky. Sept. 5, 2012), 693 F3d 532*.

Motion for class certification of action by insurance company against number of corporate defendants on theories grounded in common-law fraud, conspiracy, contract and agency concepts will not be granted where claimed predominance of common issues is no more than marginal, lack of clear-cut predominance of common issues as distinguished from similar ones renders superiority issue questionable, class action appears to be inconvenient manner of conducting litigation since only plaintiff and its counsel are located in forum district, none of defendants are citizens or residents of forum district, and none of individuals who controlled defendants and were ultimately involved with facts on which plaintiff's cause of action relies is amenable to court's process. *State Sec. Ins. Co. v. Frank B. Hall & Co. (N.D. Ill. Aug. 27, 1982), 95 FRD 496*.

Pro se plaintiffs alleging invalidity of loans and security agreements between plaintiffs and defendant insurance company have not adequately alleged pre-requisite to use of class action required by Rule 23 where complaint does not allege that class of farmers borrowing from defendants is so numerous that joinder of all members is impracticable, and court finds that pro se plaintiffs cannot fairly and adequately protect interests of class, particularly in light of manner in which complaint was drafted. *Jonak v. John Hancock Mut. Life Ins. Co. (D. Neb. Jan. 4, 1985), 629 F Supp 90*.

Class was certified because insurance companies' change of policy administration and calculation of benefits under standard contract presented common questions of law and fact among putative class members and satisfied typicality and commonality requirements of *Fed. R. Civ. P. 23(a)(2)* and *(3)*; furthermore, companies' allegations concerning insured's alleged credibility issues did not indicate any interests antagonistic to class and therefore did not render insured's representation inadequate. *Gooch v. Life Investors Ins. Co. of Am. (M.D. Tenn. Dec. 21, 2009), 264 FRD 340*, vacated, in part, *(6th Cir. Tenn. Feb. 10, 2012), 672 F3d 402, 81 Fed R Serv 3d (Callaghan) 832*.

Any inadequacies that insurance company asserted against representation provided by plaintiffs was cured by joinder of intervenors; because plaintiffs adequately represented Rule 23(b)(3) class, they satisfied all four of Rule 23(a) factors and met their burden to show that requirements of Rule 23(b)(3) had been met. *Ruderman v. Wash. Nat'l Ins. Co. (S.D. Fla. Jan. 5, 2010), 263 FRD 670*.

Insureds were granted certification of nationwide class in their action against insurer challenging changes to life insurance policies because insureds satisfied each requirement of *Fed. R. Civ. P. 23(a)*; fact that named insureds were familiar with basis for suit and their responsibilities as lead plaintiffs was sufficient to establish their adequacy. *In re Conseco Life Ins. Co. Lifetrend Ins. Sales & Mktg. Litig. (N.D. Cal. Oct. 6, 2010), 270 FRD 521*.

Insurance company's motion for reconsideration of district court's denial of class certification of counterclaim under Fed. R. Civ. P. 23(b)(2) and (3) was denied because counterclaim was properly dismissed for failure to state cause of action under Fed. R. Civ. P. 12(b)(6) and it failed to show any intervening law or new evidence. *Haddock v. Nationwide Life Ins. Co. (D. Conn. Nov. 8, 2010), 272 FRD 61*.

Class certification in action requesting declaratory and injunctive relief and damages under several Connecticut statutes regulating who could serve as title insurance agent in Connecticut was appropriate because class certification was warranted under Fed. R. Civ. P. 23(a) and claimants met requirements for certification under Fed. R. Civ. P. 23(b)(2). Gale v. Chi. Title Ins. Co. (D. Conn. Mar. 23, 2011), 274 FRD 361.

88. Mass torts

Conversion to class action ordinarily is not appropriate nor intended to apply in mass tort cases where damages, liability, and defenses affect individuals in different ways. Wright v. McMann (N.D.N.Y. July 31, 1970), 321 F Supp 127, aff'd in part and rev'd in part, (2d Cir. N.Y. Mar. 16, 1972), 460 F2d 126.

Very nature of personal injury action with its concomitant private implications militates against desirability of calling Rule 23 into play in mass disaster litigation; class action determination that would encompass issues of negligence, proximate cause, and damages would rarely be adequate in mass tort, but, if application of technique is limited to those issues in which uniformity of result is certain, Rule 23 retains its viability in mass accident setting. Hernandez v. Motor Vessel Skyward (D. Fla. 1973), 61 FRD 558, 18 Fed R Serv 2d (Callaghan) 1164, aff'd, (5th Cir. Fla. 1975), 507 F2d 1278, aff'd, (5th Cir. Fla. 1975), 507 F2d 1279, disapproved, In re Northern Dist. of California, Dalkon Shield IUD Products Liability Litigation (9th Cir. Cal. June 18, 1982), 693 F2d 847, 34 Fed R Serv 2d (Callaghan) 646, disapproved as stated in In re Bendectin Products Liability Litigation (6th Cir. Ohio Oct. 26, 1984), 749 F2d 300, 40 Fed R Serv 2d (Callaghan) 1.

There are situations where class action device may properly be used in mass accident cases, at least for common questions that will apply to each class member equally. Yandle v. PPG Industries, Inc. (E.D. Tex. 1974), 65 FRD 566, 20 Fed R Serv 2d (Callaghan) 404, disapproved, *Sterling v. Velsicol Chemical Corp. (6th Cir. Tenn. May 24, 1988), 11 Fed R Serv 3d (Callaghan) 213*.

Under some circumstances mass accident litigation may, and probably ought to be, maintained as class action, with situation in which such treatment would be appropriate being one where (1) class action is limited to issue of liability, (2) class members support action, and (3) choice of law problems are minimized by accident occurring, or substantially all plaintiffs residing, within same jurisdiction; even under such circumstances, however, to be maintainable as class action, action must meet superiority requirement of Rule 23(b)(3), with mass accident litigation, in general, not being appropriate for class action treatment pursuant to either Rules 23(b)(1) or (2). Causey v. Pan American World Airways, Inc. (E.D. Va. 1975), 66 FRD 392, 20 Fed R Serv 2d (Callaghan) 148.

There is no absolute bar to class certification in mass tort cases. Cook v. Rockwell Int'l Corp. (D. Colo. July 28, 1998), 181 FRD 473.

Under Florida law, comparative fault is always issue in negligence claim; Florida's law of comparative fault as codified in Fla. Stat. § 768.81 poses almost insurmountable obstacle to certification of any liability issue. Kelecseny v. Chevron, U.S.A., Inc. (S.D. Fla. Nov. 25, 2009), 262 FRD 660.

89. —Airplane crashes

Although it is settled in Ninth Circuit that class action brought on behalf of next-of-kin of air crash victims is not properly certified under Rule 23(b)(1) or (2), propriety of such class action under Rule 23(b)(3) remains open question. Vincent v. Hughes Air West, Inc. (9th Cir. Cal. June 16, 1977), 557 F2d 759, 23 Fed R Serv 2d (Callaghan) 1019.

Rule 23 permits courts to eliminate repetitive and burdensome litigation and, notwithstanding suggestion in Notes of the Advisory Committee that class action should not be used in tort cases, plain language of Rule 23 was devised for situation such as crash of airliner. *Petition of Gabel (C.D. Cal. Oct. 12, 1972), 350 F Supp 624, 17 Fed R Serv 2d (Callaghan) 857*, disapproved, *McDonnell Douglas Corp. v. United States Dist. Court for Cent. Dist. (9th Cir. Cal. Oct. 10, 1975), 523 F2d 1083, 20 Fed R Serv 2d (Callaghan) 11*.

Class actions are disfavored and deemed inappropriate vehicles for disposition of actions arising out of mass accidents, and court would deny class action certification to action brought against airline with respect to air crash disaster in which 113 persons lost their lives. *Marchesi v. Eastern Airlines, Inc. (E.D.N.Y. 1975), 68 FRD 500, 20 Fed R Serv 2d (Callaghan) 1235*.

90. —Asbestos

Certification on condition that discovery be limited to eight common issues was appropriate in suit brought against group of asbestos producers on behalf of all colleges and universities with friable asbestos in their buildings; findings in common issues trial on even few of eight identified questions might eventually save considerable time and judicial resources, several defendants had already settled with class and prospects of settlement promised to maximize resources available to plaintiff class and minimize drain on defendants and courts. *Central Wesleyan College v. W.R. Grace & Co. (4th Cir. S.C. Sept. 24, 1993), 6 F3d 177, 27 Fed R Serv 3d (Callaghan) 381* (criticized in *Farmer v. Monsanto Corp. (S.C. Apr. 7, 2003), 579 SE2d 325, CCH Prod Liab Rep P16598* (criticized in *Nilsen v York County (2005, DC Me) 400 F Supp 2d 266*).

Action to approve and enforce settlement modifying asbestos litigation trust to provide for pro rata distribution of trust assets to present and future claimants due to insufficiency of trust assets to pay all beneficiaries may proceed as class action, where class includes over 200,000 present beneficiaries and hundreds of thousands of unknown future beneficiaries, beneficiaries share common interest in maximizing resources of trust and assuring equitable distribution of its funds, named plaintiffs' claims are typical of, and named plaintiffs are adequate representatives of, class with respect to common interests, and counsel for plaintiff class and subclasses have requisite experience, qualifications, resources, and competency to conduct litigation. *Findley v. Falise (In re Joint E. & S. Dists. Asbestos Litig.) (E.D.N.Y. Jan. 19, 1995), 878 F Supp 473*, aff'd, *(2d Cir. N.Y. Feb. 21, 1995), 100 F3d 945*, aff'd in part, vacated in part, *(2d Cir. N.Y. Feb. 21, 1996), 78 F3d 764, 34 Fed R Serv 3d (Callaghan) 357*, aff'd, *(2d Cir. N.Y. Feb. 21, 1996), 100 F3d 944*.

91. —Oil spills

Class action for personal injuries allegedly attributable to exposure from fumes from oil spill from barge would not be certified where proposed class was unmanageably broad since it sought to include all persons present in Puerto Rico on date of oil spill and thereafter who suffered injury from inhalation of fumes, proposed class failed to satisfy requirements of typicality, adequacy of representation and predominance of common issues, and pending Limitation of Liability Act suits provided suitable and efficient vehicle for addressing individualized personal injury claims. *Puerto Rico v. M/V Emily S (D.P.R. Oct. 5, 1994), 158 FRD 9, 30 Fed R Serv 3d (Callaghan) 1293*.

92. —Other particular cases

Amount in controversy requirement was met in mass tort litigation arising out of oil refinery explosion since complaints sought over $32 billion in damages—far in excess of $10,000 then required of each of over 18,000 class members; and despite fact that some class members asserted claims for only fright and minor property damage, Louisiana law permits all plaintiffs proving actual damages to share in punitive damages, so punitive damage claim increased amount for each class member. *Watson v. Shell Oil Co. (5th Cir. La. Dec. 7, 1992), 979 F2d 1014, 24 Fed R Serv 3d (Callaghan) 593*.

District court did not abuse its discretion in finding plaintiffs would be unable to prove concentration of vinyl chloride that would create significant risk of contracting serious latent disease for all class members; nor was there common proof that could establish danger point for all class members; plaintiffs' proposed common evidence and trial plan

would not be able to prove medical necessity of plaintiffs' proposed monitoring regime without further individual proceedings to consider class members' individual characteristics and medical histories and to weigh benefits and safety of monitoring program. *Gates v. Rohm & Haas Co. (3d Cir. Pa. Aug. 25, 2011), 655 F3d 255, 80 Fed R Serv 3d (Callaghan) 604*.

District court did not abuse its discretion in finding property damage class members' individual issues predominated over issues common to class; given potential difference in contamination on properties, common issues did not predominate. *Gates v. Rohm & Haas Co. (3d Cir. Pa. Aug. 25, 2011), 655 F3d 255, 80 Fed R Serv 3d (Callaghan) 604*.

93. RICO

Because appellate court could not say settling plaintiffs' claims under *18 USCS § 1962(a)* and (b) were so untenable in light of their conformity to plain language of statute and absence of distinctiveness requirement as to prohibit federal jurisdiction under "non-frivolous assertion" standard announced in Bollard, district court properly exercised jurisdiction over class settlement where there was no requirement under Racketeer Influenced and Corrupt Organizations Act, *18 USCS §§ 1961*–*1968*, that "person" and "enterprise" be distinct in actions under *18 USCS § 1962(a)* and (b), where settling plaintiffs sufficiently alleged that income derived indirectly from acts of mail and wire fraud forming pattern of racketeering activity was used in establishment and operation of injurious recall "enterprise," as required by § 1962(a), and where complaints also alleged that defendants maintained control of recall program through acts of mail and wire fraud comprising pattern of racketeering, as required by § 1962(b). *Churchill Vill., L.L.C. v. GE (9th Cir. Cal. Mar. 16, 2004), 361 F3d 566, 58 Fed R Serv 3d (Callaghan) 53*, cert. denied, *(U.S. Oct. 4, 2004), 543 US 818, 125 S Ct 56, 160 L Ed 2d 26*.

Plaintiffs' putative class action suffered from insurmountable deficit of collective legal or factual questions; their claims were brought as based in fraud under Racketeer Influenced and Corrupt Organizations Act (RICO), *18 USCS §§ 1961*–*1968*, but under RICO, each plaintiff must prove reliance, injury, and damages; moreover, some undetermined number of plaintiffs' claims were time-barred; because individual issues outweighed issues susceptible to common proof, class was not maintainable under *Fed. R. Civ. P. 23(b)(3)*. *McLaughlin v. Am. Tobacco Co. (2d Cir. N.Y. Apr. 3, 2008), 522 F3d 215*).

Requirements of commonality and typicality under *Fed. R. Civ. P. 23(a)* were met because claims made by named plaintiffs and those made on behalf of settlement class members were indistinguishable, encompassing identical allegations that defendant insurers and insurance brokers violated Racketeer Influenced and Corrupt Organizations Act, *18 USCS § 1962(c)* and (d), federal and state antitrust laws, and common law obligation of fiduciary duty; these claims arose in each case from same course of action taken by defendants. *In re Ins. Brokerage Antitrust Litig. (3d Cir. N.J. Sept. 8, 2009), 579 F3d 241, 2009-2 Trade Cas (CCH) P76733*.

Borrower met her burden in establishing requirements of *Fed. R. Civ. P. 23* with respect to counts brought pursuant to *18 USCS § 1962(a)*, (c), and (d), because (1) alleged scheme to defraud, if proved, operated in same manner with regard to all customers and thus, liability for operating scheme would have flowed from class-wide common proof; (2) borrower only needed to show reliance on scheme, not necessarily on any particular fraudulent mailing or misrepresentation; (3) complaint adequately alleged that defendants, as result of alleged scheme, overcharged borrowers; (4) it would have been reasonable inference to assume that class member who purchased services from one of defendants relied on legitimacy of that organization in paying rate charged; and (5) need for individualized proof of damages alone would not defeat class certification. *Robinson v. Fountainhead Title Group Corp. (D. Md. Apr. 21, 2009), 257 FRD 92*.

Court granted plaintiffs' motion to certify class in their action alleging that defendants violated Racketeer Influenced and Corrupt Organizations Act, Utah Pattern of Unlawful Activity Act, and Utah Consumer Sales Practices Act by marketing, advertising and selling product as ultimate cure for fat, despite absence of any evidence of clinical or scientific support, because (1) claim was not barred by *Utah Code Ann. § 13-11-19(4)* as such behavior, if true, was prohibited by United Stated Federal Trade Commission order; (2) plaintiffs met all *Fed. R. Civ. P. 23(a)*

requirements; (3) as to requirements of Rule 23(b)(3), issue of existence of sufficient scientific basis predominated, and class action was both most efficient and most fair method for adjudicating claim; and (4) plaintiffs' plan of providing notification to potential class members satisfied notice requirements of Rule 23(c)(2). *Miller v. Basic Research, LLC (D. Utah Sept. 2, 2010), 285 FRD 647*.

94. Social Security

In action to declare statute under Social Security Act unconstitutional, class certification is appropriate, despite contention that congressional intent behind statutory scheme is to award benefits on case-by-case determination and that class actions in social security area are therefore inappropriate. *Mertz v. Harris (S.D. Tex. Sept. 10, 1980), 497 F Supp 1134*.

In action for declaratory and injunctive relief temporarily to restore terminated Social Security disability benefits to those persons who have appeals of terminations pending before United States courts, nationwide class would be certified where plaintiffs have satisfied numerosity requirement of Rule 23(a)(1) in that defendant Secretary of Health and Human Services admits that there are "a great many" disability termination cases before courts across country, and where commonality and typicality requirements of Rules 23(a)(2) and (3) are met; class would be certified under Rule 23(b)(2) with no notice to class members and no opportunity to opt out, since class is quite homogeneous, party opposing class has acted or refused to act on grounds generally applicable to class, making final injunctive relief appropriate, and numerous reported class actions under 23(b)(2) have been brought within recent year against Secretary. *Tustin v. Heckler (D.N.J. July 12, 1984), 591 F Supp 1049*, vacated, *(3d Cir. N.J. Dec. 7, 1984), 749 F2d 1055*.

Class certification is denied where plaintiffs claimed to represent class of social security recipients who had collected punitive damages under New York law providing for such award against care facilities who misappropriate social security benefits and plaintiffs argued punitive damages were not income for purposes of determining supplemental security income eligibility, because plaintiffs failed to move for certification, merely designated class in pleadings, and parroted language of Rule 23 without specifics. *Ahrens v. Bowen (E.D.N.Y. Oct. 31, 1986), 646 F Supp 1041*, rev'd, *(2d Cir. N.Y. July 14, 1988), 852 F2d 49*.

Nationwide class of persons denied benefits under invalid Social Security Administration policy that used outstanding arrest warrants rather than convictions to comply with ban on payments to probation or parole violators was certified to include persons who did not seek reinstatement of benefits or did not exhaust administrative remedies. *Clark v. Astrue (S.D.N.Y. Mar. 18, 2011), 274 FRD 462*.

95. —Medicare and Medicaid

In civil rights suit brought by Medicaid recipients against various New York state agencies alleging deficiencies in Medicaid fair hearing procedures, recipients were granted class certification under *Fed. R. Civ. P. 23* because they met all of requirements under Rule and it was shown that recipients allege that agencies systematically fail to implement fair hearing decisions within 90 days, and they sought injunction mandating that they improve fair hearing procedures so as to meet that 90-day requirement; further, agencies were alleged to have refused to act on generally applicable grounds, and final injunctive relief with respect to class as whole would likely be appropriate. *Shakhnes v. Eggleston (S.D.N.Y. Sept. 30, 2010), 740 F Supp 2d 602*.

96. Truth in Lending Act

Apart from any inherent incongruity between remedies provided by Truth in Lending Act (*15 USCS §§ 1601* et seq.) and Rule 23, there is nothing in Act itself, rule, or in notes of Advisory Committee on Rules with respect to it, which expressly or impliedly precludes class actions in cases involving Act. *Wilcox v. Commerce Bank of Kansas City (10th Cir. Kan. Feb. 20, 1973), 474 F2d 336, 16 Fed R Serv 2d (Callaghan) 1244*.

Nothing in legislative history of Truth in Lending Act (15 USCS §§ 1601 et seq.), or Act itself, expressly or impliedly prohibits use of class action. Haynes v. Logan Furniture Mart, Inc. (7th Cir. Ill. Oct. 2, 1974), 503 F2d 1161, 19 Fed R Serv 2d (Callaghan) 205.

Under 1974 amendment to Truth in Lending Act (15 USCS §§ 1601 et seq.), class action, within stated limitations, is expressly contemplated; accordingly, courts are to apply Rule 23 to Truth in Lending Act cases just as it is applied generally. Boggs v. Alto Trailer Sales, Inc. (5th Cir. La. Apr. 14, 1975), 511 F2d 114, 19 Fed R Serv 2d (Callaghan) 1490.

As matter of law, class certification was not available for rescission claims, direct or declaratory, under federal Truth in Lending Act (TILA), 15 USCS §§ 1601 et seq., and, thus, under Massachusetts Consumer Credit Cost Disclosure Act, Mass. Gen. Laws ch. 140D because it was clear that Congress did not intend rescission suits to receive class-action treatment since variation in treatment of class actions in two relevant sections of TILA strongly suggested that Congress did not intend to include class-action mechanism within compass of 15 USCS § 1635; moreover, TILA already included significant incentives for creditor compliance with its strictures, thus casting serious doubt on need for class-action mechanism with respect to rescission. McKenna v. First Horizon Home Loan Corp. (1st Cir. Mass. Jan. 29, 2007), 475 F3d 418.

Neither legislative history of Truth in Lending Act (15 USCS §§ 1601 et seq.) nor its words support position that Rule 23 should not be applied to cases involving Act. Rogers v. Coburn Finance Corp. (N.D. Ga. 1971), 53 FRD 182, 15 Fed R Serv 2d (Callaghan) 797.

Truth in Lending Act (15 USCS §§ 1601 et seq.) provisions for minimal recovery of $100, maximum of $1,000, and reasonable attorney's fee, do not indicate Congressional intent to preclude class actions in all Truth in Lending cases. Kristiansen v. John Mullins & Sons, Inc. (E.D.N.Y. 1973), 59 FRD 99, 17 Fed R Serv 2d (Callaghan) 101.

Some Truth in Lending cases may qualify as class actions and others may not. McDermott v. Hollander (E.D. La. 1973), 60 FRD 643, 18 Fed R Serv 2d (Callaghan) 740.

Decision as to whether class action is necessary to achieve purposes of Truth in Lending Act (15 USCS §§ 1601 et seq.) is one which must be answered in each case and is not susceptible to broad per se rule that class action is never proper in suit brought under Act. Turoff v. Union Oil Co. (N.D. Ohio 1973), 61 FRD 51, 18 Fed R Serv 2d (Callaghan) 728.

There is total lack of need or justification for class action proceedings in circumstances of case under Truth in Lending Act (15 USCS §§ 1601 et seq.). Umdenstock v American Mortgage & Inv. Co. (1973, WD Okla) 363 F Supp 1375, 1974-1 CCH Trade Cases P 74955, 18 FR Serv 2d 85, affd in part and revd in part on other grounds (1974, CA10 Okla) 495 F2d 589, 1974-1 CCH Trade Cases P 75039, 18 FR Serv 2d 1075 and (criticized in In re Farmers Ins. Co., FCRA Litig. (2006, WD Okla) 2006 US Dist LEXIS 27290).

In amending Truth in Lending Act (15 USCS §§ 1601 et. seq.) so as to place limit upon amount of damages recoverable, Congress did not intend that there should be class action in most cases, but intended to encourage Truth in Lending class actions only in sense of removing minimum liability provisions which had prevented majority of courts from certifying Truth in Lending cases as class actions; thus, court would apply Rule 23 to facts of action brought under Act just as it was applied generally, keeping in mind specific limitations contained in amendment. Agostine v. Sidcon Corp. (E.D. Pa. 1975), 69 FRD 437, 21 Fed R Serv 2d (Callaghan) 329.

Effect of 1974 amendment to Federal Truth in Lending Act (15 USCS §§ 1601 et seq.) was to leave Rule 23 to be applied to Federal TILA cases precisely as it applies to other cases. Kaminski v. Shawmut Credit Union (D. Mass. July 19, 1976), 416 F Supp 1119, 21 Fed R Serv 2d (Callaghan) 1332.

Suits under Truth-In-Lending Act (15 USCS §§ 1601 et seq.) can be maintained as class actions. Parr v. Thorp Credit, Inc. (S.D. Iowa 1977), 73 FRD 127, 22 Fed R Serv 2d (Callaghan) 1105.

15 USCS § 1640(a)(2)(B) was intended to guarantee availability of class actions in Truth in Lending suits but did not obviate plaintiff's traditional burden under Civil Rule 23. *Perry v. Beneficial Finance Co. (W.D.N.Y. 1979), 81 FRD 490, 27 Fed R Serv 2d (Callaghan) 39*.

97. —Particular cases

Class action brought against retailer to secure compliance with Truth in Lending Act is inappropriate where individuals suit has already secured compliance with Act, where defendant is small retailer charged with his first violation of Act, and where violation is merely technical causing no actual damages. *Watkins v. Simmons & Clark, Inc. (6th Cir. Mich. Jan. 8, 1980), 618 F2d 398, 28 Fed R Serv 2d (Callaghan) 929*.

District court erred when it awarded injunctive relief and over $22 million in restitution or disgorgement of fees to class of all people in United States who borrowed money from lender or its subsidiaries, based on borrower's claim that lender violated Truth in Lending Act (TILA) when it listed fee for non-filing insurance in wrong column of disclosure form; TILA did not give private litigants right to injunction or other equitable relief such as restitution or disgorgement, and because injunctive relief was not remedy available under TILA, Rule 23(b)(2) certification was improper; far from effectuating declaration regarding borrower's TILA action, district court circumvented remedies Congress provided under TILA: actual damages (which borrower conceded he could not prove) or statutory damages (which borrower waived). *Christ v. Ben. Corp. (11th Cir. Fla. Oct. 28, 2008), 547 F3d 1292*.

Action brought under Truth in Lending Act (*15 USCS §§ 1601* et seq.) and Regulation Z thereunder, asserting that certain procedures and arrangements employed by defendant is obtaining new members violated "four installment" rule established by regulation, could not be maintained as class action since (1) statutory penalties, including attorneys' fees, are substitute for class action in vindicating rights of small litigant, and (2) horrendous, possibly annihilating punishment, unrelated to actual damages could flow from permitting aggregation of claims of large classes under Act and Rule 23. *Mathews v. Book--of--the--Month Club, Inc. (N.D. Cal. 1974), 62 FRD 479, 18 Fed R Serv 2d (Callaghan) 1475*.

In view of amendment to Truth in Lending Act (*15 USCS §§ 1601* et seq.) leaving class action treatment for violation of Act to sound discretion of courts, District Court, in action alleging defendant's wrongful failure to disclose cost of owner's title insurance and defendant's wrongful failure to make timely disclosures, would exercise such discretion, and, finding that requirements of Rule 23(a) and (b)(3) were met, order that action be maintained as class action as to that count of complaint challenging timeliness of disclosures. *Postow v. Oriental Bldg. Ass'n (D.D.C. Mar. 14, 1975), 390 F Supp 1130*.

Because two member banks engrafted arbitration agreements in their cardholder agreements after litigation had commenced, agreements were not enforceable; therefore, court certified antitrust injunctive relief class pursuant to *Fed. R. Civ. P. 23* that consisted of all cardholders of those banks' general purpose cards without enforceable arbitration clauses, as well as two subclasses for Truth in Lending Act, *15 USCS §§ 1601* et seq., violations of those same member banks. *In re Currency Conversion Fee Antitrust Litig. (S.D.N.Y. Mar. 9, 2005), 361 F Supp 2d 237, 2005-1 Trade Cas (CCH) P74726* (criticized in *Vaughn v Leeds, Morelli & Brown, P.C. (2005, SD NY) 2005 US Dist LEXIS 16792*) and (criticized in *Austen v Catterton Partners V, LP (2011, DC Conn) 831 F Supp 2d 559*).

Retail vehicle buyer was entitled to conditional class certification under *Fed. R. Civ. P. 23(a)* and *(b)(3)* of action alleging violations of Truth in Lending Act and other state and federal laws brought against dealer as result of requiring buyer to sign form purporting to give dealer ability to revoke retail installment sale contract because he met prerequisites and established predominance and superiority of class action consisting of three purported classes and one subclass. *Salvagne v. Fairfield Ford, Inc. (S.D. Ohio Dec. 15, 2009), 264 FRD 321*.

98. Welfare and public assistance

Class action is appropriate procedure in welfare cases. *Wilson v. Weaver (N.D. Ill. Dec. 26, 1972), 358 F Supp 1147*, aff'd in part and rev'd in part, *(7th Cir. Ill. May 9, 1974), 499 F2d 155*.

Requisites for maintenance of class action pursuant to Rule 23(a) and Rule 23(b)(2) were met by class of all needy families with children in Wisconsin who are otherwise eligible to receive emergency assistance, but who have been, are being and will be denied such emergency assistance to maintain or restore their heat and utility services or to avoid evictions from their homes. *Kozinski v. Schmidt (E.D. Wis. Dec. 11, 1975), 409 F Supp 215*.

Action challenging validity of policies contained in Hawaii Public Welfare Manual § 3392, as interpreted and applied by State Department of Social Services and Housing, for evaluating equity that applicants and recipients of Aid to Families With Dependent Children may have in their home property while receiving assistance may not be brought as class action under Rule 23. *Kanda v. Chang (D. Haw. July 18, 1979), 475 F Supp 368*.

Class action by recipients of home care services challenging manner in which city and state reduced home care services for Medicaid recipients is not dismissed for lack of standing, where on date complaint was filed none of plaintiffs was experiencing reduction of services, but 3 of 5 named plaintiffs were awaiting hearings to determine whether their aid would be cut, because these 3 plaintiffs faced imminent prospect of reduction and so had standing to sue. *Mayer v. Wing (S.D.N.Y. Apr. 3, 1996), 922 F Supp 902*.

99. Other unfair debt collection claims

State's suit to enforce Missouri Merchandising Practices Act against debt collectors who were seeking to collect debts that had been discharged in bankruptcy was not "class action" within meaning of *28 USCS § 1332(d)*, because it was not filed under *Fed. R. Civ. P. 23* or Missouri equivalent thereof, which was Mo. Sup. Ct. R. 52.08, and because relief sought by State, which included restitution to be paid to State under *Mo. Rev. Stat. § 407.140(3)* and disbursed by it to affected citizens per *Mo. Rev. Stat. § 407.100*, was punitive in nature. *Missouri ex rel. Koster v. Portfolio Recovery Assocs. (E.D. Mo. Feb. 24, 2010), 686 F Supp 2d 942*.

100. Miscellaneous

Class action to vacate, annul and set aside judgments and sentences of conviction under federal wagering tax statutes and to order repayment of fines, penalties and costs could fairly and properly be characterized as civil in nature and thus could be brought under Rule 23. *Neely v. United States (3d Cir. Pa. Dec. 15, 1976), 546 F2d 1059, 22 Fed R Serv 2d (Callaghan) 765*.

Class action certification under Rule 23 is appropriate in action seeking declaratory judgment that state residential picketing statute is unconstitutional on its face and as applied to plaintiffs' peaceful picketing on public sidewalk in front of residence of city mayor to protest his policies concerning busing of children. *Brown v. Scott (7th Cir. Ill. Aug. 2, 1979), 602 F2d 791, 28 Fed R Serv 2d (Callaghan) 1128*, aff'd, *(U.S. June 20, 1980), 447 US 455, 100 S Ct 2286, 65 L Ed 2d 263*.

Class action is available under Farm Labor Contractor Registration Act (*7 USCS §§ 2041* et seq.). *De La Fuente v. Stokely-Van Camp, Inc. (7th Cir. Ill. June 29, 1983), 713 F2d 225, 36 Fed R Serv 2d (Callaghan) 1161, 98 Lab Cas (CCH) P34417*.

Because concerns about class composition and size should be left to *Fed. R. Civ. P. 23* proceedings, difficulty of class certification was not hurdle in deciding whether Holocaust survivors' property claims against Nazi puppet regime during World War II could be considered under political question doctrine. *Alperin v. Vatican Bank (9th Cir. Cal. Apr. 18, 2005), 405 F3d 727*, reprinted, *(9th Cir. Cal. June 9, 2005), 410 F3d 532*.

District court properly weighed facts before it and exercised its discretion to conclude that common predominant issue of whether windows suffered from single, inherent design defect leading to wood rot was essence of dispute and was better resolved by class treatment. *Pella Corp. v. Saltzman (7th Cir. Ill. May 20, 2010), 606 F3d 391*, cert. denied, *(U.S. Jan. 18, 2011), 562 US 1178, 131 S Ct 998, 178 L Ed 2d 826*.

District court had jurisdiction to hear class action under *Fed. R. Civ. P. 23* and *28 USCS § 1332(d)* of subscriber against satellite television provider because there was no requirement than any individual claim had to exceed

$75,000, putative class exceeded 100 persons, amount in aggregate exceeded $5 million, and there was sufficient diversity. *Cappuccitti v. DirecTV, Inc. (11th Cir. Ga. Oct. 15, 2010), 623 F3d 1118, 160 Lab Cas (CCH) P10316*.

Rule 23 cannot broaden jurisdiction of District Courts to include class action of patent infringement suit, when federal statutory provision governing jurisdiction of patent suits does not provide for it. *Sperry Products, Inc. v. Association of American Railroads (D.N.Y. Jan. 12, 1942), 44 F Supp 660*, aff'd in part and rev'd in part, *(2d Cir. N.Y. Dec. 14, 1942), 132 F2d 408*.

Class action is not prohibited in action brought under Tucker Act, *28 USCS § 1346*. *O'Meara v. United States (N.D. Ill. 1973), 59 FRD 560, 17 Fed R Serv 2d (Callaghan) 672*.

Class action under Rule 23 is not proper under Economic Stabilization Act, in light of fact that Act is essentially analogous to provisions of Truth-in-Lending Act (*15 USCS §§ 1601* et seq.). *Arnson v. General Motors Corp. (N.D. Ohio May 31, 1974), 377 F Supp 209, 19 Fed R Serv 2d (Callaghan) 60*.

Certification of plaintiff's punitive damages class is inappropriate in light of legislative history and remedial purpose of Magnuson-Moss Warranty Act. *Walsh v. Ford Motor Co. (D.D.C. Feb. 13, 1986), 627 F Supp 1519, 1986-1 Trade Cas (CCH) P66975*.

Persons who gave checks to cash-advance corporation in Georgia, but never received gifts using "gift certificates" from corporation, were certified as class, as question whether cost of advances was usurious interest raised jury question. *Upshaw v. Ga. Catalog Sales, Inc. (M.D. Ga. Apr. 3, 2002), 206 FRD 694*.

Plaintiffs' claims for declaratory and injunctive relief were appropriate for class certification in action under Equal Credit Opportunity Act, *15 USCS §§ 1691* et seq.; because it did not involve money, declaratory and injunctive relief could be awarded with no individualized analysis as to class members. *Cason v. Nissan Motor Acceptance Corp. (M.D. Tenn. Oct. 16, 2002), 212 FRD 518*.

Cattle producers were entitled to class certification of action against cattle packers alleging unjust enrichment and violation of Packers and Stockyards Act (PSA), *7 USCS §§ 181*–*229*, through unfair and deceptive practice of using incorrect U.S. Department of Agriculture boxed beef prices to negotiate purchase of slaughter cattle from producers, where there were common questions of law as to whether packers had statutory duty under *7 USCS § 192* to refrain from deceptive use of prices that were required under Livestock Mandatory Reporting Act of 1999, *7 USCS §§ 1635*–*1636h*, and whether packers were unjustly enriched; further, varying state common law standards of unjust enrichment liability could be resolved by sub-classes. *Schumacher v. Tyson Fresh Meats, Inc. (D.S.D. June 4, 2004), 221 FRD 605*.

In this action challenging constitutionality of District of Columbia's Neighborhood Safety Zone program, plaintiffs' motion for class certification was denied because injunction predicated on facial invalidation of program afforded complete protection to all potentially affected by program. *Mills v. District of Columbia (D.D.C. Mar. 31, 2010), 266 FRD 20*.

In oil and gas lease dispute over royalty payments, plaintiffs' class action allegations were not subject to dismissal based on argument that they failed to state claim for relief because, at notice pleading stage, plaintiff did not have to meet *Fed. R. Civ. P. 23* certification requirement and here plaintiffs made allegations sufficient to demonstrate that they may plausibly bring this matter as class action. *Anderson Living Trust v. ConocoPhillips Co., LLC (D.N.M. June 28, 2013), 952 F Supp 2d 979*, dismissed, in part, *(D.N.M. May 9, 2014), — F Supp 2d —, 20 F Supp 3d 1244*, dismissed, in part, dismissed without prejudice, *(D.N.M. May 16, 2014), — F Supp 2d —, 27 F Supp 3d 1188*, in part, (D.N.M. May 26, 2015), — F Supp 2d —, in part, *(D.N.M. June 24, 2015), — F Supp 2d —, 308 FRD 410*, in part, (D.N.M. Jan. 19, 2016), — F Supp 2d —, in part, (D.N.M. Mar. 1, 2016), — F Supp 2d —.

b. Civil Rights and Discrimination

101. Generally

Violations of Fourteenth Amendment are violations of individual on personal rights, but where they are committed on class basis or as group policy, such as discrimination generally because of race, they are no less entitled to be made subject of class actions and class adjudication under rule relating to class actions than are other several rights. *Kansas City v. Williams (8th Cir. Mo. June 10, 1953), 205 F2d 47*, cert. denied, *(U.S. Dec. 1, 1953), 346 US 826, 74 S Ct 45, 98 L Ed 351*; *Lucy v. Adams (D. Ala. Aug. 26, 1955), 134 F Supp 235*, aff'd, *(5th Cir. Ala. Dec. 30, 1955), 228 F2d 619*.

Civil Rights Act of 1964 in nowise precludes class action device. *Oatis v. Crown Zellerbach Corp. (5th Cir. La. July 16, 1968), 398 F2d 496, 1 Empl Prac Dec (CCH) P9894, 58 Lab Cas (CCH) P9140*.

Class actions are favorably viewed as means of seeking redress for civil rights violations. *Gerstle v. Continental Airlines, Inc. (D. Colo. July 16, 1970), 50 FRD 213, 2 Empl Prac Dec (CCH) P10273, 14 Fed R Serv 2d (Callaghan) 342*, aff'd, *(10th Cir. Colo. Oct. 2, 1972), 466 F2d 1374, 5 Empl Prac Dec (CCH) P7998, 16 Fed R Serv 2d (Callaghan) 693*.

Although class action under Rule 23 has enjoyed widespread use in field of civil rights litigation, such actions are not without limitations imposed by both USCS Rules of Civil Procedure and judicial decisions. *Jagnandan v. Giles (N.D. Miss. Aug. 15, 1974), 379 F Supp 1178*, aff'd, in part, *(5th Cir. Sept. 20, 1976), 538 F2d 1166*.

Not every claim of sex discrimination qualifies plaintiff as class representative in class action proceeding; in given case alleged discrimination may be so individualized and unique as to render any claim based thereon atypical of other claims of sexual discrimination. *Predmore v. Allen (D. Md. June 20, 1975), 407 F Supp 1053, 10 Empl Prac Dec (CCH) P10260*.

102. Race discrimination, generally

Violations of Fourteenth Amendment are violations of individual on personal rights, but where they are committed on class basis or as group policy, such as discrimination generally because of race, they are no less entitled to be made subject of class actions and class adjudication under rule relating to class actions than are other several rights. *Kansas City v. Williams (8th Cir. Mo. June 10, 1953), 205 F2d 47*, cert. denied, *(U.S. Dec. 1, 1953), 346 US 826, 74 S Ct 45, 98 L Ed 351*; *Lucy v. Adams (D. Ala. Aug. 26, 1955), 134 F Supp 235*, aff'd, *(5th Cir. Ala. Dec. 30, 1955), 228 F2d 619*.

On showing of discrimination towards himself and other members of his race, plaintiff may appropriately file and prosecute class action on behalf of himself and other members of his race. *Williams v. Matthews Co. (8th Cir. Ark. June 20, 1974), 499 F2d 819*, cert. denied, *(U.S. Nov. 18, 1974), 419 US 1021, 95 S Ct 495, 42 L Ed 2d 294*, cert. denied, *(U.S. Nov. 18, 1974), 419 US 1027, 95 S Ct 507, 42 L Ed 2d 302*.

Class actions have long been used successfully against segregation, and use of class actions is appropriate inasmuch as racial discrimination is by definition class discrimination, even though individual rights are involved. *Bennett v. Gravelle (D. Md. Jan. 19, 1971), 323 F Supp 203, 3 Empl Prac Dec (CCH) P8101, 14 Fed R Serv 2d (Callaghan) 1557, 66 Lab Cas (CCH) P12240*, aff'd, *(4th Cir. Md. Nov. 19, 1971), 451 F2d 1011, 4 Empl Prac Dec (CCH) P7566, 66 Lab Cas (CCH) P12241*, disapproved, *Sethy v. Alameda Co. Water Dist. (9th Cir. Sept. 20, 1976), 545 F2d 1157, 13 Empl Prac Dec (CCH) P11328*.

When dealing with racial discrimination, generally, fact that case proceeds as class action or not may be academic where equitable relief is deemed appropriate. *Harris v. Dumont Co. (D. Pa. 1973), 61 FRD 423*.

Racially discriminatory practices by public officers and individuals are generally regarded as proper subjects for class actions. *Hines v. D'Artois (W.D. La. July 1, 1974), 383 F Supp 184, 8 Empl Prac Dec (CCH) P9630*, rev'd, *(5th Cir. La. May 13, 1976), 531 F2d 726, 11 Empl Prac Dec (CCH) P10918, 21 Fed R Serv 2d (Callaghan) 961*, disapproved as stated in *Leonard v. Frankfort Electric & Water Plant Bd. (6th Cir. Ky. Jan. 9, 1985), 752 F2d 189, 35 Empl Prac Dec (CCH) P34911*.

Not every claim of racial discrimination qualifies plaintiff as class representative in class action proceeding; in given case alleged discrimination may be so individualized and unique as to render any claim based thereon atypical of other claims of sexual discrimination. *Predmore v. Allen (D. Md. June 20, 1975), 407 F Supp 1053, 10 Empl Prac Dec (CCH) P10260*.

103. Elections and voting

Action to void election incorporating village is appropriately certified as class action under Rule 23, where it is alleged that boundaries of proposed village have been drawn to exclude substantial areas of Black, Mexican-American and poor citizens, historically deemed integral part of area, in violation of Voting Rights Act of 1965 (*42 USCS § 1973*), *42 USCS § 1983*, and Fourteenth and Fifteenth Amendments. *Caserta v. Dickinson (S.D. Tex. June 9, 1980), 491 F Supp 500*, aff'd in part and rev'd in part, *(5th Cir. Tex. Apr. 5, 1982), 672 F2d 431*.

Plaintiffs seeking relief for alleged discrimination against minority voters in municipal election are denied certification of defendants' class composed of election district board workers and candidate's challengers where (1) it would not be burdensome for plaintiffs to amend complaint to assert causes of action against other individuals, (2) class members who had not yet engaged counsel are not adequately represented, (3) interests of named defendants may be antagonistic to proposed class members, and (4) class certification of challengers or election board members may chill legitimate exercise of their political rights. *Vargas v. Calabrese (D.N.J. May 14, 1986), 634 F Supp 910*.

Four farmers challenging federal regulations promulgated under *7 USCS § 1982* governing elections for Farmers Home Administration county committee posts and alleging specific violations affecting some county committee elections may bring all of their claims on behalf of class defined as all farmers in state who are eligible to vote in such elections, but ineligible to serve as committee members under regulations, because although precise election violations vary and did not affect all elections, claims of these 4 plaintiffs focus on implementation of regulations and validity of eligibility restrictions, which are pervasive claims common to all class members. *Hedge v. Lyng (D. Minn. June 29, 1987), 689 F Supp 884*.

Class certification is denied where members of Socialist Worker's Party sought injunction against enforcement of reporting, disclosure, and recordkeeping provisions of state election law on basis that enforcement would have chilling effect on members' constitutional rights, because if injunction is granted, proposed class would benefit even without certification, and giving notice to class members may cause unwanted disclosure of members' names, undermining thrust of lawsuit. *McArthur v. Firestone (S.D. Fla. Aug. 11, 1988), 690 F Supp 1018*.

104. Employment

Class actions are properly utilized in cases involving alleged discrimination in employment practices, and suit by single employee which is not brought as class action is perforce sort of class action for fellow employee similarly situated when it attacks employment practices of employer on grounds of discrimination. *Afro American Patrolmens League v. Duck (6th Cir. Ohio Sept. 26, 1974), 503 F2d 294, 8 Empl Prac Dec (CCH) P9697, 19 Fed R Serv 2d (Callaghan) 298*.

As general rule where employment discrimination is urged on basic specific circumstances relating to individuals involved, class action would be inappropriate, and same would be true if issue depended on construction or application of particular language in statute or collective bargaining contract where relitigation would normally be effectively barred by res judicata, but class action technique would be appropriate where general policy adverse to advancement of womankind is involved, not directed toward particular individuals nor involving specific issues of law or fact, but having general adverse impact on numerous individuals arising as consequence of such policy. *Bradford v. Peoples Natural Gas Co. (W.D. Pa. June 25, 1973), 60 FRD 432, 7 Empl Prac Dec (CCH) P9120, 18 Fed R Serv 2d (Callaghan) 1169, 73 Lab Cas (CCH) P33018*.

Suits to enjoin racial discrimination in employment are by their nature appropriate class actions. *Sabala v. Western Gillette, Inc. (S.D. Tex. July 17, 1973), 362 F Supp 1142, 6 Empl Prac Dec (CCH) P8863, 18 Fed R Serv 2d (Callaghan) 245*.

Where employment discrimination is urged on basis of specific circumstances relating only to particular individuals, class action may be inappropriate, and it may well be that where complaint merely sets forth conclusory assertions of unlawful discrimination and plaintiff can muster no facts that even tend to show racial discrimination, motion to maintain class action should be denied. *Hoston v. United States Gypsum Co. (E.D. La. Mar. 17, 1975), 67 FRD 650, 10 Empl Prac Dec (CCH) P10529, 22 Fed R Serv 2d (Callaghan) 951*.

Unpublished decision: It was not error for district court to deny employee's motion for certification of claims against employer, Social Security Administration, because employee had not established that there were common questions involving group of employees that predominated over individual questions or that resolution of certain issues would be superior through class action lawsuit, as required by *Fed. R. Civ. P. 23*. *Youngblood v. Astrue (9th Cir. Cal. June 5, 2008), 281 Fed Appx 726*.

105. —Age discrimination

Suits brought under Age Discrimination in Employment Act of 1967 (*29 USCS §§ 621*–*634*) may not be maintained as Rule 23 type class actions in view of adoption by § 7(b) of Act of provisions of Fair Labor Standards Act allowing as class members only those who opt in. *La Chapelle v. Owens-Illinois, Inc. (5th Cir. Ga. May 23, 1975), 513 F2d 286, 9 Empl Prac Dec (CCH) P10191, 20 Fed R Serv 2d (Callaghan) 368* (criticized in *Dudley v Tex. Waste Sys. (2005, WD Tex) 151 CCH LC P 34996*).

Former employee's action against employer under Age Discrimination in Employment Act is not entitled to class certification, where other members of class have failed to file intent to sue letter with Secretary of Labor in accordance with *29 USCS § 626(d)*, and where such statutory requirement is prerequisite to and complement of class action mechanism provided by § 16(b) of Fair Labor Standards Act, *29 USCS § 216(b)*. *McCorstin v. United States Steel Corp. (5th Cir. Ala. July 16, 1980), 621 F2d 749, 23 Empl Prac Dec (CCH) P31112, 29 Fed R Serv 2d (Callaghan) 1502*.

Age discrimination suit may not be brought as Rule 23 class action suit because provision in Age Discrimination in Employment Act allowing as class members only those persons who affirmatively "opt into" class is inconsistent with Rule 23 which provides that persons within description of class are considered to be class members unless they have "opted out" of suit. *Chilton v. Export Leaf Tobacco Co. (M.D.N.C. 1975), 20 Fed R Serv 2d (Callaghan) 1017*.

Rule 23 is inapplicable to action brought under Age Discrimination in Employment Act (*29 USCS §§ 621* et seq.). *Cooke v. Reynolds Metals Co. (E.D. Va. Jan. 2, 1975), 65 FRD 539, 19 Fed R Serv 2d (Callaghan) 804*.

Class action cannot be maintained for alleged violations of Age Discrimination in Employment Act (*29 USCS §§ 621* et seq.); class action under Act is statutory class action, independent of and unrelated to class action covered by Rule 23. *McGinley v. Burroughs Corp. (E.D. Pa. Dec. 18, 1975), 407 F Supp 903, 12 Empl Prac Dec (CCH) P10965, 21 Fed R Serv 2d (Callaghan) 167*, disapproved, *Bonham v. Dresser Indus. (3d Cir. Pa. Dec. 27, 1977), 569 F2d 187, 15 Empl Prac Dec (CCH) P8028*.

Individuals alleging violation of Age Discrimination in Employment Act of 1967 (*29 USCS §§ 621* et seq.) are precluded from maintaining class action under Rule 23 by consent provisions of Fair Labor Standards Act (*29 USCS § 216(b)*) specifically incorporated into ADEA. *Naton v. Bank of California (N.D. Cal. Oct. 20, 1976), 72 FRD 550, 13 Empl Prac Dec (CCH) P11464, 22 Fed R Serv 2d (Callaghan) 811*, modified, *(9th Cir. Cal. May 4, 1981), 649 F2d 691, 26 Empl Prac Dec (CCH) P31824*.

Express language of § 7(b) of Age Discrimination in Employment Act (*29 USCS § 626(b)*) selects class action mechanism defined in § 16(b) of Act (*29 USCS § 216(b)*), rather than that set forth in Rule 23. *Lusardi v. Xerox*

Corp. (D.N.J. Aug. 30, 1983), 99 FRD 89, 37 Fed R Serv 2d (Callaghan) 436 (criticized in Anne Arundel County v Cambridge Commons (2005) 167 Md App 219, 892 A2d 593).

Language of Age Discrimination in Employment Act, by its explicit incorporation of "opt in" provision of § 16(b) of Fair Labor Standards Act (*29 USCS § 216(b)*), clearly prohibits plaintiffs' efforts to have court treat age discrimination actions as Rule 23 class actions. Watkins v. Milliken & Co. (W.D.N.C. Sept. 19, 1984), 613 F Supp 408, 37 Empl Prac Dec (CCH) P35229.

Named representative plaintiffs in ADEA class action must satisfy all requirements of Rule 23 insofar as they are consistent with *29 USCS § 216*, including requirement that no person may be party plaintiff represented by named plaintiff unless that party files written consent with court. Shushan v. University of Colorado (D. Colo. Apr. 13, 1990), 132 FRD 263, 55 Empl Prac Dec (CCH) P40383 (criticized in Daggett v Blind Enters. (1996, DC Or) 1996 US Dist LEXIS 22465) and (criticized in Bayles v American Medical Response (1996, DC Colo) 950 F Supp 1053, 3 BNA WH Cas 2d 1317) and (criticized in Thiessen v GE Capital Corp. (2001, CA10 Kan) 267 F3d 1095, 2001 Colo J C A R 4826, 51 FR Serv 3d 354) and (criticized in *Rochlin v Cincinnati Ins. Co. (2003, SD Ind) 2003 US Dist LEXIS 13759*) and (criticized in *Carter v Indianapolis Power & Light Co. (2003, SD Ind) 2003 US Dist LEXIS 23398*) and (criticized in Dorsey v J&V Commun. Servs., Inc. (2004, SD Tex) 2004 US Dist LEXIS 31485) and (criticized in Leuthold v Destination Am. (2004, ND Cal) 224 FRD 462) and (criticized in England v New Century Fin. Corp. (2005, MD La) 370 F Supp 2d 504) and (criticized in Kenyatta-Bean v Hous. Auth. of New Orleans (2005, ED La) 2005 US Dist LEXIS 36667) and (criticized in Hampshire v Port Arthur Indep. Sch. Dist. (2006, ED Tex) 2006 US Dist LEXIS 88874) and (criticized in Silverman v Smithkline Beecham Corp. (2007, CD Cal) 2007 US Dist LEXIS 80030) and (criticized in Treme v HKA Enters. (2008, WD La) 2008 US Dist LEXIS 97420) and (criticized in Xavier v Belfor USA Group, Inc. (2008, ED La) 585 F Supp 2d 873) and (criticized in Watson v Travis Software Corp. (2008, SD Tex) 2008 US Dist LEXIS 94824) and (criticized in Sedtal v Genuine Parts Co. (2009, ED Tex) 2009 US Dist LEXIS 63261) and (criticized in West v Phelps Dodge Ref. Corp. (2009, WD Tex) 2009 US Dist LEXIS 70843) and (criticized in da Silva v M2/Royal Constr. of La., LLC (2009, ED La) 2009 US Dist LEXIS 100692) and (criticized in Hickson v United States Postal Serv. (2010, ED Tex) 2010 US Dist LEXIS 104112) and (criticized in Prescott v Prudential Ins. Co. (2010, DC Me) 729 F Supp 2d 357) and (criticized in Larsen v Creme De La Creme, Inc. (2011, ED Tex) 2011 US Dist LEXIS 7405) and (criticized in *Collinge v Intelliquick Delivery, Inc. (2012, DC Ariz) 19 BNA WH Cas 2d 1872*) and (criticized in Heeg v Adams Harris, Inc. (2012, SD Tex) 907 F Supp 2d 856) and (criticized in McDonald v Ricardo's on Beach, Inc. (2013, CD Cal) 2013 US Dist LEXIS 8536) and (criticized in Lee v Veolia ES Indus. Servs. (2013, ED Tex) 2013 US Dist LEXIS 74193) and (criticized in Rodriguez v Gold & Silver Buyers, Inc. (2013, SD Tex) 2013 US Dist LEXIS 136332) and (criticized in Shanks v Carrizo Oil & Gas, Inc. (2013, SD Tex) 2013 US Dist LEXIS 177539) and (criticized in Harris v Hinds County (2014, SD Miss) 2014 US Dist LEXIS 14176) and (criticized in White v Denton County (2014, ED Tex) 2014 US Dist LEXIS 43881) and (criticized in Altiep v Food Safety Net Servs. (2014, ND Tex) 2014 US Dist LEXIS 114835) and (criticized in Wellman v Grand Isle Shipyard, Inc. (2014, ED La) 2014 US Dist LEXIS 158432) and (criticized in Lewis v Southeast Commer. Cleaning LLC (2014, WD La) 2014 US Dist LEXIS 164210).

Application of Rule 23's requirements to question whether potential age discrimination plaintiffs are similarly situated is at odds with well-reasoned conclusions of other courts, remedial purposes of ADEA, and prompt and efficient resolution of similar claims, hence at preliminary notice stage plaintiffs are only required to demonstrate factual nexus that supports finding that potential plaintiffs were subjected to common discriminatory scheme. Jackson v. New York Tel. Co. (S.D.N.Y. Sept. 22, 1995), 163 FRD 429.

106. —Title VII

Class actions are permissible, indeed often preferable, in actions under Title VII of Civil Rights Act of 1964 (*42 USCS § 2000e*), if requirements of Rule 23(a) and (b)(2) are satisfied. Hill v. American Airlines, Inc. (5th Cir. Tex. July 6, 1973), 479 F2d 1057, 6 Empl Prac Dec (CCH) P8703, 17 Fed R Serv 2d (Callaghan) 1175.

Every action under Title VII of Civil Rights Act (*42 USCS §§ 2000e* et seq.) is in effect class action. EEOC v Detroit Edison Co. (1975, CA6 Mich) 515 F2d 301, 10 BNA FEP Cas 239, 10 BNA FEP Cas 1063, 9 CCH EPD P 9997, 19

FR Serv 2d 1502, vacated on other grounds *(1977) 431 US 951, 97 S Ct 2668, 53 L Ed 2d 267, 14 BNA FEP Cas 1686, 14 CCH EPD P 7580* and (superseded by statute on other grounds as stated in Dickinson v Ohio Bell Communications (1993, CA6 Ohio) 1993 US App LEXIS 17878); Marcera v Chinlund (1979, CA2 NY) 595 F2d 1231, 26 FR Serv 2d 1144, vacated *(1979) 442 US 915, 99 S Ct 2833, 61 L Ed 2d 281* and (criticized in Tilley v TJX Cos. (2003, CA1 Mass) 345 F3d 34, 68 USPQ2d 1288, 56 FR Serv 3d 1252); EEOC v. General Tel. Co. (9th Cir. Wash. June 27, 1979), 599 F2d 322, 20 Empl Prac Dec (CCH) P30036, 27 Fed R Serv 2d (Callaghan) 981, aff'd, (U.S. May 12, 1980), 446 US 318, 100 S Ct 1698, 64 L Ed 2d 319 (criticized in Brown v Nucor Corp. (2009, CA4 SC) 576 F3d 149, 106 BNA FEP Cas 1718, 92 CCH EPD P 43642).

Class actions are generally appropriate in Title VII employment discrimination cases; although such suits are self-help actions, they have broad public interest because they seek to enforce fundamental constitutional principles as well as advancing rights of individual plaintiffs who bring action, and, also, class action avoids multiplicity of suits. Rich v. Martin Marietta Corp. (10th Cir. Colo. Aug. 1, 1975), 522 F2d 333, 10 Empl Prac Dec (CCH) P10339, 21 Fed R Serv 2d (Callaghan) 509, disapproved as stated in Griffin v. Dugger (11th Cir. Fla. Aug. 7, 1987), 823 F2d 1476, 44 Empl Prac Dec (CCH) P37334, 8 Fed R Serv 3d (Callaghan) 782.

Because Civil Rights Act of 1964 (*42 USCS §§ 2000e* et seq.) attacks class-based discrimination, it is particularly appropriate that suits to remedy violations of Act be brought as class actions; relief sought in such suits seeks to establish equality, not only between group discriminated against and other groups, but also among members of victimized group. Crockett v. Green (7th Cir. Wis. Mar. 19, 1976), 534 F2d 715, 11 Empl Prac Dec (CCH) P10781, 21 Fed R Serv 2d (Callaghan) 502; Romasanta v. United Airlines, Inc. (7th Cir. Ill. July 1, 1976), 537 F2d 915, 12 Empl Prac Dec (CCH) P11042, 22 Fed R Serv 2d (Callaghan) 954, aff'd, (U.S. June 20, 1977), 432 US 385, 97 S Ct 2464, 53 L Ed 2d 423; Grogan v. American Brands, Inc. (M.D.N.C. Feb. 26, 1976), 70 FRD 579, 22 Fed R Serv 2d (Callaghan) 1369.

Actions under Title VII of 1964 Civil Rights Act are often described as inherently class suits, and requirements of Rule 23 must be read liberally in context of suits brought under Title VII and Section 1981. Nance v. Union Carbide Corp., Consumer Prods. Div. (4th Cir. N.C. July 28, 1976), 540 F2d 718, 12 Empl Prac Dec (CCH) P11106, 22 Fed R Serv 2d (Callaghan) 247, vacated, *(U.S. June 6, 1977), 431 US 952, 97 S Ct 2671, 53 L Ed 2d 268*.

Broad remedial purposes of Title VII and undoubted utility and fitness of class action device for many Title VII actions does not relieve court of obligation imposed by Rule 23(a) and (b), to inquire into specific fitness, on its own facts, of each Title VII case for which class action status is sought. Stastny v. Southern Bell Tel. & Tel. Co. (4th Cir. N.C. July 28, 1980), 628 F2d 267, 23 Empl Prac Dec (CCH) P31155, 29 Fed R Serv 2d (Callaghan) 1365.

Trial court's discretion in determining whether Title VII suit will proceed as class action is circumscribed by broad remedial purposes of Civil Rights Act (*42 USCS §§ 2000e* et seq.). Jordan v County of Los Angeles (1982, CA9 Cal) 669 F2d 1311, 28 BNA FEP Cas 518, 28 CCH EPD P 32525, 33 FR Serv 2d 1075, vacated without op, remanded *(1982) 459 US 810, 103 S Ct 35, 74 L Ed 2d 48, 29 BNA FEP Cas 1560, 30 CCH EPD P 33063* and (Vacatur noted in Horton v USAA Cas. Ins. Co. (2009, DC Ariz) 266 FRD 360).

Suits under Title VII of Civil Rights Act of 1964 alleging racial discrimination in employment may be class actions under Rule 23. Hadnott v. Laird (D.C. Cir. Feb. 29, 1972), 463 F2d 304, 4 Empl Prac Dec (CCH) P7678; Johnson v. Goodyear Tire & Rubber Co. (D. Tex. Aug. 10, 1972), 349 F Supp 3, 5 Empl Prac Dec (CCH) P8056.

Properly defined class action in conformity with Rule 23 may be maintained in litigation under Title VII of Civil Rights Act of 1964. Hardy v. United States Steel Corp. (N.D. Ala. Aug. 2, 1967), 289 F Supp 200, 1 Empl Prac Dec (CCH) P9822, 12 Fed R Serv 2d (Callaghan) 521, 56 Lab Cas (CCH) P9087; King v. Georgia Power Co. (N.D. Ga. Aug. 9, 1968), 295 F Supp 943, 1 Empl Prac Dec (CCH) P9904, 58 Lab Cas (CCH) P9150.

Class actions are allowable for suits alleging racial discrimination in employment under Title VII of 1964 Civil Rights Act (*42 USCS §§ 2000e* et seq.), but not every civil action brought pursuant to Title VII automatically qualifies as proper class action under stringent requirements of Rule 23(a), and, as in every other cause of action, employment discrimination suit must satisfy all prerequisites of Rule 23(a) before it can be maintained as class action. Kinsey v.

Legg, Mason & Co. (D.D.C. July 5, 1973), 60 FRD 91, 6 Empl Prac Dec (CCH) P8708, 17 Fed R Serv 2d (Callaghan) 857, rev'd, *(D.C. Cir. Apr. 18, 1977), 557 F2d 830, 13 Empl Prac Dec (CCH) P11614*.

Suit for violation of Title VII of Civil Rights Act of 1964 (*42 USCS §§ 2000e* et seq.) as to discrimination in employment is usually allowed to be pursued as class action since evil sought to be ended is discrimination on basis of class characteristic such as race, sex, religion, or national origin. *O'Brien v. Shimp (N.D. Ill. Jan. 12, 1973), 356 F Supp 1259, 6 Empl Prac Dec (CCH) P8746, 17 Fed R Serv 2d (Callaghan) 855*.

Justification for liberal application of Rule 23 in actions brought under Title VII of 1964 Civil Rights Act (*42 USCS §§ 2000e* et seq.) is important public policy in vindicating right to equal employment opportunities guaranteed by Title VII and fact that suit for violation of Title VII is necessarily class action as evil sought to be ended is discrimination on basis of class characteristic; however, plaintiff is not entitled to automatic class certification simply by bringing Title VII action, and while requirements of Rule 23 may be applied liberally in Title VII cases, they cannot be waived altogether. *Lamphere v. Brown University (D.R.I. July 21, 1976), 71 FRD 641, 13 Empl Prac Dec (CCH) P11486, 24 Fed R Serv 2d (Callaghan) 305* (criticized in *Smilow v Southwestern Bell Mobile Sys. (2001, DC Mass) 200 FRD 5*).

In context of actions under Title VII, *42 USCS §§ 2000e* et seq., motions for class certification should be treated with leniency, but before plaintiffs may proceed as class they must nonetheless show that they have satisfied all requirements of Rule 23(a) and that proposed class comes within one of subsections of Rule 23(b). *Petty v. Peoples Gas Light & Coke Co. (N.D. Ill. Nov. 7, 1979), 86 FRD 336, 30 Fed R Serv 2d (Callaghan) 727*.

Title VII suits are not to be held to less stringent standard for class certification purposes than are other categories of civil litigation. *Taylor v. Union Carbide Corp. (S.D. W. Va. Apr. 11, 1980), 93 FRD 1, 23 Empl Prac Dec (CCH) P31055, 31 Fed R Serv 2d (Callaghan) 102, 7 Fed R Evid Serv (CBC) 857*.

107. — —Particular cases

In action alleging racially discriminatory employment practices, brought under Title VII of 1964 Civil Rights Act (*42 USCS §§ 2000e* et seq.), denial of class certification to plaintiff seeking to represent all past, present and future black waiters in San Francisco on grounds of failure to prove existence of more than 184 potential class members, number not thought so numerous as to preclude joinder of individual plaintiffs, is remanded to district court for re-determination of class certification with consideration of broad remedial purposes of Title VII and general appropriateness of class litigation in Title VII employment discrimination cases. *Gay v. Waiters' & Dairy Lunchmen's Union (9th Cir. Cal. Mar. 11, 1977), 549 F2d 1330, 14 Empl Prac Dec (CCH) P7541, 23 Fed R Serv 2d (Callaghan) 333*, disapproved as stated in *Hartman v. Duffey (D.C. Cir. Apr. 5, 1994), 19 F3d 1459, 64 Empl Prac Dec (CCH) P43001*.

Although Title VII of Civil Rights Act of 1964, relating to Equal Employment Opportunities does not expressly provide for class action and, in fact, provides that suit may be brought only by person aggrieved who has filed charge with Equal Employment Opportunity Commission, reasonable interpretation and sensible administration of Act require that class actions be permitted under appropriate circumstances, that is, where alleged violations complained of to Commission are of general nature and raise issues which are not restricted to one person who sought aid of Commission. *Hicks v. Crown Zellerbach Corp. (D. La. June 13, 1967), 49 FRD 184, 1 Empl Prac Dec (CCH) P9899, 1 Empl Prac Dec (CCH) P9945, 58 Lab Cas (CCH) P914, 58 Lab Cas (CCH) P9145, 59 Lab Cas (CCH) P9188*.

108. —EEOC and its role

District Court is correct in finding that class action charge of across-the-board employment discrimination was beyond scope of EEOC charge where substantive inquiry by commission is limited to black employee's claims of discrimination in promotion and harassment; concept of widespread discrimination rooted in subjective decision making of white supervisory staff is not part of commission investigation. *Evans v. U.S. Pipe & Foundry Co. (11th Cir. Ala. Jan. 24, 1983), 696 F2d 925, 30 Empl Prac Dec (CCH) P33288, 35 Fed R Serv 2d (Callaghan) 1311*.

Having validly intervened in private Title VII suit, EEOC is no more subject to Rule 23 than if it had filed action as original party plaintiff. *Harris v Amoco Prod. Co. (1985, CA5 La) 768 F2d 669, 38 BNA FEP Cas 1226, 38 CCH EPD P 35568, 3 FR Serv 3d 1321*, cert den *(1986) 475 US 1011, 106 S Ct 1186, 89 L Ed 2d 302, 40 BNA FEP Cas 192, 39 CCH EPD P 35875* and (criticized in *Rivers v Barberton Bd. of Educ. (1998, CA6 Ohio) 143 F3d 1029, 76 BNA FEP Cas 1545, 73 CCH EPD P 45377, 1998 FED App 141P*).

Mere fact of Equal Employment Opportunity Commission's participation in sex discrimination action does not automatically preclude Rule 23 certification where all requirements of Rule 23 are satisfied. *26 Fed R Serv 2d (Callaghan) 736*.

109. — —Actions by EEOC

Federal Rule of Civil Procedure 23 does not apply to enforcement actions brought by EEOC in its own name pursuant to authority under *42 USCS § 2000e-5*; therefore, in action against private employer for sexual discrimination against its female employees, Equal Employment Opportunity Commission may seek classwide relief under § 706(f)(1) of Title VII of Civil Rights Act, *42 USCS § 2000e-5(f)(1)*, without being certified as class representative under Rule 23. *General Tel. Co. v. EEOC (U.S. May 12, 1980), 446 US 318, 100 S Ct 1698, 64 L Ed 2d 319* (criticized in *Brown v Nucor Corp. (2009, CA4 SC) 576 F3d 149, 106 BNA FEP Cas 1718, 92 CCH EPD P 43642*).

When EEOC is denominated as representative of class, is held by trial court to be adequate representative, and proceeds as if it is representing class, including giving notice to class members, members of class sought to be represented are bound by judgment rendered. *EEOC v. Datapoint Corp. (5th Cir. Tex. Apr. 7, 1978), 570 F2d 1264, 16 Empl Prac Dec (CCH) P8225, 25 Fed R Serv 2d (Callaghan) 324*.

Suit to prevent unlawful employment practices brought by EEOC in its own name and pursuant to its authority under Title VII of Civil Rights Act of 1964 (*42 USCS §§ 2000e* et seq.) is not subject to Rule 23, which specifies requirements for private party plaintiff in bringing class action litigation. *Donovan v. University of Texas (5th Cir. Tex. May 1, 1981), 643 F2d 1201, 25 Empl Prac Dec (CCH) P31790, 31 Fed R Serv 2d (Callaghan) 594, 91 Lab Cas (CCH) P34010*.

EEOC may seek class wide relief for purpose of securing relief for group of aggrieved individuals without being certified as class representative under rule 23. *Austad v. Risley (9th Cir. Sept. 25, 1984), 743 F2d 739*; *EEOC v. St. Louis S. F. R. Co. (10th Cir. Okla. July 13, 1984), 743 F2d 739, 36 Empl Prac Dec (CCH) P35068, 39 Fed R Serv 2d (Callaghan) 624*.

Since EEOC represents public interest in non-discriminatory market for employment, it need not obtain class certification to bring action on behalf of class of unidentified individuals. *EEOC v. UPS (7th Cir. Ill. Aug. 23, 1996), 94 F3d 314, 68 Empl Prac Dec (CCH) P44189*.

EEOC may obtain equitable relief that protects class of persons from unlawful employment discrimination without identifying class or its numbers, or even identifying pattern or practice of discrimination. *EEOC v. Frank's Nursery & Crafts, Inc. (6th Cir. Mich. Apr. 23, 1999), 177 F3d 448, 75 Empl Prac Dec (CCH) P45865*.

District court's rejection of employer's answer to EEOC complaint asserting that case could not proceed as class action without compliance with Rule 23 was functional equivalent of denying motion to certify case as class action so that it was appealable, but Supreme Court has held that EEOC is exempt from Rule 23, so it was not required to proceed under Rule 23. *In re Bemis Co. (7th Cir. Ind. Jan. 11, 2002), 279 F3d 419, 82 Empl Prac Dec (CCH) P40918, 51 Fed R Serv 3d (Callaghan) 828*.

EEOC's action for relief on behalf of unnamed minority persons is maintainable despite EEOC failure to have case certified as class action pursuant to Rule 23 since compliance with that Rule is not required in cases where agency of government seeks class relief from discriminatory employment practices. *EEOC v. Vinnell-Dravo-Lockheed-Mannix (E.D. Wash. May 19, 1976), 417 F Supp 575, 12 Empl Prac Dec (CCH) P11014, 22 Fed R Serv 2d*

(Callaghan) 1304, disapproved, *EEOC v. D. H. Holmes Co. (5th Cir. La. July 29, 1977), 556 F2d 787, 14 Empl Prac Dec (CCH) P7768, 23 Fed R Serv 2d (Callaghan) 1324*.

Equal Employment Opportunity Commission is not required to comply with Rule 23 in order to bring discrimination action on behalf of class under § 706 of Title VII, Civil Rights Act of 1964, 42 USCS § 2000(e)-*5*, since (1) statute itself provides authority for EEOC to bring suit on behalf of class, and (2) EEOC is not required to comply with Rule 23 in suits under § 707, 42 USCS § 2000(e)-*6*, and applicability of Rule 23 should be same under either section as they are effectively same in relation to enforcement power of EEOC. *EEOC v. General Tel. Co. (W.D. Wash. Nov. 11, 1977), 25 Fed R Serv 2d (Callaghan) 58, 1977 US Dist LEXIS 12991*, aff'd, *(9th Cir. Wash. June 27, 1979), 599 F2d 322, 20 Empl Prac Dec (CCH) P30036, 27 Fed R Serv 2d (Callaghan) 981* (criticized in *Brown v Nucor Corp. (2009, CA4 SC) 576 F3d 149, 106 BNA FEP Cas 1718, 92 CCH EPD P 43642*).

Employment discrimination action brought by Equal Employment Opportunity Commission pursuant to section 706(f)(1) and (3) of Title VII of Civil Rights Act of 1964, *42 USCS §§ 2000e* et seq., should not be designated as class action since EEOC can bring suit in its own name on behalf of broad group of employees subject to discrimination in order to vindicate public interest as long as allegations grow out of investigation of charges of original complaining party. *EEOC v. Raymond Metal Products Co. (D. Md. 1978), 25 Fed R Serv 2d (Callaghan) 329, 1978 US Dist LEXIS 19319*.

Equal Employment Opportunity Commission could bring class action on behalf of three named claimants and others similarly situated for alleged discrimination under Americans with Disabilities Act without meeting requirements of *Fed. R. Civ. P. 23*. *EEOC v. Northwest Airlines, Inc. (D. Minn. Aug. 14, 2002), 216 F Supp 2d 935*.

110. —Other particular cases

Although Rule 23 may provide useful analogy, it is not controlling as to issue of whether union has standing to sue on behalf of its members in action under *42 USCS §§ 1981*, *2000e*. L. 194, Retail, Wholesale & Dept. *Retail, Wholesale & Dep't Store Union v. Standard Brands, Inc. (7th Cir. Ill. Aug. 24, 1976), 540 F2d 864, 12 Empl Prac Dec (CCH) P11187, 22 Fed R Serv 2d (Callaghan) 219*.

Employment discrimination plaintiffs' claims for money damages and constitutional right of both parties to jury trial rendered case unsuitable for class certification; passage of Civil Rights Act of 1991 for first time provided plaintiffs with right to compensatory and punitive damages as well as jury trial, which both sides demanded. *Allison v Citgo Petroleum Corp. (1998, CA5 La) 151 F3d 402, 81 BNA FEP Cas 501, 73 CCH EPD P 45426*, reh den *(1998, CA5 La) 81 BNA FEP Cas 501* and (criticized in *Hoffman v Honda of Am. Mfg., Inc. (1999, SD Ohio) 191 FRD 530, 82 BNA FEP Cas 183* and subsequent app sub nom *Celestine v Petroleos de Venez. SA (2001, CA5 La) 266 F3d 343, 86 BNA FEP Cas 1462, 81 CCH EPD P 40799, 50 FR Serv 3d 1420*, reh den, reh, en banc, den *(2001, CA5 La) 275 F3d 48* and (Overruled in part as stated in *EEOC v Rock-Tenn Servs. Co. (2012, ND Tex) 901 F Supp 2d 810, 96 CCH EPD P 44596*) and (criticized in *Robinson v Metro-North Commuter R.R. (2001, CA2 NY) 267 F3d 147, 86 BNA FEP Cas 1580, 81 CCH EPD P 40846, 50 FR Serv 3d 800*) and (criticized in *Reeb v Ohio Dep't of Rehab. & Corr. Belmont Corr. Inst. (2001, SD Ohio) 203 FRD 315*) and (criticized in *Taylor v D.C. Water & Sewer Auth. (2002, DC Dist Col) 205 FRD 43, 82 CCH EPD P 41079*) and (criticized in *Molski v Gleich (2003, CA9 Cal) 318 F3d 937, 2003 CDOS 1146, 2003 Daily Journal DAR 1469, 54 FR Serv 3d 869*) and (criticized in *Parker v Time Warner Entm't Co., L.P. (2003, CA2 NY) 331 F3d 13, 55 FR Serv 3d 791*) and (criticized in *Collins v Anthem Health Plans, Inc. (2003) 266 Conn 12, 836 A2d 1124*) and (criticized in *Leider v Ralfe (2004, SD NY) 2004 US Dist LEXIS 15345*) and (criticized in *Wang v Chinese Daily News, Inc. (2005, CD Cal) 231 FRD 602*) and (Abrogated in part as stated in *Westways World Travel, Inc. v AMR, Corp. (2005, CD Cal) 2005 US Dist LEXIS 47291*) and (criticized in *Jones v Ford Motor Credit Co. (2005, SD NY) 2005 US Dist LEXIS 5381*) and (criticized in *Leonard v Southtec, LLC (2005, MD Tenn) 2005 US Dist LEXIS 32751*) and (criticized in *Ryan v Patterson (2009, Ala) 23 So 3d 12*) and (criticized in *Dukes v Wal-Mart Stores, Inc. (2010, CA9 Cal) 603 F3d 571, 109 BNA FEP Cas 15, 93 CCH EPD P 43872, 76 FR Serv 3d 928*) and (criticized in *Wang v Chinese Daily News, Inc. (2010, CA9 Cal) 623 F3d 743, 16 BNA WH Cas 2d 1337, 161 CCH LC P 35897, 77 FR Serv 3d 852*) and (Overruled in part as stated in *Morrow v Washington (2011, ED Tex) 277 FRD 172*) and (Overruled in part as stated in *FPX, LLC v Google, Inc. (2011, ED*

Tex) 276 FRD 543) and (criticized in *In re Motor Fuel Temperature Sales Practices Litig. (2012, DC Kan) 279 FRD 598*) and (criticized in *Ellis v Costco Wholesale Corp. (2012, ND Cal) 285 FRD 492, 116 BNA FEP Cas 118, 96 CCH EPD P 44630*).

Equal employment opportunity suits involving academic positions at colleges or universities are ill suited for Rule 23 class actions because decisions in question must be individually scrutinized. *Townsel v. University of Alabama (N.D. Ala. Dec. 29, 1978), 80 FRD 741*.

Although job applicant charging company with unlawful hiring practices has burden of demonstrating complete satisfaction of Rule 23's requirements, litigation over employment standards by its nature involves class-wide discrimination and is therefore frequently suited to class action adjudication. *Eirhart v. Libbey-Owens-Ford Co. (N.D. Ill. Feb. 24, 1981), 89 FRD 424, 26 Empl Prac Dec (CCH) P31909, 32 Fed R Serv 2d (Callaghan) 868*.

111. Housing

In civil rights actions such as one brought on behalf of tenants of low rent public housing projects controlled and operated by defendant housing authority, with respect to alleged assessment of additional rent charges, imposition of fines, and other adverse actions which allegedly do not comply with procedural safeguards of due process clause and rules and regulations promulgated by Department of Housing and Urban Development, class action is largely formality. *Braxton v. Poughkeepsie Housing Authority (S.D.N.Y. Mar. 22, 1974), 382 F Supp 992*.

Class actions under *42 USCS § 3612*, providing right to sue for relief from conduct made illegal by *42 USCS §§ 3603–3606* which prohibits discrimination in housing, are not excluded because of Attorney General's authority to sue under *42 USCS § 3613*. *Fort v. White (D. Conn. Oct. 25, 1974), 383 F Supp 949*.

Some of plaintiffs' claims concerning lack of reasonable accommodation under Title II of Americans with Disabilities Act, *42 USCS §§ 12131* et seq.; § 504 of Rehabilitation Act, *29 USCS § 794*; and Fair Housing Amendments Act, *42 USCS § 3604*, were not susceptible to class-based treatment under *Fed. R. Civ. P. 23(b)* because qualified-individual-with-a-disability statute was necessarily particularized when question was whether mental impairments limited major life activities in ways that were relevant to policies, procedures, and accommodations that were at issue; reasonable accommodation issues were likewise specific to circumstance and needs of particular individuals. *Blatch v. Hernandez (S.D.N.Y. Mar. 30, 2005), 360 F Supp 2d 595*.

112. Insurance

Court of appeals affirmed district court's judgment finding that class certification was not appropriate under *Fed. R. Civ. P. 23* in case that was filed by insureds who claimed that insurance companies violated *42 USCS § 1981* and *42 USCS § 1982* when they charged African-Americans higher premiums for industrial life insurance policies they sold between 1911 and 1973 because there were significant differences between policyholders that were relevant to insurance company's claim that actions were time-barred. *Thorn v. Jefferson-Pilot Life Ins. Co. (4th Cir. S.C.), 438 F3d 376*, reprinted, *(4th Cir. S.C. Feb. 15, 2006), 445 F3d 311, 64 Fed R Serv 3d (Callaghan) 310*.

Personal injury protection and uninsured motorist claims cannot be class issue in action brought against insurance company for racial discrimination in settling Black personal injury claims for less money than similar White personal injury claims, taking longer time to settle Black claims than similar White claims and forcing Blacks to hire attorneys more often than forcing Whites to hire attorneys since plaintiff's original complaint did not mention personal injury and uninsured motorist protection claims and during certification conference plaintiff offered credible evidence showing that defendant discriminated against own insured when personal injury protection or uninsured motorist claims were involved. *Ladd v. Dairyland County Mut. Ins. Co. (N.D. Tex. Jan. 25, 1982), 96 FRD 335*.

Where putative class action insureds alleged that insurer previously engaged in practice of selling insurance policies to minorities that cost more and provided less benefits than policies sold to Caucasians, class certification was warranted; class action was clearly superior method to resolve controversy which involved extremely large

number of class members and common questions of law and fact. *Thompson v. Metro. Life Ins. Co. (S.D.N.Y. Apr. 28, 2003), 216 FRD 55*.

113. Prisons and jails

Denial of class certification under *Fed. R. Civ. P. 23(b)(3)* was abuse of discretion where inmates of detention facility alleged that facility officials had failed to address threat posed by contagious skin disease; district court failed to articulate why alleged threat of injury was insufficiently typical or common to allow certification, and it was premature to have concluded that inmates' representation of class was inadequate before decision had been made on whether to appoint counsel. *Hagan v. Rogers (3d Cir. N.J. June 19, 2009), 570 F3d 146*.

Class certification is inappropriate in action by prisoners charging civil rights violations in conditions of their confinement, in that relief provided to any one plaintiff will benefit other prisoners as well. *Griffin v. Smith (W.D.N.Y. July 10, 1980), 493 F Supp 129*.

Class certification is denied where prisoner brought *42 USCS § 1983* action alleging various constitutional violations by court officials and attorneys in connection with alleged unconscionable delay in preparation of trial transcript and failure to perfect appeal, because (1) prisoner could not meet requirements of common questions of fact or typicality, (2) prisoner's claims were moot, since his appeal had been decided, and (3) defendants had acted on grounds generally applicable to class to remedy poor administrative procedures. *Mathis v. Bess (S.D.N.Y. Aug. 10, 1988), 692 F Supp 248*.

Prison overcrowding case was appropriate for class action, despite defendants' claims that federal statute addressing appropriate remedies for prison overcrowding (*18 USCS § 3626*) barred classwide relief in such cases; statute's plain language did not purport to limit class actions by prison inmates, and did not even appear to apply to class actions since it referenced only individual plaintiffs and stated that it did not limit federal judicial power to issue equitable relief other than that described. *Rentschler v. Carnahan (E.D. Mo. Feb. 10, 1995), 160 FRD 114*.

Jail detainees who were required to sleep on floor of their cell during their detentions were entitled to class certification under *Fed. R. Civ. P. 23* and for order permitting identification of class members in their *42 USCS § 1983* action against jail officials for violations of *U.S. Const. amends. IV* and *XIV*. Detainees met requirements of *Fed. R. Civ. P. 23(a)* and *23(b)(2)*, (3); court defined class as consisting of individuals who, while in custody of Los Angeles Sheriff's Department (LASD), were required to sleep on floor of LASD facility with or without bedding. *Thomas v. Baca (C.D. Cal. May 17, 2005), 231 FRD 397*.

Pre-trial detainees' motion for class certification was denied because earlier summary judgment ruling found that defendants' policy of removing all clothing from pretrial detainees was unconstitutional, proposed expanded class went beyond summary judgment ruling and sought to include convicted inmates and persons given "suicide gowns." *Rose v. Saginaw County (E.D. Mich. Nov. 21, 2005), 232 FRD 267*.

Class of 82,000 detainees' allegations that their arraignment on narcotics- or weapons-related misdemeanor offense was not sufficient to evoke reasonable suspicion that detainee might be concealing weapons or contraband at intake where offense was not known to searching officer at time of search was sufficient for their class to be certified under *Fed. R. Civ. P. 23*. *McBean v. City of New York (S.D.N.Y. Aug. 14, 2009), 260 FRD 120*.

As class definition plaintiffs proposed was sufficiently definite, all prerequisites for class certification were met, defendants' mootness argument did not render named plaintiffs atypical or inadequate to represent class, and exhaustion of Prison Litigation Reform Act of 1995 was not required as overcrowding was not issue that could be grieved, action was certified as class action for purposes of injunctive and declaratory relief to contest conditions of confinement. *Williams v. City of Philadelphia (E.D. Pa. Oct. 8, 2010), 270 FRD 208*.

Inmates were denied class certification with regard to their civil rights suits asserting racial discrimination because only two out of four inmates had claims that survived summary judgment, evidence did not suggest such

widespread or systemic discrimination as would make class action appropriate. *Reynolds v. Barrett (W.D.N.Y. Oct. 4, 2010), 741 F Supp 2d 416*, aff'd, *(2d Cir. N.Y. July 11, 2012), 685 F3d 193, 95 Empl Prac Dec (CCH) P44552*.

Arrestee's Fourth Amendment claim arising from county jail's blanket policy of strip-searching and delousing all detainees was not subject to class certification because such searches were permissible; however, Due Process Clause claim presented common question of whether right to refuse unwanted medical treatment was violated because delousing was performed absent necessity and without consent, and lack of individualized determinations satisfied predominance requirement. *Logory v. County of Susquehanna (M.D. Pa. Oct. 5, 2011), 277 FRD 135*.

114. Schools and education

School district demonstrated in class action under *Fed. R. Civ. P. 23* that it was entitled to unitary status by establishing good faith compliance with court's desegregation orders for period of 50 years supervision by court and that district had eliminated all vestiges of de jure discrimination to extent practicable. *Smiley v. Blevins (S.D. Tex. May 1, 2009), 626 F Supp 2d 659, 73 Fed R Serv 3d (Callaghan) 609*.

115. Miscellaneous

Plaintiff's motion for certification of class of all automobile owners in state is granted under Rule 23 in civil rights suit challenging state statutes concerning towing of automobiles by police and charges, liens and sale of said automobiles. *Tedeschi v. Blackwood (D. Conn. Mar. 22, 1976), 410 F Supp 34*.

Civil rights case can be maintained as class action pursuant to Rule 23 where plaintiffs sue not only in their own behalf, but also as representative parties on behalf of adult resident taxpayers and their children who are in attendance at public schools within district, challenging threatened loss of accreditation and state foundation funds. *Northside Independent School Dist. v. Texas Education Agency (W.D. Tex. Jan. 5, 1976), 410 F Supp 364*.

Class action procedures of Rule 23 are inapplicable in age discrimination actions. *Held v. National R. Passenger Corp. (D.D.C. Jan. 23, 1984), 101 FRD 420*.

Some of plaintiffs' claims concerning lack of reasonable accommodation under Title II of Americans with Disabilities Act, *42 USCS §§ 12131* et seq.; § 504 of Rehabilitation Act, *29 USCS § 794*; and Fair Housing Amendments Act, *42 USCS § 3604*, were not susceptible to class-based treatment under *Fed. R. Civ. P. 23(b)* because qualified-individual-with-a-disability statute was necessarily particularized when question was whether mental impairments limited major life activities in ways that were relevant to policies, procedures, and accommodations that were at issue; reasonable accommodation issues were likewise specific to circumstance and needs of particular individuals. *Blatch v. Hernandez (S.D.N.Y. Mar. 30, 2005), 360 F Supp 2d 595*.

c. Labor and Employment

116. Agricultural workers

Migrant farm workers are granted class certification in action against agriculture company which allegedly committed several violations of state and federal law in housing and collection of rent from workers, where workers sufficiently established numerosity, commonality, and typicality requirements for workers who had rent deducted from paychecks and showed existence of subclasses based on specific alleged violations. *Rodriguez v. Berrybrook Farms, Inc. (W.D. Mich. Sept. 23, 1987), 672 F Supp 1009, 108 Lab Cas (CCH) P35025*.

Class action was certified as to migrant agricultural workers' claims, which were asserted pursuant to Migrant and Seasonal Agricultural Worker Protection Act (AWPA), *29 USCS §§ 1801* et seq., because workers had met their burden of establishing prerequisites for class action; court certified class to include all of migrant or seasonal agricultural workers who were employed by defendants and labored with workers in 2003 Florida lemon harvest, proposed class members had similar AWPA claims, and litigating suit as class action was superior to joining each proposed member individually. *Silva-Arriaga v. Tex. Express, Inc. (M.D. Fla. Aug. 9, 2004), 222 FRD 684*.

117. Equal Pay Act

Rule 23 class action device is not available in Equal Pay Act case, and action sought to be maintained as class action in which two causes of action were alleged, one under Title VII of Civil Rights Act of 1964 (*42 USCS § 2000e*) and one under Equal Pay Act (*29 USCS § 206(d)(1)*), would be designated as class action on civil rights claim only. *Paddison v. Fidelity Bank (E.D. Pa. Sept. 27, 1973), 60 FRD 695, 7 Empl Prac Dec (CCH) P9308, 18 Fed R Serv 2d (Callaghan) 1195, 73 Lab Cas (CCH) P33061*.

Actions under Equal Pay Act (*29 USCS §§ 206* et. seq.) cannot be maintained as class actions under Rule 23. *Stansell v. Sherwin-Williams Co. (N.D. Ga. Sept. 30, 1975), 404 F Supp 696, 10 Empl Prac Dec (CCH) 10592, 21 Fed R Serv 2d (Callaghan) 352*.

Provisions of Equal Pay Act for class action (*29 USCS § 216(b)*) are distinct and independent of those of Rule 23. *Jackson v. University of Pittsburgh (W.D. Pa. Dec. 12, 1975), 405 F Supp 607*.

Equal Pay Act claims may not be pursued as class action under Rule 23. *Kuhn v. Philadelphia Electric Co. (E.D. Pa. July 9, 1979), 475 F Supp 324, 21 Empl Prac Dec (CCH) P30470, 28 Fed R Serv 2d (Callaghan) 44, 87 Lab Cas (CCH) P33858*.

Allegations brought under Equal Pay Act (*29 USCS §§ 206* et seq.) do not convert action into Rule 23 class action case; Equal Pay Act procedures govern. *Forsberg v. Pacific Northwest Bell Tel. Co. (D. Or. Mar. 29, 1985), 623 F Supp 117, 38 Empl Prac Dec (CCH) P35507, 2 Fed R Serv 3d (Callaghan) 342*.

118. —Particular cases

In suit brought in behalf of female flight cabin attendants employed by defendant airline for class action relief with respect to alleged violations of Equal Pay Act of 1963 (*29 USCS § 206(d)*) and Title VII of Civil Rights Act of 1964 (*42 USCS §§ 2000e* et seq.), action under Equal Pay Act alleging that defendant discriminated against class by wage differentials based on sex was class action created by statute independent and unrelated to class actions covered by Rule 23, so there was no need to show compliance with Rule 23(a) and (b) requirements in order to maintain action. *Maguire v. Trans World Airlines, Inc. (S.D.N.Y. Apr. 3, 1972), 55 FRD 48, 4 Empl Prac Dec (CCH) P7848, 68 Lab Cas (CCH) P32693*, modified, *(S.D.N.Y. Nov. 5, 1975), 403 F Supp 734, 10 Empl Prac Dec (CCH) P10497*.

In light of holding that class action under Rule 23 cannot be brought for violation of Fair Labor Standards Act, which includes Equal Pay Act, because provisions of *29 USCS § 216(b)* limit binding effect of judgments to those who have filed written consent to become parties to suit, court would deny motion of representative parties to certify proffered subclasses of Equal Pay Act counterplaintiffs. *American Finance System, Inc. v. Harlow (D. Md. Oct. 17, 1974), 65 FRD 94, 8 Empl Prac Dec (CCH) P9773, 19 Fed R Serv 2d (Callaghan) 486*.

Defendant employer may not have suit by Secretary of Labor, to recover backpay on behalf of employees, denominated as class action where issues and identity of employees whom litigation concerns have been ascertained, leaving no question as to res judicata effect of final judgment or consent decree, and where scope of relief would be limited to complaint under Equal Pay Act portion of Fair Labor Standards Act. *Marshall v. University of Texas (W.D. Tex. 1978), 26 Fed R Serv 2d (Callaghan) 57, 1978 US Dist LEXIS 19710*.

119. ERISA

Because appellant plan participant's individual claim was properly dismissed for failure to exhaust administrative remedies, he could not represent putative but uncertified class; he was only remaining named plaintiff, and without class representative, putative class could not be certified; thus, court did not reach appellant's arguments that district court abused its discretion by denying class discovery, class certification, and leave to amend order denying class certification. *Chorosevic v. MetLife Choices (8th Cir. Mo. Apr. 2, 2010), 600 F3d 934*.

There is nothing to indicate that proper Rule 23 action should not be certified merely because it is brought under ERISA. *Morgan v. Laborers Pension Trust Fund (N.D. Cal. 1979), 81 FRD 669, 27 Fed R Serv 2d (Callaghan) 1303*.

Defendant class consisting of 118 health care facilities which participate in state's rate setting system is not properly certified in action by union welfare and pension fund and individual beneficiaries of fund challenging rate setting system as unconstitutional due to pre-emption by ERISA, since (1) should court find system to be preempted, finding will apply to everyone in state, and (2) plaintiffs can readily join any hospitals which bring collection actions against individual fund beneficiaries. *Bonser v. New Jersey (D.N.J. Apr. 1, 1985), 605 F Supp 1227*.

Court will certify class of retirees suing meat-packing company to clarify rights to future benefits and to recover benefits allegedly due under employee welfare benefit plan where issues of law and fact are common to all retirees, claims of representative are typical of class, and class representative and counsel are adequate. *Jansen v. Greyhound Corp. (N.D. Iowa Feb. 27, 1986), 692 F Supp 1022*.

Suit by participants and beneficiaries of employee savings and stock ownership plan alleging that corporation and its directors failed to prudently monitor plan assets and failed to monitor plan committee members regarding plan investments, in violation of Employee Retirement Income Security Act, *29 USCS §§ 1001* et seq., was appropriate for class treatment under *Fed. R. Civ. P. 23* as this rule only required that class representative's claims be typical, not direct, and fact that suit could be characterized as derivative did not make it inappropriate for class action treatment. *In re Syncor Erisa Litig. (C.D. Cal. Mar. 28, 2005), 227 FRD 338*.

Employees asserted course of conduct by employer and its officers and directors that involved not only failure to disclose information, but also squandering of Employment Retirement Income Security Act of 1974, *29 USCS §§ 1001* et seq., plan assets through payment of excessive fees; this alleged conduct was uniform as to vast number of participants in plan and formed basis of employees' claims; employees' met requirements of *Fed. R. Civ. P. 23*, and court certified their class. *George v. Kraft Foods Global, Inc. (N.D. Ill. July 17, 2008), 251 FRD 338*.

Class certification inaction alleging claims with regard to termination of retirement benefits in violation of collective bargaining agreement was approved because release signed by employees was limited to claims that related to employment or termination of that employment and did not reach claims at issue here regarding improper termination of retirement benefits; furthermore, prerequisites of *Fed. R. Civ. P. 23* were met. *Alday v Raytheon Co. (2008, DC Ariz) 619 F Supp2d 726, 43 EBC 2330, 183 BNA LRRM 2537*, summary judgment den, summary judgment gr, injunction den, as moot, judgment entered *(2008, DC Ariz) 45 EBC 1608, 184BNA LRRM 3088*, affd *(2010, CA9 Ariz) 620 F3d 1219, 49 EBC 2353, 189* BNA LRRM2097, op withdrawn on other grounds, substituted op *(CA9 Ariz 2012)*.

Class certification in action alleging claims with regard to termination of retirement benefits in violation of collective bargaining agreement was approved because release signed by employees was limited to claims that related to employment or termination of that employment and did not reach claims at issue here regarding improper termination of retirement benefits; furthermore, prerequisites of *Fed. R. Civ. P. 23* were met. *Alday v. Raytheon Co. (D. Ariz. Jan. 4, 2008), 619 F Supp 2d 726*.

Because plaintiffs, current and former employees, of defendant cruise line might not adequately represent class members, and because individual claims predominated over common questions of law or fact, as required by *Fed. R. Civ. P. 23(a)(4)*, (b)(3), employees failed to show that class certification was appropriate under *Fed. R. Civ. P. 23(b)(1)(B)*. *Wallace v. NCL (Bah.), Ltd. (S.D. Fla. Dec. 31, 2010), 271 FRD 688*, aff'd, *(11th Cir. Fla. Oct. 1, 2013), 733 F3d 1093*.

Subclass of employees who were subject to automatic meal break deduction were eligible for class certification on their claims under Employee Retirement Income Security Act and New York Labor Law; majority of approximately 2,200 to 2,300 current hourly employees were subject to deduction; there were common legal questions of whether policy for voiding automatic deduction and alleged failure to ensure that breaks were taken constituted violations of law; plaintiff's affirmation indicated that she had sufficient knowledge concerning meal break deduction claims;

common questions predominated over individual issues; and class action was superior method of resolving claims. *Meyers v. Crouse Health Sys. (N.D.N.Y. Mar. 8, 2011), 274 FRD 404*.

Subclasses were appropriate because all members of proposed class challenge defendants' policies as violative of Fair Labor Standards Act, New York Labor Law, and Employee Retirement Income Security Act, but claims were based on four distinct alleged policies and not all proposed class members asserted claims in each subclass. *Colozzi v. St. Joseph's Hosp. Health Ctr. (N.D.N.Y. Mar. 8, 2011), 275 FRD 75*.

Certification of injunctive class was granted for individuals diagnosed with autism spectrum disorder in action alleging that ERISA health benefit plan illegally denied coverage in Oregon for therapeutic technique of applied behavior analysis, under developmental disability exclusion; no showing of individualized harm was required to establish Article III standing for certification of injunctive class. *A.F. v. Providence Health Plan (D. Or. Dec. 24, 2013), 300 FRD 474, 87 Fed R Serv 3d (Callaghan) 417*.

120. —Breach of fiduciary duty

Class certification pursuant to *Fed. R. Civ. P. 23(a)* was not appropriate in severance pensioners' ERISA breach of fiduciary duty claims under *29 USCS § 1132(a)(3)* as not all of pensioners' putative class attended same meetings, or heard same presentations concerning severance pension benefits. *Gesell v. Commonwealth Edison Co. (C.D. Ill. Aug. 18, 2003), 216 FRD 616, 56 Fed R Serv 3d (Callaghan) 1109*.

Where former employees of bankrupt employer alleged that administrators of employees' stock option plan breached duties in violation of Employee Retirement Income Security Act of 1974, *29 USCS §§ 1001* et seq., by granting themselves large bonuses and continuing to invest in employer despite knowledge of employer's insolvency, certification of class of approximately 500 employees who participated in plan was proper; class was sufficiently numerous, claims were common to and typical of class members, class was represented by qualified counsel, and claims were all based on conduct by administrators which was generally applicable to class. *Kirse v. McCullough (W.D. Mo. Dec. 5, 2005), 2005 US Dist LEXIS 35981*.

Class certification under *Fed. R. Civ. P. 23* was denied as to claims for breach of fiduciary duty under Employee Retirement Income Security Act (ERISA), *29 USCS §§ 1001* et seq., because individual issues of reliance would have been probative to resolution of any ERISA fiduciary duty claim. *Coffin v. Bowater Inc. (D. Me. June 21, 2005), 228 FRD 397*.

Court denied participant's *Fed. R. Civ. P. 23(b)(3)* motion for class certification of her action alleging that defendants, retirement plan services provider and division of it, violated Employee Retirement Income Security Act of 1974 (ERISA), *29 USCS § 1132(a)(3)*, when they induced participants to roll over their 401(k) retirement funds and purchase defendants' proprietary investment products because (1) participant had not provided court with evidence common to class that made prima facie showing that defendants, who were ERISA service providers, became fiduciaries under *29 USCS § 1002(21)(A)(i)*–(ii), and thus, individual issues predominated over common questions of fiduciary status; (2) any inquiry into causation and damages would require individualized inquiries, presenting additional impediment to predominance; (3) assuming that participant could show fiduciary status and ill-gotten profits with common evidence, there was no common evidence showing causal connection between alleged breaches and any alleged ill-gotten profits; and (4) individualized inquiries would significantly impede management of case as class action, so class treatment in case was not superior to individual litigation. *Walsh v. Principal Life Ins. Co. (S.D. Iowa Mar. 24, 2010), 266 FRD 232*.

In suit alleging breach of fiduciary duty under § 502(a)(2) of ERISA, *29 USCS § 1132(a)(2)*, class certification under *Fed. R. Civ. P. 23* was denied because class definitions assumed that underperformance of class members' investments in comparison to another set of funds was proper measure of loss, and assumed that all of class members would have invested in other funds had they been offered in plan—issues that were far from resolved. *George v. Kraft Foods Global, Inc. (N.D. Ill. Oct. 25, 2011), 2011 US Dist LEXIS 124210*.

Class certification was appropriate in ERISA breach of fiduciary duty case, even though each beneficiary's damages might vary, because insurer acted in its own interest when it set up interest rates that benefitted it, rather than beneficiaries, for retained asset accounts that were used for payment of death benefits. *Merrimon v. Unum Life Ins. Co. of Am. (D. Me. Feb. 3, 2012), 845 F Supp 2d 310*, aff'd in part and rev'd in part, *(1st Cir. Me. July 2, 2014), 758 F3d 46*.

121. Fair Labor Standards Act

Suit authorized by provision of Fair Labor Standards Act (*29 USCS §§ 201* et seq.) providing that action to recover liability under such Act "may be maintained in any court of competent jurisdiction by any one or more employees for or in behalf of himself or themselves and other employees similarly situated," is not proper class suit within Rule 23. *Clougherty v. James Vernor Co. (6th Cir. Mich. Feb. 19, 1951), 187 F2d 288, 19 Lab Cas (CCH) P66184*, cert. denied, *(U.S. Aug. 1, 1951), 342 US 814, 72 S Ct 28, 96 L Ed 616*.

Government has power under § 17 of Fair Labor Standards Act (*29 USCS § 217*) to seek class-wide relief for victims without resorting to Rule 23. *Donovan v. University of Texas (5th Cir. Tex. May 1, 1981), 643 F2d 1201, 25 Empl Prac Dec (CCH) P31790, 31 Fed R Serv 2d (Callaghan) 594, 91 Lab Cas (CCH) P34010*.

Action under provision of Fair Labor Standards Act (*29 USCS §§ 201* et seq.) authorizing suit by employee for and in behalf of himself and other employees similarly situated against employer to recover certain amounts if employer violates provisions as to minimum wages or maximum hours, is not truly class action within Rule 23. *Burrell v. La Follette Coach Lines (D. Tenn. Apr. 19, 1951), 97 F Supp 279, 19 Lab Cas (CCH) P66352*.

Fair Labor Standards Act has its own class action provision, and that provision rather than *Rule 23 of Federal Rules of Civil Procedure* controls class actions brought under FLSA. *Pirrone v. North Hotel Associates (E.D. Pa. Oct. 24, 1985), 108 FRD 78*.

Fed. R. Civ. P. 23 requirements do not apply to collective action procedure set forth at § 16(b) of Fair Labor Standards Act, *29 USCS § 216(b)*. *Villatoro v. Kim Son Rest., L.P. (S.D. Tex. Mar. 17, 2003), 286 F Supp 2d 807*).

Fair Labor Standards Act (FLSA) collective actions are incompatible with *Fed. R. Civ. P. 23* state-law class actions for overtime pay and two types of actions can not be brought together in single lawsuit in federal court because that would undermine Congress's intent in implementing opt-in requirement for FLSA collective actions. *Warner v. Orleans Home Builders, Inc. (E.D. Pa. May 7, 2008), 550 F Supp 2d 583*.

Class certification for action brought under Fair Labor Standards Act (FLSA), *29 USCS §§ 201* et seq., was granted because individualized lawsuits would be financially burdensome, and many employees would not have means or ability to prosecute their claims separately; on other hand, advantages of determining common issues by means of class action were evident as all employees in class could finalize their claims in one proceeding rather than in hundreds of individual suits. *McLaurin v. Prestage Foods, Inc. (E.D.N.C. Nov. 10, 2010), 271 FRD 465*.

122. —Consent or opt-in requirement

Pure Rule 23 class actions are precluded in Fair Labor Standards Act cases by § 16(b) of such Act (*29 USCS § 216(b)*), which provides that no person can become party plaintiff and no person may be bound by or benefit from judgment unless he has affirmatively opted into class, that is, given his written filed consent. *La Chapelle v. Owens-Illinois, Inc. (5th Cir. Ga. May 23, 1975), 513 F2d 286, 9 Empl Prac Dec (CCH) P10191, 20 Fed R Serv 2d (Callaghan) 368* (criticized in *Dudley v Tex. Waste Sys. (2005, WD Tex) 151 CCH LC P 34996*).

Section 16(b) of Fair Labor Standards Act (*29 USCS § 216(b)*), which regulates class action procedures under Act and permits employee plaintiff to represent others similarly situated who consent in writing, is irreconcilable with Rule 23; accordingly, Federal District Court orders allowing action brought under Fair Labor Standards Act to be maintained as class action under Rule 23 would be vacated. *Schmidt v. Fuller Brush Co. (8th Cir. Minn. Dec. 22, 1975), 527 F2d 532, 21 Fed R Serv 2d (Callaghan) 44, 78 Lab Cas (CCH) P33321*.

Unlike class member in Rule 23 action, class member in action under Fair Labor Standards Act (29 USCS §§ 201 et seq.) who is not notified and does not consent is not bound by adverse judgment and is not barred from filing individual claim. Partlow v. Jewish Orphans' Home, Inc. (9th Cir. Cal. May 18, 1981), 645 F2d 757, 91 Lab Cas (CCH) P34014, disapproved, Hoffmann-La Roche Inc. v. Sperling (U.S. Dec. 11, 1989), 493 US 165, 110 S Ct 482, 107 L Ed 2d 480.

While there may in some cases be exceptional circumstances or compelling reasons for declining jurisdiction, conflict between opt-in procedure under Fair Labor Standards Act, 29 USCS §§ 201–19, and opt-out procedure under Fed. R. Civ. P. 23 is not proper reason to decline jurisdiction under 28 USCS § 1367(c)(4). Salim Shahriar v. Smith & Wollensky Rest. Group, Inc. (2d Cir. N.Y. Sept. 26, 2011), 659 F3d 234, 80 Fed R Serv 3d (Callaghan) 1075, 161 Lab Cas (CCH) P35953.

28 USCS § 2072(b) did not bar certification of plaintiff workers' opt-out class action based on state claims paralleling Fair Labor Standards Act (FLSA), as *29 USCS § 216(b)* was procedural since it related to judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them, and therefore would be properly displaced by Fed. R. Civ. P. 23, so opt-out class action alleging violations of state laws could proceed alongside separately-filed FLSA opt-in action. Knepper v. Rite Aid Corp. (3d Cir. Pa. Mar. 27, 2012), 675 F3d 249, 162 Lab Cas (CCH) P36007.

In light of holding that class action under Rule 23 cannot be brought for violation of Fair Labor Standards Act, which includes Equal Pay Act, because provisions of *29 USCS § 216(b)* limit binding effect of judgments to those who have filed written consent to become parties to suit, court would deny motion of representative parties to certify proffered subclasses of Equal Pay Act counterplaintiffs. American Finance System, Inc. v. Harlow (D. Md. Oct. 17, 1974), 65 FRD 94, 8 Empl Prac Dec (CCH) P9773, 19 Fed R Serv 2d (Callaghan) 486.

Applying Lusardi two-step procedure for FLSA opt-in suits, city employees established, through their pleadings, affidavits, and averments, that their job requirements and remuneration were sufficiently alike to warrant conditional class certification and they were allowed to notify all putative class members of pending lawsuit so that they could "opt-in" to class action. Butler v. City of San Antonio (W.D. Tex. Aug. 21, 2003), 2003 US Dist LEXIS 15805.

In contrast to class actions that are brought pursuant to Fed. R. Civ. P. 23(b)(3), "collective action" to recover benefits under Fair Labor Standards Act (FLSA), 29 USCS §§ 201 et seq., requires similarly situated class members to opt-in to case; requirements of Fed. R. Civ. P. 23 do not apply to FLSA actions and no showing of numerosity, commonality, typicality and adequacy of representation need be made. Davis v. Lenox Hill Hosp. (S.D.N.Y. Aug. 31, 2004), 2004 US Dist LEXIS 17283.

Employees could not pursue both collective action class claims for overtime pay under *29 USCS § 216(b)*, and state law overtime class claims under Fed. R. Civ. P. 23(b)(3) in same suit; opt-in provisions of *29 USCS § 216(b)* were incompatible with opt-out provisions of Fed. R. Civ. P. 23(b)(3), and limits on representative actions under FLSA would have been undermined by use of Rule 23 to pursue essentially identical state law claims; in addition, use of Rule 23 to abridge substantive rights created by FLSA's opt-in procedure was prohibited by Rules Enabling Act, 28 USCS § 2072(b). Ellis v. Edward D. Jones & Co., L.P. (W.D. Pa. Dec. 18, 2007), 527 F Supp 2d 439).

In case where employees who were customer engineers for national company brought claims under Fair Labor Standards Act (FLSA), 29 USCS §§ 201 et seq., case was appropriate for permitting opt-in notice under *29 USCS § 216(b)* because there was adequate showing of similarly situated employees that were subjected to common policy; class certification under Fed. R. Civ. P. 23 for similar state law claims was not warranted, however, because state claims covered much longer period of time and supplemental state claims could then predominate over federal claims, which would be inappropriate. Molina v. First Line Solutions LLC (N.D. Ill. June 28, 2007), 566 F Supp 2d 770.

Hourly employees who alleged wage violations in both collective action under Fair Labor Standards Act, *29 USCS § 216*, and under state wage laws could maintain their federal and state law wage claims in same lawsuit despite

procedural differences between Fed. R. Civ. P. 23 and opt-in procedures of *29 USCS § 216(b)*. Spoerle v. Kraft Foods Global, Inc. (W.D. Wis. May 5, 2008), 253 FRD 434.

Class certification under Fed. R. Civ. P. 23 was appropriate for training-related claims under Cal. Bus. & Prof. Code § 17200 and Cal. Lab. Code §§ 1197, 2698 et seq., 2802 because court's certification of Fair Labor Standards Act collective action under *29 USCS § 216(b)*, with its opt-in procedure, did not preclude Rule 23(b)(3) findings of predominance and superiority; as to § 2802 claim for failure to reimburse post-training expenses, however, certification was not appropriate because there were problems with adequacy and commonality under Rule 23(a) and predominance and superiority under Rule 23(b)(3). Harris v. Vector Mktg. Corp. (N.D. Cal. Nov. 5, 2010), 753 F Supp 2d 996.

123. —Combined state and federal claims or cases

To allow § 216(b) of Fair Labor Standards Act (FLSA), 29 USCS §§ 201 et seq., opt-in class action to proceed accompanied by state law class action claim, to which Fed. R. Civ. P. 23 opt-out requirements apply, would essentially nullify Congress' intent in crafting § 216(b) of FLSA and eviscerate purpose of § 216(b) of FLSA's opt-in requirement; § 216(b) of FLSA and Fed. R. Civ. P. 23 are mutually exclusive and irreconcilable. Otto v. Pocono Health Sys. (M.D. Pa. Oct. 27, 2006), 457 F Supp 2d 522, overruled as stated in , Busk v. Integrity Staffing Solutions, Inc. (9th Cir. Nev. Apr. 12, 2013), 713 F3d 525, 163 Lab Cas (CCH) P36113.

Class of city police officers was not certified under Fed. R. Civ. P. 23 in action for violation of 29 USCS § 207(a), and state law because class would have been based on solely state law claims and superior means of certification existed in *29 USCS § 216(b)*. Edwards v. City of Long Beach (C.D. Cal. Dec. 12, 2006), 467 F Supp 2d 986 (criticized in Murillo v Pac. Gas & Elec. Co. (2010, ED Cal) 266 FRD 468, 76 FR Serv 3d 111) and (criticized in Dukes v Wal-Mart Stores, Inc. (2010, CA9 Cal) 603 F3d 571, 109 BNA FEP Cas 15, 93 CCH EPD P 43872, 76 FR Serv 3d 928).

Even though Fed. R. Civ. P. 23 and Fair Labor Standards Act (FLSA), *29 USCS § 216(b)*, provide different procedures for bringing class action suits, those procedural differences will not preclude employee from asserting class action claims under both FLSA and state law in same suit; 29 USCS § 218(a) makes clear that Congress did not intend to preempt more stringent state law in enacting FLSA, and there is nothing in plain text of FLSA that reflects congressional intent to limit substantive remedies available to employee under state law or to limit procedural mechanism by which such remedy may be pursued. Lehman v. Legg Mason, Inc. (M.D. Pa. Sept. 20, 2007), 532 F Supp 2d 726.

Plaintiffs—technicians who allegedly were due overtime pay under Ohio statutes—met requirements of Fed. R. Civ. P. 23(b) because, although each potential class member had sustained alleged loss, costs of pursuing matter significantly impaired ability of individual plaintiffs to proceed on case-by-case basis; this weighed against any interest of members of class to individually control prosecution of action. Laichev v. JBM, Inc. (S.D. Ohio June 19, 2008), 269 FRD 633.

Employees who alleged that their employer failed to pay them for certain work time could bring both collective action under *29 USCS § 216(b)*, Fair Labor Standards Act (FLSA), and class action under Fed. R. Civ. P. 23 as to claims under Wisconsin state law; FLSA did not expressly provide that its opt-in procedure applied to all wage disputes. DeKeyser v. Thyssenkrupp Waupaca, Inc. (E.D. Wis. Nov. 26, 2008), 589 F Supp 2d 1026.

Employees' claim that they were not paid minimum wages and overtime wages as required under both Fair Labor Standards Act (FLSA) and state law could be certified under both FLSA and Fed. R. Civ. P. 23, in part because employees established numerosity, commonality, typicality, and adequacy of representation as required by Fed. R. Civ. P. 23(a), and predominance and superiority under Fed. R. Civ. P. 23(b)(3). Alcantara v. CNA Mgmt. (S.D.N.Y. Dec. 7, 2009), 264 FRD 61.

In case in which district court had certified collective action of workers' claims under Fair Labor Standards Act (FLSA), 29 USCS §§ 201–219 and workers moved for determination as to whether their contract claims could be

maintained as class action under Fed. R. Civ. P. 23, employers unsuccessfully argued that workers' contract claims were preempted by FLSA; FLSA's savings clause, which allowed states to enact stricter wage, hour, and child labor provisions, indicated that FLSA did not provide exclusive remedy for its violations. Perez-Benites v. Candy Brand, LLC (W.D. Ark. Mar. 23, 2010), 267 FRD 242.

Where numerosity requirement was satisfied by 355 identified loan officers to which court-ordered notice of Fair Labor Standards Act collective action in case was sent, predominant issue for putative class members was whether employers' compensation policy unlawfully deprived them of wages, thus, satisfying typicality requirement, adequacy element was satisfied, and employees were similarly situated and could proceed to trial as representative action, class certification was granted. Shabazz v. Morgan Funding Corp. (S.D.N.Y. June 9, 2010), 269 FRD 245.

Certification of New York Labor Law class alongside conditionally certified *29 USCS § 216(b)* Fair Labor Standards Act (FLSA) collective action was appropriate in light of precedent in Second, Seventh, Ninth, and District of Columbia Circuits supporting certification of simultaneous state labor law class actions and FLSA collective actions. Meyers v. Crouse Health Sys. (N.D.N.Y. Mar. 8, 2011), 274 FRD 404.

All criteria of Fed. R. Civ. P. 23(a) and (b)(3) were satisfied; it was not fact of actual interference with control, but right to interfere, that made difference between independent contractor and servant, and right to control, nature of work, and its importance to defendant's business were all subject to common evidence. *Scovil v. FedEx Ground Package Sys. (D. Me. Oct. 10, 2012), 886 F Supp 2d 45*.

Unpublished decision: District court abused its discretion by failing to provide rigorous analysis of Fed. R. Civ. P. 23(a) and (b)(3)'s requirements sufficient to allow for meaningful appellate review of its decision to certify collective class action in wages and hours dispute brought under Fair Labor Standards Act, 29 USCS §§ 201 et seq., and Maryland law; district court needed to determine in first instance whether common questions were dependent upon common contention, resolution of which would resolve each one of claims in one stroke; district court needed to clarify its predominance analysis which was unclear and, in any case, insufficiently rigorous; and district court needed to address whether, in fact, class action was superior method for resolving controversy compared to other alternatives. Ealy v. Pinkerton Gov't Servs. (4th Cir. Md. Mar. 14, 2013), 514 Fed Appx 299, 163 Lab Cas (CCH) P36104.

124. —Sub-classes

Employees' motion for certification of subclass, Meal Break Deduction Class, was granted because they satisfied Fed. R. Civ. P. 23(a) requirements by preponderance of evidence, they demonstrated that certification was appropriate under Rule 23(b)(3), as questions common to class predominated over individual questions, and class litigation was superior method of adjudicating Fair Labor Standards Act claims. Colozzi v. St. Joseph's Hosp. Health Ctr. (N.D.N.Y. Mar. 8, 2011), 275 FRD 75.

Employees' motion for certification of subclasses, Pre and Postliminary Work Class and Employee Retirement Income Security Act (ERISA) Class, was denied in Fair Labor Standards Act suit as they could not satisfy first Fed. R. Civ. P. 23(a) prerequisite of numerosity based solely on three affidavits and 21 interrogatory responses, and sparse evidence offered in support of ERISA Subclass IV was insufficient. Colozzi v. St. Joseph's Hosp. Health Ctr. (N.D.N.Y. Mar. 8, 2011), 275 FRD 75.

125. —Overtime and working time

Employees could not pursue both collective action class claims for overtime pay under *29 USCS § 216(b)*, and state law overtime class claims under Fed. R. Civ. P. 23(b)(3) in same suit; opt-in provisions of *29 USCS § 216(b)* were incompatible with opt-out provisions of Fed. R. Civ. P. 23(b)(3), and limits on representative actions under FLSA would have been undermined by use of Rule 23 to pursue essentially identical state law claims; in addition, use of Rule 23 to abridge substantive rights created by FLSA's opt-in procedure was prohibited by Rules Enabling Act, 28 USCS § 2072(b). Ellis v. Edward D. Jones & Co., L.P. (W.D. Pa. Dec. 18, 2007), 527 F Supp 2d 439).

Without evidence addressing actual duties of case management nurse, medical management nurse, and utilization review nurse, and other job positions carrying substantially similar job duties, court could not be assured that any of four prerequisites delineated in *Fed. R. Civ. P. 23(a)* were satisfied, and it declined to issue ruling on certification in Fair Labor Standards Act action for overtime wages. *Ruggles v. Wellpoint, Inc. (N.D.N.Y. Sept. 24, 2008), 253 FRD 61*.

Class certification was granted for case brought by employees who were alleging wage violations in both collective action under Fair Labor Standards Act, *29 USCS § 216*, and under state wage laws, utilizing class certification standards at *Fed. R. Civ. P. 23*, because employees were challenging policy of refusing to pay hourly employees for certain activities and class was limited to those employees who engaged in those activities; members of class appeared to be similarly situated and employer had not identified any persuasive reasons why individual lawsuits would be superior method to resolving parties' dispute. *Spoerle v. Kraft Foods Global, Inc. (W.D. Wis. May 5, 2008), 253 FRD 434*.

Employees were entitled to class certification under *Fed. R. Civ. P. 23(a)* and *(b)(3)* on their claim that employer violated *Wis. Stat. § 109.03(1)* and Wisconsin wage regulations by failing to pay employees for some of time they spent donning and doffing protective gear and walking to work areas; it was permissible for employees to pursue their state labor law class claims and collective action under Fair Labor Standards Act in single lawsuit; however, employees were not entitled to class certification on breach of contract, unjust enrichment, and quantum meruit claims arising from failure to pay wages because predominance requirement of *Fed. R. Civ. P. 23(b)(3)* was not satisfied. *Kasten v. St.-Gobain Performance Plastics Corp. (W.D. Wis. June 2, 2008), 556 F Supp 2d 941*.

Motion for certification of action for overtime pay was granted because security investigators met numerosity, commonality, typicality, and adequacy of representation requirements of *Fed. R. Civ. P. 23(2)*; moreover, all four factors of *Fed. R. Civ. P. 23(b)* weighed in security investigators' favor, which demonstrated that class action was superior to other methods of litigating dispute since: (1) there appeared to be no interest in class members controlling individual actions and there was no evidence of other pending litigation; (2) it was desirable to keep case in court because employer was headquartered in Maryland, attorneys were based there, and many of corporate witnesses lived and work there; and (3) there did not appear to be difficulties in managing class action such that court should deny motion. *Calderon v. GEICO Gen. Ins. Co. (D. Md. Feb. 14, 2012), 279 FRD 337*.

126. —Other particular cases

Since suits under Fair Labor Standards Act (*29 USCS §§ 201* et seq.) may not be maintained as Rule 23 class actions, motion of plaintiff to maintain action for alleged violations of Act as Rule 23(b)(1) or (2) class action would be denied. *Lombardi v. Altemose Constr. Co. (E.D. Pa. Nov. 4, 1975), 69 FRD 410, 22 Fed R Serv 2d (Callaghan) 632, 78 Lab Cas (CCH) P33376*.

In view of fact that only Secretary of Labor can seek injunction under Fair Labor Standards Act and that statute of limitations continues to run for those employees who have not given their consent to being plaintiffs in suit, action of minors civilly committed to camps of state's Division for Youth not appropriate for class action treatment insofar as it sought damages for violations of Act, but portion of complaint seeking declaratory judgment based upon violations of Act was maintainable as class action. *King v. Carey (W.D.N.Y. Dec. 11, 1975), 405 F Supp 41, 78 Lab Cas (CCH) P33354*.

In putative Fair Labor Standards Act collective action, court noted that, from its numbering, N.D. Ga. R. 23.1 was intended as corollary to *Fed. R. Civ. P. 23*, and employees correctly noted that Rule 23 did not apply to *29 USCS § 216(b)* collective actions; *Fed. R. Civ. P. 23* and *29 USCS § 216(b)* actions were mutually exclusive and irreconcilable. *Maddox v. Knowledge Learning Corp. (N.D. Ga. Aug. 3, 2007), 499 F Supp 2d 1338*.

Immigration status of class representative was irrelevant in wage and hour cases, in light of Fair Labor Standards Act's coverage of all workers—undocumented or not—defendant could explore and challenge class certification requirements of numerosity, typicality, commonality, and adequacy of representation, and predominance of

common issues of law and fact, without identifying information of named plaintiffs, putative class members, or potential witnesses. *Montoya v. S.C.C.P. Painting Contrs., Inc. (D. Md. Jan. 14, 2008), 530 F Supp 2d 746*.

District court did not consider merits of truck driver's action alleging that employer violated Fair Standards Labor Act (FLSA), *29 USCS § 207(a)*, by requiring drivers to work more than 40 hours without overtime pay in determining whether class certification was appropriate because any consideration of "merits" evidence went only to issue of whether class could be certified and not whether driver would prevail at trial; district court found that driver failed to satisfy his burden on class certification that class members were similarly situated under FLSA, *29 USCS § 213(b)(1)*, and it evaluated evidence of Motor Carrier exemption, FLSA, *29 USCS § 213(b)(1)*, not to determine whether driver would ultimately prevail at trial but to determine whether proposed class members were similarly situated. *Bishop v. Petro-Chemical Transp., LLC (E.D. Cal. July 17, 2008), 582 F Supp 2d 1290*.

Employees, three opt-in plaintiffs from Fair Labor Standards Action (FLSA) collective action, were dismissed as parties because they did not qualify under conditional certification order as they admitted in their interrogatory responses that they did not work through or during meal break without compensation; thus they fell outside conditionally certified FLSA class. *Colozzi v. St. Joseph's Hosp. Health Ctr. (N.D.N.Y. Mar. 8, 2011), 275 FRD 75*.

127. Labor Management Relations Act

As for certification of class for purposes of bringing claims under Labor Management Relations Act (LMRA), *29 USCS §§ 141* et seq., prerequisites of *Fed. R. Civ. P. 23(a)* were met as subclasses were sufficiently numerous; although each subclass consisted of individuals covered by different collective bargaining agreements (CBAs), all CBAs at issue allegedly had effect of providing lifetime benefits to retirees, and that issue was common to all potential LMRA plaintiffs; and representation by named plaintiffs and their counsel would have adequately protected interests of class members. *Coffin v. Bowater Inc. (D. Me. June 21, 2005), 228 FRD 397*.

128. Labor Management Reporting and Disclosure Act

Class actions can be maintained for violation of rights under § 101 of Labor-Management Reporting and Disclosure Act (*29 USCS § 411*). *Rota v. Bhd. of Ry., Airline & S.S. Clerks (N.D. Ill. 1974), 64 FRD 699, 19 Fed R Serv 2d (Callaghan) 278, 76 Lab Cas (CCH) P10775*.

Class action may be maintained for violation of § 101 of Labor-Management Reporting and Disclosure Act (*29 USCS § 411*) in connection with union dues increases. *Gates v. Dalton (E.D.N.Y. 1975), 67 FRD 621, 22 Fed R Serv 2d (Callaghan) 1335, 78 Lab Cas (CCH) P11320*.

129. Unions, generally

Labor Management Relations Act (*29 USCS §§ 141* et seq.) does not abolish class actions in federal courts by or against labor unions, and there is no inconsistency in permitting unions to sue or be sued in their common names and at same time allowing them to sue and be sued by device of class action. *Tisa v. Potofsky (D.N.Y. Apr. 14, 1950), 90 F Supp 175, 18 Lab Cas (CCH) P65724*.

Action by union pension and welfare fund and individual beneficiaries of fund challenging state's hospital rate setting system is not properly certified as plaintiff class action where true dispute in case is between fund and state, thus making class certification unnecessary, and where there have been instances where fund has clearly benefited from system, thus indicating potential for antagonism between interests of fund and certain of its members. *Bonser v. New Jersey (D.N.J. Apr. 1, 1985), 605 F Supp 1227*.

Essential purpose of Rule 23.2 was to abrogate common law rule whereby, in order for unincorporated association to sue or be sued, all of its members had to be named parties to action; in this sense, Rule 23.2 supplements Rule 17 by allowing unincorporated associations same legal status as person or corporation; Rule 23 therefore remains unsullied by Rule 23.2, and labor union or those representing union's membership must comply with its provisions

when bringing class action suit. *Stolz v. United Brotherhood of Carpenters & Joiners, Local Union No. 971 (D. Nev. Oct. 15, 1985), 620 F Supp 396*.

130. Worker Adjustment and Retraining Notification Act (WARN)

In employee's adversary proceeding claiming that his bankrupt employer violated WARN Act by failing to give employees sixty days written notice of their termination and sought sixty days of wages and benefits under Act to be paid as administrative claims under *11 USCS § 503(b)(1)(A)* or, alternatively, as priority unsecured claims under *11 USCS § 507(a)(4)* and (5), it was proper for bankruptcy court, in addressing *Fed. R. Civ. P. 23* certification motion to consider bankruptcy matters, among other things, but reasons for bankruptcy court's order were unclear as to Rule 23's numerosity and superiority requirements, so remand for reconsideration was required. *Teta v. Chow (In re TWL Corp.) (5th Cir. Tex. Mar. 29, 2013), 712 F3d 886, 163 Lab Cas (CCH) P10583*.

In action by former employees against their former employer alleging violation of Worker Adjustment and Retaining Notification Act (WARN), *29 USCS §§ 2101* et seq., following closing of one of employer's production plants, employees' motion for class certification was granted where (1) employees met requirements under *Fed. R. Civ. P. 23(a)* when joinder was impracticable, several factual issues were common to all of employees' claims, employer's conduct toward employees was more or less uniform, and proposed class representatives had colorable claims under WARN Act; and (2) requirements under *Fed. R. Civ. P. 23(b)(3)* were met because determination of liability would likely depend on resolution of several common questions regarding events surrounding employees' layoffs and how WARN Act liability provisions were applied to those circumstances, and class action was superior to other means of adjudication because, if class certification was denied, it was probable that some employees would forego their opportunity to litigate because of relatively low stakes involved. *Moreno v. DFG Foods, LLC (N.D. Ill. May 21, 2003), 2003 US Dist LEXIS 8700*.

Former employees' motion for class certification of its suit against former employer under Worker Adjustment and Retraining Notification Act (WARN Act), *29 USCS §§ 2101* et seq., was granted because numerosity requirement was met since former employees all alleged WARN Act violations and joinder of hundreds, potentially thousands, of lawsuits in case was impracticable; class action lawsuit was divided into three sub-classes based upon three layoff dates alleged in complaint to meet commonality requirement; their claims were identical to claims of other members of respective sub-classes based upon layoff date; there was no substantial conflict of interest between proposed sub-class representatives and respective sub-classes so that adequacy of representation requirement was met; and, predominance of factual and legal issues made class action, with sub-classes and method for adjudicating individualized damages claims, most desirable vehicle for adjudicating WARN Act claims. *Weekes-Walker v. Macon County Greyhound Park, Inc. (M.D. Ala. Mar. 15, 2012), 281 FRD 520*, modified, (M.D. Ala. Apr. 3, 2014), — F Supp 2d —.

Adversary proceeding brought by former employee against Chapter 11 debtor was not subject to dismissal because adversary proceeding was potentially best method for determining employee's right to payments under Worker Adjustment and Retraining Notification Act, *29 USCS §§ 2101* et seq., particularly because employee potentially sought class action for all employees similarly situated and class action could not go forward under contested claim procedure. *Burgio v. Protected Vehicles, Inc. (In re Protected Vehicles, Inc.) (Bankr. D.S.C. July 30, 2008), 392 BR 633*.

Bankruptcy court granted employees' motions for class certification of their adversary proceedings alleging that their former employer violated Worker Adjustment and Retraining Notification Act, *29 USCS §§ 2101*–*2109*, Employee Retirement Income Security Act, Consolidated Omnibus Budget Reconciliation Act of 1985, and South Carolina Payment of Wages Act, *S.C. Code Ann. § 41-10-50*, when it closed facilities where it manufactured blast protected military vehicles without giving employees advance notice that they would lose their jobs and without paying them for work they had already performed; although employer had filed petition under Chapter 11 of Bankruptcy Code, class certification was appropriate because employees' actions involved same claims against same defendant, and differences such as rate of pay and date of termination were minor. *Burgio v. Protected Vehicles, Inc. (In re Protected Vehicles, Inc.) (Bankr. D.S.C. Nov. 21, 2008), 397 BR 339*.

Former employees who alleged that Chapter 11 debtors, automobile dealership and related entities, violated Worker Adjustment and Retraining Notification Act, *29 USCS § 2101* et. seq., when they ceased operations and informed substantially all their employees they were terminated, were granted class certification on their claims, pursuant to *Fed. R. Civ. P. 23*; debtors terminated employment of approximately 2,300 employees, each employee had essentially same claims under *29 USCS § 2104*, and it would have been too expensive and time consuming to resolve each employee's claim by requiring employees to file individual claims against debtors' bankruptcy estates. *Kettell v. Bill Heard Enters. (In re Bill Heard Enters.) (Bankr. N.D. Ala. Jan. 12, 2009), 400 BR 795*.

Former employees who filed adversary proceeding against business that declared Chapter 11 bankruptcy, claiming that business violated Worker Adjustment and Retraining Notification Act ("WARN Act"), *29 USCS §§ 2101* et seq., when it closed facilities and laid off employees without giving employees proper notice, met their burden under *Fed. R. Civ. P. 23* and *Fed. R. Bankr. P. 7023* of showing that case should be tried as class action; class certification was appropriate because case involved single legal claim arising from common operative facts, i.e., mass termination of employment without giving employees advance written warning in compliance with WARN Act, and business's defenses were common to entire class; in addition, up to 293 employees could have been affected by business's decision, and that number was sufficient to demonstrate impracticability of joinder and need to try case as class action. *Bent v. ABMD Ltd. (In re ABMD Ltd.) (Bankr. S.D. Ohio Nov. 17, 2010), 439 BR 475*.

Where former employee of bankruptcy debtor brought putative class action adversary proceeding against debtor alleging that debtor violated Worker Adjustment and Retraining Notification Act (WARN Act), *29 USCS §§ 2101* et seq., based on debtor's abrupt termination of its business, and thus termination of its employees, without required notice to employees, class treatment in action was clearly warranted; employees were clearly numerous and similarly situated, common class issues of liability under WARN Act predominated, and class treatment was superior to piecemeal litigation of each employee's claim. *Wenzel v. Partsearch Techs., Inc. (In re Partsearch Techs., Inc.) (Bankr. S.D.N.Y. June 21, 2011), 453 BR 84*.

Bankruptcy court approved settlement of class action former employee filed against company that declared Chapter 11 bankruptcy, alleging that company violated Worker Adjustment and Retraining Notification Act ("WARN Act") *29 USCS §§ 2101–2109* and New York State Worker Adjustment and Retraining Notification Act when it closed plant in Michigan where he worked with almost 200 other employees without giving employees 60 days' advance notice; settlement was fair and reasonable under *Fed. R. Civ. P. 23* and *Fed. R. Bankr. P. 9019*, even though it capped company's liability exposure at 17 percent, because company had defenses it could have asserted under WARN Act and only three members of class of almost 200 employees opted out of settlement. *Pinsker v. Borders, Inc. (In re BGI, Inc.) (Bankr. S.D.N.Y. Feb. 17, 2012), 465 BR 365*.

Class certification under *Fed. R. Civ. P. 23* was granted for class of former employees terminated in violation of *29 USCS § 2102* of Federal Workers Adjustment and Retraining Notification Act. *Schuman v. Connaught Group, Ltd. (In re Connaught Group, Ltd.) (Bankr. S.D.N.Y. Apr. 16, 2013), 491 BR 88*.

131. Other state law claims

Class of employees forced to wait in security line after their shifts was certified under *Fed. R. Civ. P. 23* as: (1) class was not overbroad; (2) numerosity requirement was met since all 3,965 agency-furnished employees were required to go through security screening; (3) there was common issue of law as to whether post-shift security line time was compensable under California Labor Code; (4) employees' claims were typical of those of security line class members because employees were subject to same security procedures as all class members; (5) employees could adequately represent proposed classes, and their counsel had extensive experience handling similar class actions and adequate resources to represent proposed classes; one overarching question of law was whether time spent waiting in line was compensable under California Labor Code. *Cervantez v. Celestica Corp. (C.D. Cal. July 30, 2008), 253 FRD 562, 71 Fed R Serv 3d (Callaghan) 284*.

Proposed meal and rest period class was certified as amended under *Fed. R. Civ. P. 23* as: (1) proposed definition was overbroad, and was amended to allege violation of California Labor Code's requirements such as *Cal. Lab.*

Code § 226.7; (2) since all of agency's employees furnished to corporation were scheduled to work eight-hour shifts, numerosity requirement for proposed class was satisfied; (3) corporate policy that affected all class members commonly could be inferred to establish commonality; (4) employees' claims were typical of class because they all were allegedly were denied meal and rest period premiums, second meal breaks, and suitable resting facilities; (5) employees were able to represent classes adequately, and their counsel had extensive experience handling similar class actions and had adequate resources to represent proposed classes; whether employees agency furnished to corporation worked in different job positions, their meal and rest breaks were subject to common policy and were subject to common proof. *Cervantez v. Celestica Corp. (C.D. Cal. July 30, 2008), 253 FRD 562, 71 Fed R Serv 3d (Callaghan) 284*.

Classes for wage claims under Minnesota, Colorado, Oregon, and Washington law were certified under *Fed. R. Civ. P. 23*; under modified class definitions, common questions of law and fact would predominate, and by focusing only on booting up and shutting down claims, ultimate trial of case would focus on two limited activities that were universally performed across class. *Burch v. Qwest Communs. Int'l, Inc. (D. Minn. Dec. 16, 2009), 677 F Supp 2d 1101*.

Former and current employees' motion for class certification was granted with regard to seeking to recover unpaid prevailing wages for their work on various public works projects against employer under State of New York law because under *Fed. R. Civ. P. 23*, they established: numerosity by alleging that class consists of at least 400 members; requirement of commonality was satisfied as their claim, that proposed class members were denied prevailing wages by employer, raised common questions of law and fact; as to typicality, they each performed similar work for employer, were subject to same payroll procedures of defendant, and were not paid prevailing wages to which they were entitled; law firm was chosen to satisfy adequate representation requirement; common questions of law and fact relevant to all class members predominated over individualized issues as, although putative class members earned prevailing wages at different rates and some worked more hours than others, those differences do not predominate over main issue: whether employer systematically failed to pay its employees prevailing wages due them; and class action was superior to other means of adjudication. *Ramos v. SimplexGrinnell LP (E.D.N.Y. June 21, 2011), 796 F Supp 2d 346*, vacated, *(2d Cir. N.Y. Dec. 4, 2014), 773 F3d 394, 165 Lab Cas (CCH) P61544*.

Class certification of employees alleging New York Labor Law violations was proper, as over 40 employees were involved; claims depended upon common contention that certain employees were not eligible for inclusion in tip pool; all class members were required to share gratuities with ineligible employees; named plaintiffs would adequately represent class; proposed class was easily identifiable, predominance was satisfied because if plaintiffs showed that certain employees were not eligible to receive tips, then each of class plaintiffs would likely prevail; and class action was superior to other methods for adjudicating claims. *Schear v. Food Scope Am., Inc. (S.D.N.Y. Jan. 8, 2014), — F Supp 2d —, 297 FRD 114*.

132. Miscellaneous

Rule 23 of Federal Rules of Civil Procedure is not applicable to NLRB proceedings. *NLRB v. Plumbers & Pipefitters Local Union No. 403, etc. (9th Cir. July 22, 1983), 710 F2d 1418, 37 Fed R Serv 2d (Callaghan) 168, 98 Lab Cas (CCH) P10317*.

Federal Employers' Liability Act does not, as matter of law, bar class actions; fact that it provides for reduction of damages in proportion to each employee's contributory negligence does not preclude class certification, although it may suggest certification is not desirable in some cases or that bifurcation may be required on issue of damages. *Inter-Modal Rail Emples. Ass'n v. A.T.& S.F. Ry. (9th Cir. Cal. Mar. 27, 1996), 80 F3d 348, 35 Fed R Serv 3d (Callaghan) 279*, vacated, *(U.S. May 12, 1997), 520 US 510, 117 S Ct 1513, 137 L Ed 2d 763*.

Plaintiff had failed to state which, if either, employee retirement plan formed basis for particular subclass, nor did she include information regarding whom this subclass would be comprised of; based on lack of evidence provided

by plaintiff, considered with that offered by defendants in opposition, she could not satisfy requirements for certification of this subclass. *Meyers v. Crouse Health Sys. (N.D.N.Y. Mar. 8, 2011), 274 FRD 404*.

Unpublished decision: District court did not abuse its discretion when it denied class certification because employees failed to show all of *Fed. R. Civ. P. 23(a)*'s requirements and failed to establish their suit satisfied either *Fed. R. Civ. P. 23(b)(2)* or *23(b)(3)*. *Atwell v. Gabow (10th Cir. Colo. Feb. 9, 2009), 311 Fed Appx 122*.

d. Securities, Stocks and Bonds

133. Generally

Class action is appropriate, and often preferable, means of litigating claims of violation of securities laws. *In re Goldchip Funding Co. (M.D. Pa. 1974), 61 FRD 592, 18 Fed R Serv 2d (Callaghan) 256, Fed Sec L Rep (CCH) P94382*.

In making class determination in securities case, requirements of Rule 23 must be liberally construed; policy of Rule 23 is to favor class actions. *Hochschuler v. G. D. Searle & Co. (N.D. Ill. 1978), 82 FRD 339*.

Class action device is particularly suitable in securities actions, since such actions are usually complex and expensive, and without class action device many actionable wrongs would go uncorrected and persons affected thereby unrecompensed, and therefore, in doubtful case any error should be committed in favor of allowing class action. *Piel v. National Semiconductor Corp. (E.D. Pa. 1980), 86 FRD 357, 29 Fed R Serv 2d (Callaghan) 1332*.

134. Fraud

Policy of Rule 23 favoring maintenance of class actions operates in cases where securities fraud is charged and is especially strong in instances where denial of class status would effectively terminate further litigation of securities fraud claims. *King v. Kansas City Southern Industries, Inc. (7th Cir. Ill. June 19, 1975), 519 F2d 20, 20 Fed R Serv 2d (Callaghan) 593, Fed Sec L Rep (CCH) P95213*.

Class action is particularly suitable for use in suits charging violations of antifraud provisions of federal securities laws and is increasingly recognized as private policing weapon supplementing governmental administrative action. *Berland v. Mack (S.D.N.Y. 1969), 48 FRD 121, 13 Fed R Serv 2d (Callaghan) 659, Fed Sec L Rep (CCH) P92499*, disapproved as stated in *In re Franklin Nat'l Bank Sec. Litigation (2d Cir. N.Y. Apr. 3, 1978), 574 F2d 662, 25 Fed R Serv 2d (Callaghan) 1, Fed Sec L Rep (CCH) P96373*.

Rule 23 is important as protection for small claimants against securities fraud. *Frankel v. Wyllie & Thornhill, Inc. (W.D. Va. 1972), 55 FRD 330, 16 Fed R Serv 2d (Callaghan) 652, Fed Sec L Rep (CCH) P93672*.

In securities fraud cases, class action is properly maintainable if some uniform misrepresentations are found, and in such cases proof of individual reliance and damages are subject to severance and treatment in subsequent proceedings. *Hernandez v. Motor Vessel Skyward (D. Fla. 1973), 61 FRD 558, 18 Fed R Serv 2d (Callaghan) 1164*, aff'd, *(5th Cir. Fla. 1975), 507 F2d 1278*, aff'd, *(5th Cir. Fla. 1975), 507 F2d 1279*, disapproved, *In re Northern Dist. of California, Dalkon Shield IUD Products Liability Litigation (9th Cir. Cal. June 18, 1982), 693 F2d 847, 34 Fed R Serv 2d (Callaghan) 646*, disapproved as stated in *In re Bendectin Products Liability Litigation (6th Cir. Ohio Oct. 26, 1984), 749 F2d 300, 40 Fed R Serv 2d (Callaghan) 1*.

Securities fraud, perpetrated on large group of persons by similar or identical misrepresentations, is appropriate for class treatment. *Crasto v. Estate of Kaskel (S.D.N.Y. 1974), 63 FRD 18, 18 Fed R Serv 2d (Callaghan) 1010, Fed Sec L Rep (CCH) P94524*.

Not every securities fraud claim requires class action certification. *Steinmetz v. Bache & Co. (S.D.N.Y. 1976), 71 FRD 202, 23 Fed R Serv 2d (Callaghan) 84, Fed Sec L Rep (CCH) P95528*.

In alleged securities fraud case, when court is in doubt as to whether or not to certify class action, court should err in favor of allowing class to go forward. *In re Blech Sec. Litig. (S.D.N.Y. May 11, 1999), 187 FRD 97, Fed Sec L Rep (CCH) P90476*.

Plaintiffs in analyst cases do not need to show market impact at class certification stage of securities fraud action under § 10(b) (*15 USCS § 78j(b)*) as such requirement does not address underlying purposes of *Fed. R. Civ. P. 23*. *In re Credit Suisse-AOL Secs. Litig. (D. Mass. Sept. 26, 2008), 253 FRD 17, Fed Sec L Rep (CCH) P94859*.

135. —Particular cases

Securities fraud actions substantially based on oral misrepresentations usually cannot be maintained as class action; however, mere fact that oral misrepresentations are among transgressions alleged does not by itself preclude finding that common questions predominate. *Dirks v. Clayton Brokerage Co. (D. Minn. Mar. 12, 1985), 105 FRD 125, 1 Fed R Serv 3d (Callaghan) 771*.

Certification of plaintiff class is rule in Northern District of California in cases where alleged securities fraud concerns misrepresentations or omissions in offering materials issued prior to public offering. Re Activision Secur. *In re Activision Sec. Litigation (N.D. Cal. Nov. 4, 1985), 621 F Supp 415, 3 Fed R Serv 3d (Callaghan) 761*.

Proposed class in securities fraud and racketeering case satisfied requirements of numerosity, common questions of law or fact, typicality, and adequacy of representation, where (1) class consisted of over 200 members, (2) issues presented centered around misstatements, fraud, and misappropriation in particular investment vehicles, (3) plaintiffs' claim arises out of same scheme, and (4) plaintiffs are committed to successful prosecution of their claims and those of all other class members. *Tedesco v. Mishkin (S.D.N.Y. June 10, 1988), 689 F Supp 1327, Fed Sec L Rep (CCH) P93900*.

Claims of putative class of shareholders in action for breach of contract against stockbroker to extent claims stated were actually for fraud that was related to purchase of securities were preempted by Securities Litigation Uniform Standards Act of 1998, P. L. No. 105-353, *112 Stat. 3227*, codified at *15 USCS §§ 77p*, *78bb(f)*. *Dacey v. Morgan Stanley Dean Witter & Co. (S.D.N.Y. May 20, 2003), 263 F Supp 2d 706, Fed Sec L Rep (CCH) P92501*.

In proposed class action against nationwide automotive service business, proposed representative party could not fully and adequately protect interests of class pursuant to *Fed. R. Civ. P. 23(a)(4)* because there was significant divergence of interests between representative and members of proposed classes; additionally, her lack of memory relating to certain of matters alleged could be detrimental to interests and claims of absent class members. *Thompson v. Jiffy Lube Int'l, Inc. (D. Kan. July 16, 2008), 250 FRD 607*.

Motion for class certification in securities fraud action under § 10b of Securities Exchange Act of 1934, *15 USCS § 78j(b)*, was granted because defendants identified no reason to deprive investor benefit of fraud-on-the-market presumption and, although class members could favor differing interpretations regarding damages, all class members were unified by interest in proving same common course of conduct. *In re LDK Solar Sec. Litig. (N.D. Cal. Jan. 28, 2009), 255 FRD 519, Fed Sec L Rep (CCH) P95054*.

Bondholder class was certified to bring claims under *15 USCS §§ 77k(a)*, *77o*, *78j*, and *78t* because class met requirements of *Fed. R. Civ. P. 23* in attacking scheme concerning fraudulent representation that corporation's financial condition was far better than it actually was. *In re HealthSouth Corp. Secs. Litig. (N.D. Ala. Sept. 30, 2009), 261 FRD 616*.

After securities fraud actions were consolidated investor who had lost most in alleged fraud scheme during class period was presumed to be adequate lead and investor further met preliminary requirements of typicality as required by *Fed. R. Civ. P. 23* during early stage of litigation, so that investor could be appointed as lead plaintiff. *Ellenburg v. JA Solar Holdings Co. (S.D.N.Y. Apr. 17, 2009), 262 FRD 262, Fed Sec L Rep (CCH) P95211*.

In putative class action alleging securities fraud brought by investors against company and principals, investor with largest financial stake in controversy was proper party to serve as lead plaintiff under *15 USCS § 78u-4(a)(3)(B)* of in that he met typicality and adequacy requirements of *Fed. R. Civ. P. 23* and his selected counsel was approved as lead counsel for actions consolidated under *Fed. R. Civ. P. 42*. *Guohua Zhu v. UCBH Holdings, Inc. (N.D. Cal. Jan. 27, 2010), 682 F Supp 2d 1049, Fed Sec L Rep (CCH) P95586*.

15 USCS § 78u-4(a)(3)(B)(iii)(I)(aa) was not applicable as every proposed lead plaintiff had timely complied with procedure described in court's order and thus, all movants had equal standing; therefore, to choose lead plaintiff for case, court had to determine which movant had largest financial interest in relief sought by class and otherwise satisfied requirements of *Fed. R. Civ. P. 23*, while remaining cognizant of goals and values underlying Private Securities Litigation Reform Act, *15 USCS § 78u-4* et seq. *In re Gentiva Sec. Litig. (E.D.N.Y. Jan. 26, 2012), 281 FRD 108*, dismissed without prejudice, *(E.D.N.Y. Mar. 25, 2013), 932 F Supp 2d 352, Fed Sec L Rep (CCH) P97345*.

Unpublished decision: District court did not abuse its discretion in concluding that individual issues would predominate in plaintiffs' Securities Act of 1933 action; to determine whether each purchaser had actual knowledge of specific untruths or omissions at time of its purchase would have required many individualized inquires, outweighing common issues in case. *N.J. Carpenters Health Fund v. Rali Series 2006-QO1 (2d Cir. N.Y. Apr. 30, 2012), 477 Fed Appx 809, Fed Sec L Rep (CCH) P96817*.

136. SEC Rule violations

Class action may be particularly appropriate to claims arising under SEC Rule 10b. *Bleznak v. C.G.S. Scientific Corp. (E.D. Pa. 1973), 61 FRD 493, Fed Sec L Rep (CCH) P94804*.

There are strong policy reasons for use of class actions in cases alleging SEC Rule 10b-5 violations. *Polak v. Noel Industries, Inc. (S.D.N.Y. 1974), 64 FRD 333, 19 Fed R Serv 2d (Callaghan) 251, Fed Sec L Rep (CCH) P94842*.

137. Miscellaneous

Fact that securities action was filed as class action does not preclude District Court from finding absence of reliance on motion for summary judgment because some other members of putative class might claim reliance, where plaintiffs have not moved to have class certified and no evidence has been presented that requirements of Rule 23 are met. *Biechele v. Cedar Point, Inc. (6th Cir. Ohio Nov. 8, 1984), 747 F2d 209, Fed Sec L Rep (CCH) P91829*.

District court properly granted class certification under *Fed. R. Civ. P. 23* to holders of defaulted Argentine bonds because (1) as to adequacy of representation, at time district court granted class certification, it concluded that potential conflicts of interest would have threatened damages phase of proceedings, not liability phase, there was no doubt that district court would continue to be alert to issue in course of subsequent proceedings, and potential conflict did not justify refusing to certify class; (2) holders satisfied predominance requirement because even resolved questions of liability implicated whether putative class shared common nucleus of facts, and fact that damages may have to be ascertained on individual basis was not sufficient to defeat class certification; and (3) with reservation that certification of classes may have been either altered or terminated at future stages of litigation, there was no reason why proceeding by class action was not superior, especially given importance of hunt for assets available to all members of all classes. *Seijas v. Republic of Arg. (2d Cir. N.Y. May 27, 2010), 606 F3d 53*.

In action instituted by minority shareholders alleging that defendants breached their fiduciary duties under Delaware law in effectuating short-form merger pursuant to relevant state law, plaintiffs' motion for class certification would be denied where primary relief sought by plaintiffs was restoration of minority to their status as full shareholders of corporation, where nearly all former shareholders had accepted corporation's offer or had sought appraisal in state court, and where, if former shareholders were included in class action which ultimately prevailed, defendants would be faced with inconsistent judgments as to same parties. *Green v. Santa Fe Industries (S.D.N.Y. 1979), 82 FRD 688, 27 Fed R Serv 2d (Callaghan) 1004*.

Defendant class of underwriters is conditionally certified for purpose of claims under Securities Act of 1933 (*15 USCS §§ 77k* and *77l*(2)) action arising out of alleged misleading registration statement and prospectus since there are 104 jurisdictionally diverse defendants which cannot practically be joined as defendants, there are common questions of facts as to presence of any misstatements or omissions in registration statements and underwriters proposed as class representatives will have defense typical of class. *McFarland v. Memorex Corp. (N.D. Cal. Sept. 17, 1982), 96 FRD 357, Fed Sec L Rep (CCH) P98816*.

Investor's motion for certification of class who bought municipal bonds from underwriter, where prospectus was allegedly misleading under *15 USCS §§ 77l* and *77o*, was granted, despite privity and exemption arguments. *Daniels v. Blount Parrish & Co. (N.D. Ill. Dec. 23, 2002), 211 FRD 352, Fed Sec L Rep (CCH) P92254*.

Given that participants sold substantially more shares than they purchased during period of inflation, they could only have benefitted from overvaluation of corporation's stock; because participants failed to demonstrate individual injury in fact, they lacked Article III standing to assert their breach of fiduciary duty claims under Employee Retirement Income Security Act, *29 USCS §§ 1001* et seq., and their motion for class certification was denied. *In re Boston Sci. Corp. Erisa Litig. (D. Mass. Nov. 3, 2008), 254 FRD 24*.

Investor group met requirements of *Fed. R. Civ. P. 23(a)* and *15 USCS § 78u-4* where group suffered losses as result of defendants' alleged misrepresentations, individual investor had greatest financial stake in litigation of any movant, and its choice of counsel was well-qualified to act as class counsel. *Hodges v. Akeena Solar, Inc. (N.D. Cal. Oct. 21, 2009), 263 FRD 528*.

Having shown director interest in transaction and failure to have measure approved by majority of disinterested directors, plaintiff pleaded sufficient facts to show demand futility. *Heine v. Streamline Foods, Inc. (N.D. Ohio July 29, 2011), 805 F Supp 2d 383*.

B. Need for Class Action

138. Generally

If prerequisites and conditions of Rule 23 have been met, court may not deny class status on basis that there is no need for it. *Vickers v. Trainor (7th Cir. Ill. Dec. 10, 1976), 546 F2d 739*.

Rule 23 allows litigants to bring class actions so long as they meet its standards; thus, plaintiff need not prove that certification is necessary, but only that there is compliance with prerequisites of Rule 23. *Geraghty v. United States Parole Com. (3d Cir. Pa. Mar. 9, 1978), 579 F2d 238, 25 Fed R Serv 2d (Callaghan) 352*, vacated, *(U.S. Mar. 19, 1980), 445 US 388, 100 S Ct 1202, 63 L Ed 2d 479*.

No rule requires demonstration of need for class action in action under Rule 23(b)(2). *Percy v. Brennan (S.D.N.Y. Nov. 8, 1974), 384 F Supp 800, 8 Empl Prac Dec (CCH) P9799, 19 Fed R Serv 2d (Callaghan) 659*.

139. Individual relief and class relief

When retroactive monetary relief is not at issue and prospective benefits of declaratory and injunctive relief will benefit all members of proposed class to such extent that certification of class would not further implementation of judgment, district court may decline certification. *Davis v. Smith (2d Cir. N.Y. Aug. 11, 1978), 607 F2d 535, 25 Fed R Serv 2d (Callaghan) 1428, 28 Fed R Serv 2d (Callaghan) 1335*, vacated, *(2d Cir. N.Y. Feb. 23, 1979), 607 F2d 535, 28 Fed R Serv 2d (Callaghan) 1335*.

Class certification is unnecessary where only injunctive and declaratory relief may be awarded and where relief granted will automatically inure to benefit of all members of proposed class. *Riley v. Ambach (E.D.N.Y. July 1, 1980), 508 F Supp 1222, 29 Fed R Serv 2d (Callaghan) 1400*, rev'd, *(2d Cir. N.Y. May 19, 1981), 668 F2d 635*.

Class certification will be denied where judgment in favor of plaintiffs would be sufficiently broad to protect interests of potential members of proposed class. *Ruhe v. Block (E.D. Va. Feb. 9, 1981), 507 F Supp 1290, 31 Fed R Serv 2d (Callaghan) 112*, aff'd, *(4th Cir. Va. July 19, 1982), 683 F2d 102*.

Where declaratory or injunctive relief sought will accrue to benefit of others similarly situated whether there is class or not there is no need for class certification. *Curry v. Dempsey (W.D. Mich. July 22, 1981), 520 F Supp 70*, rev'd, *(6th Cir. Mich. Feb. 28, 1983), 701 F2d 580*.

There must be some necessity for class certification; where relief, if granted to plaintiff in his individual capacity only, would inure to benefit of entire proposed class, class need not be certified. *Perez-Funez v. District Director, Immigration & Naturalization Service (C.D. Cal. Jan. 24, 1984), 611 F Supp 990*.

140. —Actions against states or political subdivisions

Class action is not required for action brought by 2 couples on behalf of "all persons who wish and are legally entitled to be married by Clerk of City of New York or by his agents," to obtain compensatory and punitive damages, as well as injunctive and declaratory relief, with respect to requirements which defendant clerk has established in conjunction with his officiating at civil weddings, where any declaratory relief awarded to plaintiffs in action will quite likely have city-wide effect. *Rappaport v. Katz (S.D.N.Y. 1974), 62 FRD 512, 19 Fed R Serv 2d (Callaghan) 245*.

In action brought under federal civil rights legislation seeking, among other things, declaration that city ordinance is unconstitutional, request that action be maintained as class action on behalf of class encompassing all persons of political or social persuasion different from that of government officials and officers of city police department is denied where no useful purpose would be served by permitting case to proceed as class action; determination and relief requested can be granted regardless of whether action is treated as individual action or as class action. Vietnam Veterans against *War v Benecke (DC Mo 1974), 63 FRD 675*.

Action seeking declaratory and injunctive relief to permit distribution of prison newspaper and its continued publication without interference or censorship by state cannot be maintained as class action where maintenance of suit as class action is unnecessary since relief applicable to plaintiff will be applicable to entire class of subscribers. *The Luparar v. Stoneman (D. Vt. Sept. 30, 1974), 382 F Supp 495*, dismissed, *Luparar v. Stoneman (2d Cir. Vt. 1975), 517 F2d 1395*, disapproved, *Pittman v. Hutto (4th Cir. Va. Mar. 22, 1979), 594 F2d 407*.

Proposed class of all needy persons living in New York state who beg on public streets or public parts of New York City was necessary where defendant police department conceded that it would give effect to decision after all appeals have been exhausted since, given inevitable time gap between court's decision on merits and final disposition on appeal, many potential class members could be subject to arrest or prosecution in absence of class certification so that certification would not be strictly formality; furthermore, class representatives might become impossible to locate in future so that, without class certification, case could fail on technicality. *Loper v. New York City Police Dep't (S.D.N.Y. Apr. 2, 1991), 135 FRD 81, 19 Fed R Serv 3d (Callaghan) 874*.

141. —Employment discrimination

Fed. R. Civ. P. 23(c)(4) provided that, when appropriate, action could be brought or maintained as class action as to particular issues; practices challenged could most efficiently be determined on class-wide basis rather than in 700 individual lawsuits and district judge erred in deciding to contrary. *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (7th Cir. Ill. Feb. 24, 2012), 672 F3d 482, 95 Empl Prac Dec (CCH) P44424, 81 Fed R Serv 3d (Callaghan) 1218*, cert. denied, *(U.S. Oct. 1, 2012), 568 US 887, 133 S Ct 338, 184 L Ed 2d 157*.

Additional reason for denying class action treatment on claim for declaratory and injunctive relief in action brought under civil rights legislation by female who had been refused employment as assistant professor at defendant college and who seeks to represent class of (1) females employed at college denied opportunities for positions leading to tenure based on sex and (2) females who applied for and were refused employment based on sex, is lack of need for invoking class action machinery since, to extent that plaintiff's claim might properly have some

general significance to other employees or potential employees of college, precedential effect of decision on plaintiff's claim will carry all general effect which is necessary. *O'Connell v. Teachers College (S.D.N.Y. July 8, 1974), 63 FRD 638, 8 Empl Prac Dec (CCH) P9518, 18 Fed R Serv 2d (Callaghan) 1374*.

In actions challenging civil service examinations on grounds that examinations have discriminatory impact on Blacks and Hispanics and are not job related, there is no need to designate class, even though plaintiff satisfied requirements of Rule 23, since plaintiffs request only declaratory and injunctive relief, which would in any event benefit all members of proposed class. *Jones v. New York City Human Resources Admin. (S.D.N.Y. Jan. 10, 1975), 391 F Supp 1064, 9 Empl Prac Dec (CCH) P10091, 9 Empl Prac Dec (CCH) P9905*, aff'd, *(2d Cir. N.Y. Jan. 26, 1976), 528 F2d 696, 11 Empl Prac Dec (CCH) P10664*, in part, *(S.D.N.Y. Jan. 21, 1982), 539 F Supp 795, 28 Empl Prac Dec (CCH) P32649*.

Action brought by female university professor charging sex discrimination in administration of pension plan by virtue of utilization of sex-based actuarial tables is not certified as class action where (1) class action status is mere formality since declaratory and injunctive relief would, as practical matter, inure to benefit to all members of proposed class, (2) plaintiff, who is deferred annuitant having not yet retired cannot represent class of immediate annuitants and thus her action can not be certified for purposes of monetary relief, and (3) court determines that employer university is indispensable party so that if suit were certified as class action either all participating universities would have to be joined or plaintiff's employer would be saddled with responsibility of being class representative for them, which would be unduly burdensome to Court and to involuntary defendant university and would not advance litigation. *Spirt v. Teachers Ins. & Annuity Asso. (S.D.N.Y. July 1, 1976), 416 F Supp 1019, 13 Empl Prac Dec (CCH) P11327*.

Age discrimination action challenging mandatory retirement provision of § 632 of Foreign Service Act of 1946 (22 USCS § 1002) is not certified as class action where, inter alia, even in absence of class, appropriate equitable relief can be fashioned, if warranted, which would protect those people which plaintiffs seek to represent, and it is therefore unnecessary and inadvisable to encumber suit with burdens of class action. *Bradley v. Kissinger (D.D.C. June 30, 1976), 418 F Supp 64, 12 Empl Prac Dec (CCH) P11054*.

142. —Housing

Action by tenants in New York City public housing projects on behalf of themselves and others similarly situated, in which it was claimed that criteria and procedures of defendant housing administration proceedings for terminating plaintiffs' leases violated constitutional rights and rights under United States Housing Act of 1937 (*42 USCS §§ 1401* et seq.), could not be maintained as class action where adequate remedy was afforded to plaintiffs suing in their individual capacities, and, as to other tenants who might in future encounter claimed unconstitutional action of defendants, it could properly be assumed that agency of government would not persist in taking actions violative of tenants' rights. *Tyson v. New York City Housing Authority (S.D.N.Y. Jan. 9, 1974), 369 F Supp 513*.

Class certification under *FRCP 23* was necessary in claim by non-elderly disabled applicants to challenge city housing authority's discriminatory practices and policies as to admission to low-income senior/disabled complex because, according to allegations, housing authority had knowingly engaged in its discriminatory policy against disabled for years and there was little reassurance that judgment in individual action would inure to benefit of all class members. *Matyasovszky v. Hous. Auth. of Bridgeport (D. Conn. Jan. 7, 2005), 226 FRD 35*.

143. —Schools and education

In actions by Congressmen who nominated female applicants for service academies, to obtain declaratory relief, injunction, and damages against Air Force Academy and Naval Academy for their alleged unconstitutional failure to consider women for appointment to those academies, where plaintiff seeks to maintain suits as class actions on behalf of all past, present, and future female applicants to academies who had been, were, and would be denied admission by discriminatory practices, no compelling reason is presented to complicate lawsuit by class certification in light of fact that where injunctive and declaratory relief is requested, such relief, where appropriate, can be fashioned to run to benefit of those sought to be included in class, and speedy resolution of issues would be aided

by proceeding with named plaintiffs only. *Edwards v. Schlesinger (D.D.C. June 19, 1974), 377 F Supp 1091, 19 Fed R Serv 2d (Callaghan) 281*, rev'd, *(D.C. Cir. Nov. 20, 1974), 509 F2d 508*.

Pursuant to Second Circuit's "necessity" doctrine, class will not be certified in action involving state's provision of educational services to handicapped school-age children with special educational needs, where there has been no suggestion that compliance with court's mandate would not be forthcoming should plaintiffs prevail on merits of their claim. *Stanton v. Board of Education (N.D.N.Y. Dec. 30, 1983), 581 F Supp 190*.

Class of public school students would not be certified in suspended student's lawsuit challenging school's policies which compelled his suspension for allegedly being under influence of alcohol since injunctive relief sought could be fairly adjudicated without certification of class and plaintiff failed to identify with greater particularity class members within 96,100 student-class he would represent. *Kubany v. School Bd. (M.D. Fla. July 13, 1993), 149 FRD 664*.

Class certification under *Fed. R. Civ. P. 23* was not appropriate; determination in favor plaintiff high school students that school authorities could not constitutionally punish out-of-school expressive conduct on grounds of disrepute to school, would have school-wide impact going forward, without need for class-action dimension to litigation. *T.V. v. Smith-Green Cmty. Sch. Corp. (N.D. Ind. Mar. 11, 2010), 267 FRD 234*.

144. —Social Security

In action brought by professional society of Doctors of Podiatric Medicine licensed to practice in District of Columbia and 11 members of society, charging that defendants discriminated against podiatrists in favor of physicians in administering Medicaid program in violation of Titles XVIII and XIX of Social Security Act (*42 USCS §§ 1395jff* and 1396ff) and in violation of due process clause of Fifth Amendment, motion to maintain action as class action under Rule 23(b)(2) is denied, where relief being sought could be fashioned in such way that it would have same purpose and effect as class action. *District of Columbia Podiatry Soc. v. District of Columbia (D.D.C. 1974), 65 FRD 113, 19 Fed R Serv 2d (Callaghan) 657*.

Class action status was unnecessary for action in which plaintiffs allege that they have been denied due process of law by conduct of Social Security Administration with respect to their claims for Social Security Act benefit payments, where any relief which might be ordered on behalf of named plaintiffs as individuals with respect to hearing rights mandated by due process and adequacy of procedures would necessarily inure to benefit of class as whole. *Thomas v. Weinberger (S.D.N.Y. Nov. 14, 1974), 384 F Supp 540*.

Wholly apart from whether plaintiff fulfills requirements of Rule 23, court refuses to certify action challenging constitutionality of provisions of Social Security Act (*42 USCS §§ 301*–*1396i*) where there exists no need for class action because only declaratory and injunctive relief is sought on behalf of class and court can, without resort to class action, fashion decree which will run to relief both of named representative and all others similarly situated. *Coffin v. Secretary of Health, Education & Welfare (D.D.C. July 15, 1975), 400 F Supp 953*.

145. —Welfare and public assistance

Class action certification is proper in action challenging "flat grant" allocation system established by state welfare department for recipients of Aid to Families with Dependent Children where all requirements for class action are fulfilled, where relief would be identical and would benefit proposed class and where risk of mootness is great and issue is important to all members of class. *Hoehle v. Likins (8th Cir. Minn. July 22, 1976), 538 F2d 229*.

Action challenging manner in which Secretary of Agriculture administers federal food stamp program is not maintainable as class action under Rule 23(b)(2) on behalf of all actual or potential food stamp recipients in United States, where declaratory and injunctive relief requested by plaintiffs, if granted, would be identical regardless of whether or not class action is maintained. *Bennett v. Butz (D. Minn. Oct. 11, 1974), 386 F Supp 1059*.

District Court declines to certify class action under Rule 23 even though plaintiff would adequately represent interests of welfare recipients who, like herself, are immediately and intimately affected by recoupment of agency

overpayments from earned income "disregards," and even though numerosity requirement is satisfied; certification of class action status would add no force to prospective effects of declaratory judgment and can not serve to implement any meaningful retroactive relief in which members of such class might share since court is without power to award welfare benefits retroactively. *McGraw v. Berger (S.D.N.Y. Feb. 25, 1976), 410 F Supp 1042*, aff'd, *(2d Cir. N.Y. July 2, 1976), 537 F2d 719*.

"Non-necessary" doctrine applies to action brought against state challenging state's policy and practice of determining eligibility for public funded daycare services, and class certification pursuant to Rule 23 is denied since there is no indication that decree to be entered in favor of plaintiffs will not be honored by defendants as to those persons similarly situated. *Ruiz v. Blum (S.D.N.Y. Oct. 27, 1982), 549 F Supp 871, 36 Fed R Serv 2d (Callaghan) 57*.

Motion for class certification was granted because all plaintiffs in proposed class, by its definition, suffered same injury in that they were all subject to drug testing required under *Fla. Stat. § 414.0652* to obtain temporary assistance to families in need; thus, commonality of constitutional challenge was of such nature that it was capable of class wide resolution. *Lebron v. Wilkins (M.D. Fla. Dec. 7, 2011), 277 FRD 664, 81 Fed R Serv 3d (Callaghan) 167*.

146. —Other particular cases

Ground that relief with respect to named plaintiffs would inure to benefit of present and future persons incarcerated at federal penitentiary might or might not be adequate reason for denying class action but where District Court thereafter enters declaratory judgment which redounds to benefit of class, but where no declaratory relief is granted and nothing in amended judgment overcomes grievances asserted on behalf of class, case must proceed as class action upon remand. *Workman v. Mitchell (9th Cir. Wash. Aug. 21, 1974), 502 F2d 1201, 19 Fed R Serv 2d (Callaghan) 1299*, limited, *Smith v. Grimm (9th Cir. Cal. Apr. 13, 1976), 534 F2d 1346*.

In action for alleged violation of SEC Rule 10b-5 where only relief sought by plaintiffs which could properly be requested upon behalf of class consisting of corporation's shareholders was injunction against manipulative activities which allegedly depressed price of corporation's stock, suit was not maintainable as class action since injunction obtained individually would in any case benefit class. .

No useful purpose will be served by permitting case to proceed as class action, and action is declared not to be proper class action where gravamen of case is constitutionality of certain sections of Iowa adoption procedure, and where determination of constitutional question can be made by court regardless of whether action is treated as individual action or as class action. *Hatfield v. Williams (D. Iowa 1974), 64 FRD 71*.

In action challenging reporting requirement of Federal Trade Commission, plaintiffs' motion for class action determination is denied on ground that there is no need for class action, where to extent action raises general issues capable of resolution without examination of particular company's circumstances, favorable disposition of lawsuit would inure to benefit of every corporation that is required to file type of report at issue. *Aluminum Co. of America v. Federal Trade Com. (S.D.N.Y. 1975), 67 FRD 510, 1975-1 Trade Cas (CCH) P60333*.

In action attacking constitutionality of two of commonwealth's mental health statutes governing arrest, detention, and 60-day observation of dangerous patients, alleged mentally ill woman for whom commitment petition has been filed is entitled to represent class under Rule 23(b)(2) of any and all persons who in future will be subject to arrest or commitment pursuant to statutes in particular county in commonwealth, but there is no reason to grant class action certification for defendant class of 120 commonwealth attorneys in view of fact that any determination as to constitutionality of statute will affect all commonwealth attorneys equally. *Kendall v. True (W.D. Ky. Feb. 26, 1975), 391 F Supp 413*, disapproved, *Project Release v. Prevost (2d Cir. N.Y. Oct. 24, 1983), 722 F2d 960*.

147. Other particular cases

Court may not deny class status simply because there is no need for it where finding is made that class is so numerous that joinder of all members is impractical, that there are questions of law and fact common to class, that claims of named parties typify those of class, that representative parties will fairly and adequately protect interests of class, and that action satisfies any one of three alternatives of Rule 23(b). *Wilson v. Weaver (N.D. Ill. Dec. 26, 1972), 358 F Supp 1147*, aff'd in part and rev'd in part, *(7th Cir. Ill. May 9, 1974), 499 F2d 155*.

No rule requires demonstration of need for class action in action under Rule 23(b)(2); accordingly, in action sought to be maintained under Rule 23(b)(2) on behalf of minority person seeking training and employment in New York construction industry, challenging affirmative action plan governing federal and state assisted construction projects in New York City, plaintiffs are entitled to proceed as class without demonstrating necessity of class relief. *Percy v. Brennan (S.D.N.Y. Nov. 8, 1974), 384 F Supp 800, 8 Empl Prac Dec (CCH) P9799, 19 Fed R Serv 2d (Callaghan) 659*.

Including future disability claimants in class action challenging social security severity regulation is proper, since any judgment or order in action will not affect those claimants until they actually make claim for benefits. *Dixon v. Heckler (S.D.N.Y. June 22, 1984), 589 F Supp 1494, 39 Fed R Serv 2d (Callaghan) 1476*, aff'd, *(2d Cir. N.Y. Mar. 7, 1986), 785 F2d 1102*.

Even assuming inappropriateness of any monetary relief in class suit against long-distance telephone company by cardholders, universal nature of alleged fraud warranted proceeding as class action. *Gelb v. American Tel. & Tel. Co. (S.D.N.Y. Aug. 19, 1993), 150 FRD 76*.

There are strong parallels between *Fed. R. Civ. P. 23* class action and *29 USCS § 216* Fair Labor Standards Act (FLSA) collective action in that both litigation devices operate to resolve claims of many individuals based on representative evidence; it is appropriate to reevaluate propriety of collective treatment in context of both FLSA and traditional class actions under *Fed. R. Civ. P. 23*. *Johnson v. Big Lots Stores, Inc. (E.D. La. June 20, 2008), 561 F Supp 2d 567*.

Class certification was well-suited and needed where (1) all members of proposed class may have been injured identically by debtor's failure to send or provide adequate notice in bankruptcy; as such, litigating claims in one proceeding would have been most efficient, and (1) each member of proposed class' potential recovery, most likely approximately $21, was so small as to preclude individual members from pursuing those claims even if plaintiff, as individual plaintiff absent class certification, prevailed in its action. *Hacienda Heating & Cooling, Inc. v. UA Theatre Circuit, Inc. (In re UA Theatre Co.) (Bankr. D. Del. Aug. 26, 2009), 410 BR 385*.

148. —Housing

In action arising out of defendant's alleged racially motivated refusal to sell residence to one of plaintiffs, defendant's motion for determination that litigation should not proceed as class action is granted where class action aspect of litigation is superfluous. *Du Pont v. Woodlawn Trustees, Inc. (D. Del. 1974), 64 FRD 16, 19 Fed R Serv 2d (Callaghan) 103*.

In action against city housing authority challenging alleged policy and practice of terminating tenancies for nondesirability without sufficient evidence to support finding that offending member of household was still residing in tenant's apartment, class certification was necessary because proposed class members, consisting of present and future tenants of housing authority, were by definition without sufficient means to meet their basic subsistence needs and therefore could not afford to obtain legal representation to assert their claims individually. *Bruce v. Christian (S.D.N.Y. Nov. 25, 1986), 113 FRD 554*.

Class certification under *FRCP 23* was necessary in claim by non-elderly disabled applicants to challenge city housing authority's discriminatory practices and policies as to admission to low-income senior/disabled complex because, according to allegations, housing authority had knowingly engaged in its discriminatory policy against disabled for years and there was little reassurance that judgment in individual action would inure to benefit of all class members. *Matyasovszky v. Hous. Auth. of Bridgeport (D. Conn. Jan. 7, 2005), 226 FRD 35*.

149. —Welfare and public assistance

Although there is policy that class certification is not necessary in cases such as one presented, action seeking preliminary injunction against state welfare regulation regarding notice of discontinuance or reduction of public assistance payments is certified and injunction is issued. *Lugo v. Dumpson (S.D.N.Y. Feb. 24, 1975), 390 F Supp 379, 20 Fed R Serv 2d (Callaghan) 114*.

Class action treatment is not warranted in action challenging determinations made by state's Department of Public Welfare in interpretation of federal regulations promulgated under Medicaid program, where court's grant of plaintiff's motion for summary judgment binds defendant as to all members of putative class who have similar claims, and class action certification would simply impede expedited treatment of issues presented. *Brown v. Beal (E.D. Pa. Nov. 17, 1975), 404 F Supp 770*.

C. Existence of Class

150. Generally

In order for class action to be maintained under Rule 23 there must be ascertainable class. *Connell v. Higginbotham (M.D. Fla. Oct. 30, 1969), 305 F Supp 445*, aff'd in part and rev'd in part, *(U.S. June 7, 1971), 403 US 207, 91 S Ct 1772, 29 L Ed 2d 418*.

Essential prerequisite to maintaining class action is existence of class whose bounds are precisely drawn. *Williams v. Page (N.D. Ill. 1973), 60 FRD 29, 17 Fed R Serv 2d (Callaghan) 1576*; *Considine v. Park Nat'l Bank (E.D. Tenn. 1974), 64 FRD 646, 19 Fed R Serv 2d (Callaghan) 1317*.

Essential prerequisite to class action is existence of class. *Sperberg v. Firestone Tire & Rubber Co. (N.D. Ohio 1973), 61 FRD 70, 18 Fed R Serv 2d (Callaghan) 1002*.

One of essential requirements of class action is existence of class, and when it appears that class does not exist, action under Rule 23 cannot be maintained. *McAdory v. Scientific Research Instruments, Inc. (D. Md. Feb. 23, 1973), 355 F Supp 468, 5 Empl Prac Dec (CCH) P8524, 16 Fed R Serv 2d (Callaghan) 1502*.

It is axiomatic that in order for there to be proper class action there must be class. *Barnes v. Board of Trustees (W.D. Mich. Dec. 21, 1973), 369 F Supp 1327*.

Although not specifically mentioned in *FRCP 23*, essential prerequisite of action thereunder is existence of identifiable class. *Colorado Cross-Disability Coalition v. Taco Bell Corp. (D. Colo. Feb. 3, 1999), 184 FRD 354*.

In addition to specifications of *FRCP 23*, certain implied requirements exist; specifically, there must be identifiable class and plaintiff or plaintiffs must be members of such class. *Chisolm v. TranSouth Fin. Corp. (E.D. Va. May 12, 2000), 194 FRD 538*.

Although *Fed. R. Civ. P. 23* does not specifically require plaintiffs to establish that class exists, that is common-sense requirement and courts routinely require it; requirement is not designed to be particularly stringent test, but plaintiffs must at least be able to establish that general outlines of membership of class are determinable at outset of litigation. *Bynum v. District of Columbia (D.D.C. Mar. 31, 2003), 214 FRD 27*.

151. Determination by court

Before considering criteria established by Rule 23, it is first necessary to determine whether class exists and is capable of legal definition. Vietnam Veterans against *War v Benecke (DC Mo 1974), 63 FRD 675*.

Prior to considering criteria set forth under Rule 23(a), court must find that precisely defined class exists. *John Does 1-100 v. Boyd (D. Minn. July 31, 1985), 613 F Supp 1514*.

Before considering requirements of FRCP 23, court must determine whether class exists that can adequately be defined. Buford v H & R Block (1996, SD Ga) 168 FRD 340, RICO Bus Disp Guide (CCH) P 9123, affd sub nom *Jones v H & R Block Tax Servs. (1997, CA11 Ga) 117 F3d 1433* and (criticized in CGC Holding Co., LLC v Hutchens (2013, DC Colo) 2013 US Dist LEXIS 29412).

152. Particular cases

District Court did not err in denying class certification in sex discrimination case where it found plaintiffs' evidence of existence of class, namely regression analysis showing wage disparities between men and women employees and other statistics, flawed because it did not take into account various relevant non-discriminatory factors such as education, prior job history, or job level. Sheehan v. Purolator, Inc. (2d Cir. N.Y. Feb. 12, 1988), 839 F2d 99, 45 Empl Prac Dec (CCH) P37780, 10 Fed R Serv 3d (Callaghan) 986, cert. denied, *(U.S. Oct. 11, 1988), 488 US 891, 109 S Ct 226, 102 L Ed 2d 216*.

Claims under federal Credit Repair Organizations Act, 15 USCS §§ 1679 et seq., against new set of defendants could not ride on coattails of earlier action under guise of enforcement proceeding because, seeking only recovery on behalf of class, plaintiffs had to allege and establish compliance with Fed. R. Civ. P. 23(a) and (b) conditions on establishment of new class action, which they had declined to do. Zimmermann v. Epstein Becker & Green, P.C. (1st Cir. Mass. Sept. 22, 2011), 657 F3d 80.

Elements needed to satisfy Rule 23 were lacking in action challenging constitutionality of Connecticut body execution statute, where plaintiff, judgment debtor against whose body writ of execution had issued and who instituted action as class action, could point to no one similarly situated. Abbit v. Bernier (D. Conn. Dec. 24, 1974), 387 F Supp 57.

Since plaintiff must present facts which show existence of class, court must be presented with evidence, usually statistical, of reasonable across board discrimination before certifying broad across board class; thus, class action certification is denied in action by EEOC where (1) statistics presented by EEOC fail to include breakdown of departments and present no data on available minority work force, (2) assertion that 80 percent of black employees were concentrated in "operations classifications" does not define that term and does not state percentage of whites in those classifications, (3) EEOC fails to present statistics of number of white and black applicants actually hired, (4) although over 200 job classifications allegedly have never been held by black employee, there is no further explanation and defendants proffer statistics as to number of job classifications having only few employees, and (5) binomial distribution analysis by defendants shows no inference of across board discrimination. EEOC v. Westinghouse Electric Corp., Nuclear Turbine Plant (M.D.N.C. Jan. 3, 1979), 81 FRD 528.

Neither plaintiff's statistical evidence nor affidavit established existence of aggrieved class of female employees since statistics merely compared relative number of men and women in various job titles and failed to offer relevant comparisons of similarly situated female and male employees, and motion for certification of class comprising nearly 200 females rested on sworn allegations of 3 named plaintiffs and only one putative class member. Ross v. Nikko Sec. Co. Int'l, Inc. (S.D.N.Y. Nov. 16, 1990), 133 FRD 96, 55 Empl Prac Dec (CCH) P40552.

Oklahoma law required plaintiffs to demonstrate existing disease or physical injury before they could recover costs of future medical treatment that was deemed medically necessary; here, plaintiffs who sought to represent medical Monitoring Class disavowed any injury; thus, Oklahoma law did not support creation of medical monitoring class. Cole v. ASARCO, Inc. (N.D. Okla. Apr. 2, 2009), 256 FRD 690.

In litigation between retirement plan participants and fiduciaries, class of participants was certified under Fed. R. Civ. P. 23; there was adequate commonality, certification eliminated risk of multiple and varying adjudications by individual class members, and class counsel provided adequate representation. Zilhaver v. UnitedHealth Group, Inc. (D. Minn. Aug. 20, 2009), 646 F Supp 2d 1075.

Smokers were not entitled to class certification of two remaining claims against tobacco company where there was no good way to identify individuals who met central condition that class members smoked Marlboro cigarettes for at

least 20 pack-years. *Xavier v. Philip Morris USA Inc. (N.D. Cal. Apr. 18, 2011), 787 F Supp 2d 1075, CCH Prod Liab Rep P18630* (criticized in *Roberts v Electrolux Home Prods. (2013, CD Cal) 2013 US Dist LEXIS 185488*).

Suit alleging violation of Telephone Consumer Protection Act, *47 USCS § 227*, had sufficiently ascertainable class because plaintiff had provided data showing 29,113 unique fax numbers within specified zip codes. and determining owners of fax machines corresponding with fax numbers was feasible through claims administration process. *City Select Auto Sales, Inc. v. David Randall Assocs. (D.N.J. Dec. 20, 2013), 296 FRD 299*.

Legally definable class existed where (1) in its summary judgment ruling, Arizona state court held that at least 57,000 individuals or entities listed in Database received initial junk fax; it left for trial issue of whether additional violations beyond 57,600 occurred, which plaintiff there later conditionally waived, (2) further, Arizona state court held that every individual and entity listed in Database potentially was entitled to share in $28.8 million damage award, (3) moreover, it was this Database that Delaware District Court relied upon to distribute Notice that plaintiff attacked in instant action, (4) accordingly, entire group plaintiff sought to have certified as class had standing: it was this group that was identified in Arizona state court's summary judgment ruling, and it was this group to which Notice was to be sent, and (5) also, membership in class could be ascertained objectively and feasibly: whether individual or entity appeared in Database. *Hacienda Heating & Cooling, Inc. v. UA Theatre Circuit, Inc. (In re UA Theatre Co.) (Bankr. D. Del. Aug. 26, 2009), 410 BR 385*.

Unpublished decision: Class certification was denied under *Fed. R. Civ. P. 23(b)(3)*, in part because district court properly considered both evidence of uniform policies and of diverse work activities; work activity evidence showed variations in recruiters' candidate sourcing techniques, interview styles, authority, and relationship with supervisors—all relevant to Cal. Code Regs. tit. 8, § 1104. *Delodder v. Aerotek Inc. (9th Cir. Cal. Mar. 15, 2012), 471 Fed Appx 804*.

153. Miscellaneous

Class must be sufficiently homogeneous to satisfy Rule 23. *Hagans v. Wyman (2d Cir. N.Y. Dec. 10, 1975), 527 F2d 1151*.

Fact that Rule 23 provides for subclasses when they are efficient makes it clear that existence of multiple classes, in and of itself, is not sufficient to justify district court's denial of class certification. *Williams v. Chartwell Fin. Servs. (7th Cir. Ill. Feb. 8, 2000), 204 F3d 748, 45 Fed R Serv 3d (Callaghan) 1410*.

Question of whether class exists is question of fact which ought to be determined on basis of circumstances of case. *Leszczynski v. Allianz Ins. (S.D. Fla. Dec. 8, 1997), 176 FRD 659, 39 Fed R Serv 3d (Callaghan) 908*.

Subdivision (a) of Rule 23 of Arizona Rules of Civil Procedure (identical to *Rule 23 of USCS Rules of Civil Procedure*) requires by implication that definable class exists. *Lennon v. First Nat'l Bank (Ariz. Ct. App. 1974), 518 P2d 1230*.

D. Definition of Class and Necessity Thereof

1. In General

154. Generally

In order to maintain class action, class sought to be represented must be adequately defined and clearly ascertainable. *DeBremaecker v Short (1970, CA5 Tex) 433 F2d 733, 14 FR Serv 2d 835* criticized in *DL v District of Columbia (2013, DC Dist Col) 302 FRD 1*); *Welmaker v. W. T. Grant Co. (N.D. Ga. Dec. 11, 1972), 365 F Supp 531, 18 Fed R Serv 2d (Callaghan) 280*, disapproved, *McGowan v. King, Inc. (5th Cir. Miss. Mar. 15, 1978), 569 F2d 845*.

To maintain class action, existence of class must be pleaded and limits of class must be defined with some specificity. *Wilson v. Zarhadnick (5th Cir. Ga. June 23, 1976), 534 F2d 55, 22 Fed R Serv 2d (Callaghan) 48*.

Essential prerequisite to class action is that there must be defined class. *Sharp v. Hilleary Franchise Systems, Inc. (E.D. Mo. 1972), 56 FRD 34, 16 Fed R Serv 2d (Callaghan) 1131, Fed Sec L Rep (CCH) P93951*.

It is necessary to maintenance of class action that there be ascertainable defined class. *Arnesen v. Raymond Lee Organization, Inc. (C.D. Cal. 1973), 59 FRD 145*.

No action may proceed as class action unless class is defined. *Jenkins v. Fidelity Bank (E.D. Pa. Sept. 20, 1973), 365 F Supp 1391, Fed Sec L Rep (CCH) P94373*.

Well-settled rule of class actions is that class description must be sufficiently definite. *Jagnandan v. Giles (N.D. Miss. Aug. 15, 1974), 379 F Supp 1178*, aff'd, in part, *(5th Cir. Sept. 20, 1976), 538 F2d 1166*.

Court must be able to distinguish or define membership of class at outset when certifying action as class action. *Doe v. Lally (D. Md. Mar. 5, 1979), 467 F Supp 1339*.

Class definition is of critical importance because it identifies persons entitled to relief, persons bound by judgment, and persons entitled to notice; greater precision is required in defining class when compensatory relief is sought, rather than injunctive or declaratory relief. *Zapata v. IBP, Inc. (D. Kan. May 15, 1996), 167 FRD 147*.

Proposed class definition must be precise, objective and presently ascertainable. *Rozema v. Marshfield Clinic (W.D. Wis. May 19, 1997), 174 FRD 425, 1997-2 Trade Cas (CCH) P71905*.

Class definition is implicit requirement which must be met before *FRCP 23* analysis can be undertaken by district court. *Singer v. AT&T Corp. (S.D. Fla. Mar. 4, 1998), 185 FRD 681*.

It is absolutely necessary that for class action to be certified, class must be susceptible to precise definition. *Clay v. American Tobacco Co. (S.D. Ill. June 29, 1999), 188 FRD 483*.

Definition of class should not be so broad so as to include individuals who are without standing to maintain action on their own behalf. *Clay v. American Tobacco Co. (S.D. Ill. June 29, 1999), 188 FRD 483*.

While class definitions are obviously individualized to given case, important elements of defining class include (1) specifying particular group at particular time frame and location who were harmed in particular way, and (2) defining class such that court can ascertain its membership in some objective manner. *Edwards v. McCormick (S.D. Ohio Oct. 31, 2000), 196 FRD 487*.

Proposed class may not be amorphous, vague or indeterminate. *Mueller v. CBS, Inc. (W.D. Pa. Jan. 30, 2001), 200 FRD 227*.

Proper definition of ascertainable class is prerequisite to class certification. *Johnson v. Midland Credit Mgmt. Inc. (N.D. Ohio Nov. 29, 2012), 89 Fed R Evid Serv (CBC) 1391, 2012 US Dist LEXIS 170420*.

Class does not need to be defined to such precise degree that any error in definition would make class invalid. *Johnson v. Midland Credit Mgmt. Inc. (N.D. Ohio Nov. 29, 2012), 89 Fed R Evid Serv (CBC) 1391, 2012 US Dist LEXIS 170420*.

155. Role of court in definition

Court has greater freedom in both timing and specificity of its class definition where class action seeks only injunctive or declaratory relief for which notice provision of Rule 23(c)(2) is not mandatory. *Battle v. Pennsylvania (3d Cir. Pa. July 15, 1980), 629 F2d 269*.

In defining class, district court would enter conditional definition at outset and thereafter continue to exercise its authority under *Rule 23, FRCP*, to alter or amend class definition prior to final judgment if good cause for such revision is shown. *McBroom v. Western Electric Co. (M.D.N.C. Apr. 4, 1977), 429 F Supp 909*.

When necessary, court may fashion its own definition of class. *Stolz v. United Brotherhood of Carpenters & Joiners, Local Union No. 971 (D. Nev. Oct. 15, 1985), 620 F Supp 396*.

If court must come to numerous conclusions regarding class membership, or must adjudicate underlying issues on behalf of each class member, then proper class cannot be defined concisely. *Reeb v. Ohio Dep't of Rehab. & Corr. Belmont Corr. Inst. (S.D. Ohio Oct. 24, 2001), 203 FRD 315*, vacated, *(6th Cir. Ohio Nov. 18, 2003), 81 Fed Appx 550*.

Where named plaintiffs fail to define class adequately, court need not proceed to full analysis under *FRCP 23*. *Reeb v. Ohio Dep't of Rehab. & Corr. Belmont Corr. Inst. (S.D. Ohio Oct. 24, 2001), 203 FRD 315*, vacated, *(6th Cir. Ohio Nov. 18, 2003), 81 Fed Appx 550*.

Court has power, but not obligation, to redefine classes or subclasses sua sponte prior to certification. *Robinson v. Gillespie (D. Kan. Oct. 16, 2003), 219 FRD 179*, dismissed, *(D. Kan. Sept. 22, 2004), 2004 US Dist LEXIS 21645*.

Court was not obligated to unilaterally expand class definition in manner that might prove more advantageous to plaintiffs, who, having selected and litigated class definition of their choice, had to live with that choice; as to that proffered class, counsel failed to present single named plaintiff who belonged to class and possessed standing to represent interests of class, omission that was fatal to motion for class certification. *Fisher v. Ciba Specialty Chems. Corp. (S.D. Ala. July 13, 2006), 238 FRD 273*.

156. —Discretion of court

Basic responsibility for determining extent of class membership falls upon trial judge; he must try to keep class feature of litigation within reasonably manageable proportions and bounds, and should have range of discretion in such connection to extent of expediting trial. *Baxter v. Savannah Sugar Refining Corp. (S.D. Ga. Dec. 9, 1968), 46 FRD 56, 1 Empl Prac Dec (CCH) P9937, 12 Fed R Serv 2d (Callaghan) 555, 59 Lab Cas (CCH) P9180*.

It is within prerogative of court to construct definition of class. *Metcalf v. Edelman (N.D. Ill. 1974), 64 FRD 407, 19 Fed R Serv 2d (Callaghan) 236*.

Judge has discretion to define class, and need not strictly follow request of parties. *Schneider v. United States (D. Neb. July 21, 2000), 197 FRD 397*.

Trial court, if possible, should employ its discretion to define class in manner that will allow utilization of class action procedure. *Lennon v. First Nat'l Bank (Ariz. Ct. App. 1974), 518 P2d 1230*.

157. Identification of class members

In order to maintain class action it is not necessary that members of class be so clearly identified that any member can be presently ascertained. *Carpenter v. Davis (5th Cir. Miss. Apr. 9, 1970), 424 F2d 257, 14 Fed R Serv 2d (Callaghan) 66*.

In order to maintain action as class under original Rule 23 or rule as revised in 1966, there must be class in which membership is distinguishable or at least definable at outset. *Cunningham v. Ellington (W.D. Tenn. Mar. 5, 1971), 323 F Supp 1072*, disapproved, *Mattis v. Schnarr (8th Cir. Mo. Dec. 1, 1976), 547 F2d 1007*, disapproved as stated in *Carter v. Chattanooga (6th Cir. Tenn. June 27, 1988), 850 F2d 1119*.

To maintain class action under Rule 23, members of class must be capable of definite identification as either being in or out of it. *Eisman v. Pan American World Airlines (E.D. Pa. Dec. 22, 1971), 336 F Supp 543, 15 Fed R Serv 2d (Callaghan) 1060*.

It is not necessary that exact identity of class members be specified. *Richerson v. Fargo (E.D. Pa. Feb. 5, 1974), 61 FRD 641, 7 Empl Prac Dec (CCH) P9310, 18 Fed R Serv 2d (Callaghan) 1169*, vacated, *(D. Pa. Oct. 3, 1974), 64 FRD 393, 8 Empl Prac Dec (CCH) P9751*.

There is no need to state exact identity of every class member because to do so would frustrate purpose of class actions when recoveries may be numerous but small. *In re U. S. Financial Sec. Litigation (S.D. Cal. 1975), 69 FRD 24*.

In Rule 23(b)(2) action actual membership of class need not be precisely drawn. *Lund v. Affleck (D.R.I. Jan. 15, 1975), 388 F Supp 137, 20 Fed R Serv 2d (Callaghan) 610*.

For class to be sufficiently defined, identity of class members must be ascertainable by reference to objective criteria. *Clay v. American Tobacco Co. (S.D. Ill. June 29, 1999), 188 FRD 483*.

Plaintiffs sufficiently outline boundaries of class when court, by looking at (1) class definition, (2) counsel, and (3) putative class members, can easily ascertain whether they are members of class. *Bynum v. District of Columbia (D.D.C. Mar. 31, 2003), 214 FRD 27*.

Although defendant contended that class was not ascertainable because class was imprecise and because determining class membership would require individualized factual determinations, both of these arguments were unpersuasive as membership in class was defined by identifiable criteria—all debit or credit card customers who received receipt from certain store whose receipt was printed after December 4, 2006, and contained more than last five digits of their credit card number, or whose receipt was printed after June 3, 2008, and contained expiration date of card—and small number of individualized factual determinations that were to be made in ascertaining membership in class were entirely manageable. *Chana Friedman-Katz v. Lindt & Sprungli (USA), Inc. (S.D.N.Y. Nov. 19, 2010), 270 FRD 150*.

For purposes of class certification under *Fed. R. Civ. P. 23(a)* and *(b)*, plaintiffs' proposed class definition was not overbroad because there was no basis for believing that identifying class members would require individualized investigation into merits or into individualized facts; and plaintiffs' class definition was properly based on objective criteria which were administratively feasible for court to use in determining whether particular individuals were members of class. *Janson v. LegalZoom.com, Inc. (W.D. Mo. Dec. 14, 2010), 271 FRD 506*.

158. —Administrative feasibility to ascertain members

Class does not have to be so ascertainable that every potential member can be specifically identified at commencement of action; rather, class description need only be sufficiently definite that it is administratively feasible for court to ascertain whether particular individual is member of class. *Stewart v. Associates Consumer Discount Co. (E.D. Pa. Oct. 27, 1998), 183 FRD 189, RICO Bus Disp Guide P9635*.

Class is sufficiently defined if it is administratively feasible for court to determine whether particular individual is member. *Colorado Cross-Disability Coalition v. Taco Bell Corp. (D. Colo. Feb. 3, 1999), 184 FRD 354*.

It is absolutely necessary that for class action to be certified, class must be susceptible to precise definition; therefore, class description must be sufficiently definite so that it is administratively feasible for court to determine whether particular individual is member of proposed class. *Clay v. American Tobacco Co. (S.D. Ill. June 29, 1999), 188 FRD 483*.

Proposed class may not be amorphous, vague or indeterminate, and it must be administratively feasible to determine whether given individual is member of class. *Mueller v. CBS, Inc. (W.D. Pa. Jan. 30, 2001), 200 FRD 227*.

In this action alleging unjust enrichment in which plaintiffs sought class certification, court doubted ascertainability of class because undoubtedly individual chiropractors differed in how they presented their plans, how they disclosed their concerns or practices, and whether they obtained informed consent of their patients. *Brown v. Kerkhoff (S.D. Iowa Mar. 22, 2012), 279 FRD 479*.

159. —Not presently identifiable members

Fact that class may include persons who are not identifiable at present, or that class membership may change by end of trial, is no impediment to certification of class. *Johnson v. Brelje (N.D. Ill. Nov. 6, 1979), 482 F Supp 121, 29 Fed R Serv 2d (Callaghan) 614*.

Fact that classes may include persons who are not identifiable at present, or that class membership may change by end of trial, is no impediment to certification of these classes. *Caroline C. by & Through Carter v. Johnson (D. Neb. Sept. 26, 1996), 174 FRD 452*.

160. Failure to adequately define class and effect thereof

Class certified under *Fed. R. Civ. P. 23* was not clear and precise, and certification order did not define claims, issues, or defenses; moreover, proposed class raised serious ascertainability issues and claims also could not meet predominance requirement because determining reason for each tire failure would devolve into numerous mini-trials, so class certification was vacated. *Marcus v. BMW of N. Am., LLC (3d Cir. N.J. Aug. 7, 2012), 687 F3d 583, 83 Fed R Serv 3d (Callaghan) 246*.

Where named plaintiffs fail to define class adequately, court need not proceed to full *FRCP 23* analysis. *Edwards v. McCormick (S.D. Ohio Oct. 31, 2000), 196 FRD 487*.

While court was troubled by shareholder's failure to place temporal limitation on his proposed class, court did deny certification under *Fed. R. Civ. P. 23(b)(3)* on that basis because class definition was subject to refinement based upon further development of record, and could have been expanded or contracted if facts so warranted. *Geer v. Cox (D. Kan. Aug. 20, 2003), 216 FRD 677, 56 Fed R Serv 3d (Callaghan) 762*.

161. Modification of definition

Even after certification order is entered, judge remains free to modify it in light of subsequent developments in litigation. *Benjamin v. Dep't of Pub. Welfare of Pa. (3d Cir. Pa. Dec. 12, 2012), 701 F3d 938*.

Fact that plaintiff's definition of class needed modification did not require dismissal of class action, since court can, in its discretion under rule, define class in manner which will allow utilization of class action procedure. *Thomas v. Clarke (D. Minn. 1971), 54 FRD 245, 15 Fed R Serv 2d (Callaghan) 1579*.

Court may modify proposed definition of class if it believes definition is inadequate. *Metropolitan Area Housing Alliance v. United States Dep't of Housing & Urban Development (N.D. Ill. 1976), 69 FRD 633, 22 Fed R Serv 2d (Callaghan) 241*.

Postjudgment determination of class, or postjudgment modification of class previously determined, must be exception rather than rule. *Taylor v. Teletype Corp. (E.D. Ark. Aug. 29, 1979), 475 F Supp 958, 21 Empl Prac Dec (CCH) P30343*.

Factors bearing on manageability of class, including problems related to identity of members in class notice, may justify modification of class. *In re New York City Municipal Sec. Litigation (S.D.N.Y. 1980), 87 FRD 572, Fed Sec L Rep (CCH) P97528*.

If class is amorphous or indefinite, court may limit or redefine class to bring it within *FRCP 23*. *Rozema v. Marshfield Clinic (W.D. Wis. May 19, 1997), 174 FRD 425, 1997-2 Trade Cas (CCH) P71905*.

162. —Particular cases

In civil rights action brought under *42 USCS § 1983* on behalf of all pregnant teachers in Virginia to challenge allegedly discriminatory maternity leave policies, court will amend defendant class defined in terms of school boards so as to include members of such boards which maintained allegedly discriminatory maternity leave policies, in view of holding that board of education was not person subject to suit under § 1983. *Paxman v Wilkerson (1975, ED Va) 390 F Supp 442, 10 BNA FEP Cas 230, 9 CCH EPD P 10113, 20 FR Serv 2d 94*, affd in part and revd in part on other grounds *(1980, CA4 Va) 612 F2d 848, 21 BNA FEP Cas 895, 22 CCH EPD P 30563, 28 FR Serv 2d 923*, cert den *(1981) 449 US 1129, 101 S Ct 951, 67 L Ed 2d 117, 24 BNA FEP Cas 1356, 24 CCH EPD P 31479* and (criticized in *Brown v Kelly (2007, SD NY) 244 FRD 222, 68 FR Serv 3d 1276*).

Defendant's motion to alter definition of class was denied where defendant participated fully in briefing and argument of class certification issue, and having failed to raise objection when proper definition of class was at issue, defendant was not permitted to raise it 2½ years after certification of class since class members with actual notice of certified class action may have refrained from filing individual suits in interim believing their interests were being represented. *Torosian v. National Capital Bank (D.D.C. Feb. 24, 1976), 411 F Supp 167, 21 Fed R Serv 2d (Callaghan) 543*.

In defining class, district court would enter conditional definition at outset and thereafter continue to exercise its authority under *Rule 23, FRCP*, to alter or amend class definition prior to final judgment if good cause for such revision is shown. *McBroom v. Western Electric Co. (M.D.N.C. Apr. 4, 1977), 429 F Supp 909*.

In class action by 8 women against telephone utility and union for alleged sex discrimination in employment, definition of class will not be amended to embrace claims of salaried women whose alleged unequal treatment stemmed from employer's alleged preference for men rather than women at second and higher supervisory positions since amendment is in effect new law suit which will have disruptive effect, trigger large-scale new discovery, will require substantial part of already completed discovery to be repeated, and will disserve interest of justice. *Bennett v. Central Tel. Co. (N.D. Ill. Apr. 6, 1983), 97 FRD 518*.

To accommodate Article III constraints and plaintiffs' desire to represent future victims of state's allegedly unlawful tax assessments procedures, plaintiff class and subclasses would be redefined to (1) exclude currently underassessed (or properly assessed) taxpayers and (2) include taxpayers who would be overassessed in future. *Coleman v. McLaren (N.D. Ill. July 14, 1983), 98 FRD 638, 38 Fed R Serv 2d (Callaghan) 910*.

Although persons who have actually litigated their claims and received final judgment by court of competent jurisdiction are barred from entering national class through principle of res judicata, court must reject defendant's contention that nationwide class should not include potential members of class from districts or circuits in which certain issues have been decided, regardless of whether or not such persons were litigants before any court or personally subject to ruling in any manner. *Coleman v. Block (D.N.D. Feb. 17, 1984), 580 F Supp 194*, amended, in part, *(D.N.D. Mar. 3, 1986), 632 F Supp 997*.

In class action by inmates against state prison officials, alleging that segregated inmates are denied reasonable access to courts, class is not modified to exclude prisoners with short stays in segregation who would at most suffer de minimis denial of their right to access, because modification would be practically impossible to manage since (1) officials' calculation of time inmates spend in segregation are not reliable, (2) attempt to limit class as proposed would require officials to continually monitor sentences, and (3) 85 percent of inmates stay in segregation for long

time. *Walters v. Edgar (N.D. Ill. Aug. 28, 1995), 900 F Supp 197*, dismissed, *(N.D. Ill. June 26, 1997), 973 F Supp 793*.

Plaintiffs met implied requirements for certification of seven subclasses pursuant to *Fed. R. Civ. P. 23*; amended definition of proposed subclasses was sufficiently definite and allowed court to objectively determine which of mortgage servicing company's former customers qualified for class membership, and which did not. *Fournigault v. Independence One Mortg. Corp. (N.D. Ill. Feb. 21, 2006), 234 FRD 641*, amended, *(N.D. Ill. May 10, 2007), 2007 US Dist LEXIS 38413*.

In retiree's class action against pension plan administrator under *29 USCS §§ 1054(g)* and *1132(a)(1)(B)*, modification of certification order under *Fed. R. Civ. P. 23(c)* to include deferred annuitants in class was proper as legal issue of appropriate construction of plan was identical as between lump-sum discounted Accelerated Transition Benefit recipients and deferred annuitants; addition of deferred annuitants would not defeat commonality or typicality under Rule 23(a). *Barnes v. AT&T Pension Benefit Plan-Nonbargained Program (N.D. Cal. Feb. 18, 2011), 273 FRD 562*.

Modification of class definition to exclude specific judgment debtors did not defeat plaintiff's ability to satisfy criteria under *Fed. R. Civ. P. 23(a)* or *Fed. R. Civ. P. 23(b)* because information necessary to determine which judgment debtors had to be excluded from class was readily accessible in database form. *Massey v. On-Site Manager, Inc. (E.D.N.Y. Aug. 23, 2012), 285 FRD 239*.

163. Determinations by court

Before considering Rule 23 criteria, preliminary determination that class is capable of definition must be made. *Thomas v. Clarke (D. Minn. 1971), 54 FRD 245, 15 Fed R Serv 2d (Callaghan) 1579*.

Before considering criteria established by Rule 23, it is first necessary to determine whether class exists and is capable of legal definition. Vietnam Veterans against *War v Benecke (DC Mo 1974), 63 FRD 675*.

Definition of class is necessary before determination can be made as to whether class action is proper under Rule 23; class must be capable of concise and exact definition. *Metcalf v. Edelman (N.D. Ill. 1974), 64 FRD 407, 19 Fed R Serv 2d (Callaghan) 236*.

To be maintainable as class action, claim must support preliminary determination that proposed class is capable of definition. *Conway v. Kenosha (E.D. Wis. Dec. 2, 1975), 409 F Supp 344*.

Rule 23 requirement that there be class will be deemed satisfied if class identification is sufficiently definite so that it is administratively feasible for court to determine whether particular person is member of class. *Rutherford v. United States (W.D. Okla. Apr. 8, 1977), 429 F Supp 506, 23 Fed R Serv 2d (Callaghan) 289*.

If court must come to numerous conclusions regarding class membership, or must adjudicate underlying issues on behalf of each class member, then proper class cannot be defined concisely. *Reeb v. Ohio Dep't of Rehab. & Corr. Belmont Corr. Inst. (S.D. Ohio Oct. 24, 2001), 203 FRD 315*, vacated, *(6th Cir. Ohio Nov. 18, 2003), 81 Fed Appx 550*.

In determining whether to certify class, court begins with proposed definition of class. *Robinson v. Gillespie (D. Kan. Oct. 16, 2003), 219 FRD 179*, dismissed, *(D. Kan. Sept. 22, 2004), 2004 US Dist LEXIS 21645*.

164. Appeal and review

In action brought for alleged race discrimination in employment by black employees of defendant, where District Court did not enter order making class action determination as required by Rule 23(c)(1), but did, in its final decision, refer to class as all black citizens whom defendant company refused to hire, discharged from employment, discriminated against with respect to compensation, terms, conditions, and terms of employment, and otherwise

segregated, classified, or deprived of employment opportunities because of race or color, Court of Appeals can limit class to actual employees of defendant company, since inclusion of rejected black applicants for employment and those black citizens who were deterred from applying because of defendant company's reputation in community raise doubt as to whether representation would be proper under Rule 23(a)(4), and since inclusion of class of blacks who would have applied for employment except for defendant's reputation would create serious problems in terms of identification of individual members and determination of availability of openings for such persons. *EEOC v Detroit Edison Co. (1975, CA6 Mich) 515 F2d 301, 10 BNA FEP Cas 239, 10 BNA FEP Cas 1063, 9 CCH EPD P 9997, 19 FR Serv 2d 1502*, vacated on other grounds *(1977) 431 US 951, 97 S Ct 2668, 53 L Ed 2d 267, 14 BNA FEP Cas 1686, 14 CCH EPD P 7580* and (superseded by statute on other grounds as stated in *Dickinson v Ohio Bell Communications (1993, CA6 Ohio) 1993 US App LEXIS 17878*).

Order defining class is reviewable only for abuse of discretion. *Richardson v. Byrd (5th Cir. Tex. July 22, 1983), 709 F2d 1016, 32 Empl Prac Dec (CCH) P33749, 36 Fed R Serv 2d (Callaghan) 1448*, cert. denied, *(U.S. Dec. 5, 1983), 464 US 1009, 104 S Ct 527, 78 L Ed 2d 710*.

United States Court of Appeals, in dealing with action brought with respect to homes purchased with mortgages insured by Federal Housing Administration, would not consider action as class action, where record contained neither certificate nor any showing that District Court agreed to hear case as class action, nor any judicial pronouncement to define scope of class. *Jackson v. Lynn (D.C. Cir. Oct. 17, 1974), 506 F2d 233*.

165. Miscellaneous

Need for definition of class purported to be represented by named plaintiffs is especially important in cases where litigation is likely to become moot as to initial named plaintiffs prior to exhaustion of appellate review. *Board of School Comm'rs v. Jacobs (U.S. Feb. 18, 1975), 420 US 128, 95 S Ct 848, 43 L Ed 2d 74*.

Plaintiffs will not be permitted to represent class which is too amorphous and imprecise, neither distinguishable nor definable. *Rappaport v. Katz (S.D.N.Y. 1974), 62 FRD 512, 19 Fed R Serv 2d (Callaghan) 245*.

In Rule 23(b)(2) cases precise definition of class is relatively unimportant, but in Rule 23(b)(3) action, because of notice and opt out features, greater precision in class definition is required. *Rice v. Philadelphia (E.D. Pa. 1974), 66 FRD 17*.

Detailed class definitions often require extensive consideration of ultimate factual issues, and, as result, such definitions may be more appropriately deferred until completion of trial on merits. *Freeman v. Motor Convoy, Inc. (N.D. Ga. Jan. 9, 1975), 68 FRD 196, 8 Empl Prac Dec (CCH) P9798, 19 Fed R Serv 2d (Callaghan) 650, 19 Fed R Serv 2d (Callaghan) 650, 21 Fed R Serv 2d (Callaghan) 13, 21 Fed R Serv 2d (Callaghan) 13*, aff'd, *(11th Cir. Ga. Mar. 21, 1983), 700 F2d 1339, 31 Empl Prac Dec (CCH) P33455, 36 Fed R Serv 2d (Callaghan) 185*.

Class may be certified even though initial definition includes members who have not been injured or do not wish to pursue claims against defendant. *Stewart v. Associates Consumer Discount Co. (E.D. Pa. Oct. 27, 1998), 183 FRD 189, RICO Bus Disp Guide P9635*.

Definition of class should not be so broad so as to include individuals who are without standing to maintain action on their own behalf. *Clay v. American Tobacco Co. (S.D. Ill. June 29, 1999), 188 FRD 483*.

2. Particular Cases

a. In General

166. Antitrust

Plaintiffs, former automobile dealers claiming that as result of illegal monopolization by defendants, they were unable to do business in automobile retailing field, failed to adequately define class they sought to represent in

action under anti-trust laws where class was described only as "those similarly situated to plaintiffs" or "independent dealers such as plaintiffs," and complaint, while alleging general scheme of monopolization by defendants, raised number of different claims, too numerous and too varied to be available to single class. *D & A Motors, Inc. v. General Motors Corp. (D.N.Y. 1956), 19 FRD 365, 1956 Trade Cas (CCH) P68347*.

Several difficulties were presented with respect to adequacy of class definition upon motion of plaintiff liquor retailer to maintain 12 actions for alleged violations of Sherman Act (*15 USCS §§ 1*, *2*) and Robinson-Patman Act (*15 USCS § 13(a)* as class action on behalf of class of approximately 2,500 liquor retailers, where in 11 of cases plaintiff sought to exclude certain "favored" retailers from class, since various depositions filed in case indicated that there were variety of "deals," made on relatively individual basis, concerning purchase of liquor and exclusion of certain retailers because of their relationship to one count would sacrifice any rights they possessed regarding other count. *J. W. T., Inc. v. Joseph E. Seagram & Sons, Inc. (D. Ill. 1974), 63 FRD 139, 1974 Trade Cas (CCH) P75048, 1974-1 Trade Cas (CCH) P75048*.

In action brought as class action for alleged violation of federal antitrust laws with respect to commission rates charged in connection with sale of real estate, where notice of proposed settlement of action had been given to class members who could be identified through reasonable effort, court would allow action to be maintainable as Rule 23(b)(3) class action and define class so as to exclude class of persons or entities who had requested exclusion from class and whose names were set forth on docket sheet for action. *Hill v. Art Rice Realty Co. (N.D. Ala. 1974), 66 FRD 449, 1974-2 Trade Cas (CCH) P75364*, aff'd, *(5th Cir. Ala. 1975), 511 F2d 1400*.

In action brought against basketball leagues for alleged violation of federal antitrust laws, plaintiff class, comprised of all active players in one of leagues from date of commencement of action in 1970 through present and all future players in league prior to date of final judgment, was neither amorphous nor imprecise, notwithstanding defendant league's claim that class lacked definition, where at time of decision there were 365 class members, fact that 50 to 100 more members might be joining class did not make it unmanageable, court could determine at any time whether particular individual was member of class, and, in view of size of class and plaintiffs' agreement to give notice of proceedings to all present and future members, notice requirement did not raise serious issue. *Robertson v. NBA (S.D.N.Y. Feb. 14, 1975), 389 F Supp 867, 19 Fed R Serv 2d (Callaghan) 982, 76 Lab Cas (CCH) P10729, 1975-1 Trade Cas (CCH) P60168*.

In consolidated antitrust suit against automaker, court will deny motion by plaintiff to reconsider established starting and ending dates for certified class where no theory or principle advanced by plaintiffs support proposition that scope of certified classes should be reconsidered after 3 years of extensive trial preparation by parties and where cases where ready for remand to their respective transferor judges. *In re Nissan Motor Corp. Antitrust Litigation (S.D. Fla. 1979), 82 FRD 193*.

In antitrust suit by condominium purchasers against developer for allegedly tying execution of 99-year lease of lands for recreational purposes to purchase of condominium units, proposed class encompassing all condominium units is too broad, where (1) although tied product, recreational lease, is same, tying products are not, in that they include both apartment units and separate single family homes, requiring proof of different relevant markets in apartment units and in separate homes, and (2) proposed class consists both of unit owners who purchased from developer and unit owners who purchased from original purchasers, thus presenting disparate questions of law and fact in proving requisite force and coercion. *Sandles v. Ruben (S.D. Fla. Mar. 25, 1981), 89 FRD 635, 31 Fed R Serv 2d (Callaghan) 1133, 1981-1 Trade Cas (CCH) P64142*.

167. —Price-fixing

In action involving, among other things, alleged price-fixing conspiracy in violation of federal antitrust laws with respect to defendant's dealings with Negro purchasers of used residential property, although plaintiffs were entitled to maintain class action on behalf of class consisting of themselves and other potential plaintiffs, action did not identify appropriate defendant class and defendants could not be sued as class, where it was not claimed that all sales of used residential property to Negroes during relevant time were within specific allegations of complaint,

there was no definable limit for group of sellers other than group of named defendants, and defendants were all named. *Contract Buyers League v. F & F Inv. (N.D. Ill. 1969), 48 FRD 7, 13 Fed R Serv 2d (Callaghan) 590, 1969 Trade Cas (CCH) P72754*.

In Rule 23(b)(3) class action against wholesale bakery companies for alleged price fixing, certifiable class consists of all persons who have purchased bakery products from defendant companies at any time during specified period within described geographical area. Re South Cent. *In re South Cent. States Bakery Products Antitrust Litigation (M.D. La. 1980), 86 FRD 407, 30 Fed R Serv 2d (Callaghan) 944, 1980-2 Trade Cas (CCH) P63332* (criticized in *Package Shop, Inc. v Anheuser-Busch, Inc. (1984, DC NJ) 1984 US Dist LEXIS 24942*).

In antitrust suit by indirect purchasers (IPs) of static random access memory (SRAM) devices, alleging price-fixing conspiracy by sellers of SRAM, IPs sufficiently alleged objectively ascertainable class because class members (1) had to live in particular state; (2) could not be direct purchaser; (3) could not be re-seller; (4) must have made purchase within certain time period; and (5) must have purchased product containing SRAM made by named seller. *In re Static Random Access Memory Antitrust Litig. (N.D. Cal. Nov. 25, 2009), 264 FRD 603, 2009-2 Trade Cas (CCH) P76819*.

Unpublished decision: In antitrust action, defendants had not established that reconsideration of court's earlier order allowing for certification of six sub-classes was warranted because there was evidence to support six subclasses set forth by court, plaintiffs were not required to submit trial plan at current stage of proceedings, and court could determine later whether or not to try cases jointly or separately. *In re Plastics Additives Antitrust Litig. (E.D. Pa. Dec. 20, 2006), 2006 US Dist LEXIS 98277*.

168. Bankruptcy

Where customers of bankruptcy debtors' telephone service alleged that debtors fraudulently advertised their services by omitting fees and availability of service, certification of class of customers who were induced by debtors' fraudulent advertising to subscribe to service was not warranted since members of class were not readily ascertainable; there were no objective criteria to determine customers who were induced to subscribe through reliance on debtors' alleged omissions, and establishing class membership would require examination of each individual customer's state of mind. *In re Worldcom, Inc. (Bankr. S.D.N.Y. May 4, 2006), 343 BR 412*.

Pursuant to *Fed. R. Civ. P. 23(a)* and *(b)*, which was applicable to bankruptcy adversary proceedings by *Fed. R. Bankr. P. 7023*, debtor's proposed class of mortgagors could not be sustained in adversarial action against loan servicer's regarding allegedly impermissible collection of fees that were not approved by bankruptcy court when debtor failed to show that complaint involved questions of law or fact common to any other potential class member; proposed class definition failed to state cognizable cause of action against servicer. *Thompson v. HomEq Servicing Corp. (In re Thompson) (Bankr. N.D. Miss. Aug. 11, 2006), 351 BR 402*.

Where two classes were certified consisting of all New Mexico debtors who were granted bankruptcy discharge after certain date and who owed money pre-petition to defendant credit union, and who claimed that they were damaged in some manner by defendant's credit reporting practices, decertification was warranted in part because it seemed likely that many more members had no claims against defendant than had claims. *Montano v. First Light Fed. Credit Union (In re Montano) (Bankr. D.N.M. Mar. 21, 2013), 488 BR 695*.

169. Banks and banking

Proposed class consisting of all mortgagors of defendant banks whose mortgages were acquired on or after May 20, 1972 and whose loan agreement required them to pay monthly taxes and/or insurance charges into noninterest-bearing escrow accounts is limited by excluding those members of class who pressed claims which accrued more than 4 years prior to commencement of suit and who, in order to escape limitations bar, assert defendants have been guilty of fraudulent concealment since representative has no interest in proving any elements of fraudulent concealment and there is no reason to expect that any acts of this kind will be shown. *Wolfson v. Artisans Sav.*

Bank (D. Del. 1979), 83 FRD 547, 28 Fed R Serv 2d (Callaghan) 726, 1980-2 Trade Cas (CCH) P63422 (criticized in *Masquat v Daimlerchrysler Corp. (2008) 2008 OK 67, 195 P3d 48*).

Class certification was granted because claims made by named plaintiffs were "reasonably coextensive" with those made by broader class, despite fact that specifics of company's bad check program varied by county. del *del Campo v. Am. Corrective Counseling Servs., Inc. (N.D. Cal. Dec. 3, 2008), 254 FRD 585*.

Class certification was appropriate in debtors' action against bank, which alleged that bank imposed and collected unlawful fees, prepayment penalties, and finance charges from them in connection with their mortgage loans, because (1) numerosity requirement of *Fed. R. Civ. P. 23(a)* was satisfied because debtors argued that hundreds of thousands of consumers paid disputed charges; (2) regardless of distinctions in amounts paid, or even nomenclature used to describe disputed charges, common questions of law existed, for example, as to whether fees violated bank's contractual obligations to mortgage borrowers; (3) legality of fees charged by bank for repayment of home mortgage loans were typical among both group of named plaintiffs and proposed class; (4) there was no indication that any of proposed class representatives maintained interests that were inconsistent with claims of proposed class; (5) proposed class counsel were apparently experienced attorneys and firms in area of law, who had manifested willingness to devote necessary resources to litigate vigorously on behalf of entire class; (6) certification pursuant to Rule 23(b)(2) was appropriate; and (7) certification pursuant to Rule 23(b)(3) was appropriate because common questions regarding legality of fees assessed clearly predominated over any individual questions, and variations present in state law issues did not preclude certification. *Cassese v. Wash. Mut., Inc. (E.D.N.Y. Dec. 29, 2008), 255 FRD 89*.

Where prerequisites of *Fed. R. Civ. P. 23(a)* and *(b)(3)* were met by named plaintiff, in class-action suit against bank challenging bank's charging of user fees for its automatic teller machines to non-customers; more information was required for court to approve settlement of claim. *Kinder v. Northwestern Bank (W.D. Mich. Nov. 2, 2011), 278 FRD 176, 80 Fed R Serv 3d (Callaghan) 1421*.

In replevin action brought by bank against former holder of account and "Guardian Check Cashing Service Courtesy Card" to obtain possession of property covered by security agreement which bank had entered into with account holder when she became indebted to bank, where woman counterclaimed (1) alleging that service charges on her account had been unlawful, that bank had erred in computing balance in her account, and that she had signed promissory note and security agreement as result of fraud and duress, and (2) asserting that she was member of class of people who had been assessed illegal service charges, class would be limited to persons who were holding or had held Guardian Check Cashing Cards and who had been assessed allegedly illegal service charges, since woman could not represent those not similarly situated. *Lennon v. First Nat'l Bank (Ariz. Ct. App. 1974), 518 P2d 1230*.

170. —Usury

Action brought by plaintiff on behalf of himself and others similarly situated for alleged violation of *12 USCS §§ 85* and *86* by defendant national bank which allegedly charged plaintiff and others usurious interest on credit card transactions could not be maintained as class action, where although plaintiff's class was potentially definite, he failed to describe class with necessary specificity beyond declaration that class members were credit card holders of defendant in several surrounding states. *Considine v. Park Nat'l Bank (E.D. Tenn. 1974), 64 FRD 646, 19 Fed R Serv 2d (Callaghan) 1317*.

In action brought against bank for alleged violations of state and federal usury statutes, where plaintiffs sought to represent class of all account holders with bank who held credit card accounts with defendant bank at any point in time during two years immediately preceding filing of action, and those who also continued to hold such accounts at present, court would not permit potential assertion of counterclaims against few delinquent account holders to defeat otherwise valid class action; court would define class to exclude persons previously having credit cards whose account became delinquent and were cancelled, and court would further limit class to include only those customers who received cash advance through accounts with defendant bank in two year period ending on date

defendant eliminated practice of charging two percent fee on cash advances. *Cosgrove v. First & Merchants Nat'l Bank (E.D. Va. 1975), 68 FRD 555, 20 Fed R Serv 2d (Callaghan) 1230*.

171. Consumers and their protection

In consumer lawsuit alleging false and deceptive advertisement of particular diet supplement, plaintiff's assurance that it intended to meet ascertainability requirements was insufficient: plaintiff could not propose method of ascertaining class without evidentiary support that method would be successful. *Carrera v. Bayer Corp. (3d Cir. N.J. Aug. 21, 2013), 727 F3d 300*.

Motion for class certification of alleged fake Internet auction bidding was denied because class as presently defined was, in parts, imprecise, overbroad and unascertainable and individual questions of damages predominated and therefore proposed class was not sufficiently cohesive to warrant adjudication by representation. *Mazur v. eBay, Inc. (N.D. Cal. May 4, 2009), 257 FRD 563*.

Plaintiff proposed class of all persons who (1) purchased any beverage bearing mark or brand of acquired company (2) in United States (3) between May 16, 2002 and June 30, 2006; by these objective criteria members of proposed class allegedly false or deceptive beverage labeling could be ascertained by tangible and practicable standards for determining who was and who was not member of class. *Chavez v. Blue Sky Natural Bev. Co (N.D. Cal. June 18, 2010), 268 FRD 365*.

Crux of plaintiffs' class action claims was that defendant gas stations sold motor fuel at retail without disclosing or accounting for temperature; proposed class definition captured this premise; although plaintiffs may rely on 60-degree-Fahrenheit reference temperature in proving their claims, class definition was precise, objective and presently ascertainable without it. *In re Motor Fuel Temperature Sales Practices Litig. (D. Kan. Jan. 19, 2012), 279 FRD 598*.

In case involving persons who purchased defendants' "Men's Vitamins" in California, plaintiffs' motion for class certification was granted, where plaintiffs met all requirements of *Fed. R. Civ. P. 23(a)* and *(b)(3)*; plaintiffs satisfied typicality and adequacy requirements, while common questions predominated over individual questions. *Johns v. Bayer Corp. (S.D. Cal. Feb. 3, 2012), 280 FRD 551*.

In action by Superbowl ticketholders seeking class certification for ticketholders who were moved to other seats, whether class member received "lesser quality" seat went to questions of liability and damages, but it was not so vague that potential class members were unascertainable, such that as "fail-safe" class, definition was sufficient on its face. *Simms v. Jones (N.D. Tex. July 9, 2013), 296 FRD 485*, in part, *(N.D. Tex. July 10, 2013), 2013 US Dist LEXIS 189697*, aff'd, *(5th Cir. Tex. Sept. 9, 2016), 836 F3d 516, 95 Fed R Serv 3d (Callaghan) 1372*.

Unpublished decision: In consumer fraud suit alleging that video game was defective, class certification was properly denied based on finding that proposed class was not adequately defined or clearly ascertainable; district court found that proposed class included all persons or entities nationwide who purchased any version of game from anyone, whether or not they experienced alleged defect. *Walewski v. Zenimax Media, Inc. (11th Cir. Fla. Dec. 20, 2012), 502 Fed Appx 857*.

Unpublished decision: In certifying class in action filed against food manufacturer under Florida Deceptive and Unfair Trade Practices Act (FDUTPA), *Fla. Stat. § 501.201* et seq., district court found that common issues predominated over individualized issues and that class action was superior method of adjudicating this controversy; thus, district court concluded that requirements of *Fed. R. Civ. P. 23(b)(3)* were satisfied; however, district court erred by defining class in manner which took into account individual reliance on allegedly false statements made by manufacturer, because plaintiff need not prove reliance on allegedly false statement to recover damages under FDUTPA; therefore, district court should have defined class in manner which did not take individual reliance into account. *Fitzpatrick v. General Mills, Inc. (11th Cir. Fla. Mar. 25, 2011), 635 F3d 1279, 79 Fed R Serv 3d (Callaghan) 293* (criticized in *Greenfield v Sears, Roebuck & Co. (In re Sears, Roebuck & Co. Tools Mktg. & Sales Practices Litig.) (2012, ND Ill) 2012-1 CCH Trade Cases P 77861*).

172. —Breach of warranties

In purported class action suit brought by aircraft purchaser against aircraft seller, proposed breach of warranty class did not satisfy either of implied prerequisites of *Fed. R. Civ. P. 23* because purchaser's proposed class definition was not sufficiently precise to enable court to ascertain identity of class members by reference to objective criteria, and it failed to meet its burden of proving that it was member of class it sought to represent. *Cunningham Charter Corp. v. Learjet, Inc. (S.D. Ill. Apr. 27, 2009), 258 FRD 320*.

173. —Products liability

In products liability suit regarding allegedly addictive drug, class definition that included all persons in Kentucky who obtained drug at issue and/or who would obtain drug in future was vague and called for subjective medical conclusions; case was unsuitable for certification because each class member's state of mind required litigating each individual case, and proposed class was so highly diverse and difficult to ascertain that it was not adequately defined. *Gevedon v. Purdue Pharma (E.D. Ky. Oct. 17, 2002), 212 FRD 333*.

In products liability suit against pharmaceutical company by patients prescribed certain osteoporosis drug, alleging that drug caused them to develop osteonecrosis of jaw (ONJ) or suffer significantly increased risk of developing ONJ, patients were not entitled to *Fed. R. Civ. P. 23* class certification of classes of patients in three states bringing medical monitoring claims requiring company to set up and fund program to administer regimen of dental procedures to monitor for ONJ for all class members, because class representatives failed to define proper class since proposed class definitions did not set any dosage or duration of use limitations, screen out those with unique risks for ONJ, or specify duration of proposed dental monitoring program. *In re Fosamax Prods. Liab. Litig. (S.D.N.Y. Jan. 3, 2008), 248 FRD 389*.

When asymptomatic smokers of certain brand of cigarette sued cigarette's manufacturer for medical monitoring and sought certification of class action, class was sufficiently ascertainable because requirements of described class that member have smoking history of at least twenty pack-years and that member not be under physician's care for lung cancer were objective criteria. *Donovan v Philip Morris USA, Inc. (2010, DC Mass) 268 FRD 1, CCH Prod Liab Rep P 18443*, motion to strike gr, partial summary judgment den, in part, partial summary judgment gr, in part, motion to strike den, motion to strike gr, in part, motion to strike den, in part, motion to strike gr, in part *(DC Mass 2014), 2014 US Dist LEXIS 172177*.

174. Telephone Consumer Protection Act

Court denied plaintiff's *Fed. R. Civ. P. 23* motion to certify class in its action alleging violations of Telephone Consumer Protection Act, *47 USCS § 227*, based on unsolicited fax advertisement sent by or on behalf of defendant because although it appeared that putative class met requirements of R. 23(a), (b)(3), there was no reasonable way of identifying potential class members as there appeared to be no list of numbers from which parties (or court) could reasonably assume class members could be identified, even if class members were only subset of that universal list. *Saf-T-Gard Int'l, Inc. v. Wagener Equities, Inc. (N.D. Ill. June 3, 2008), 251 FRD 312*.

Plaintiff's motion to certify class in his action against collection agency for alleged violations of Telephone Consumer Protection Act, *47 USCS § 227*, was granted because proposed class, people whom agency called with auto-dialer during four-year period on area code cell phone number it obtained from medical provider, was defined by objective criteria and with reference to agency's alleged conduct. *Mitchem v. Ill. Collection Serv. (N.D. Ill. Jan. 3, 2011), 271 FRD 617*.

In plaintiffs' action asserting claims for violations of Telephone Consumer Protection Act, *47 USCS § 227*, and *Cal. Bus. & Prof. Code § 17538.43*, court certified classes under TCPA because plaintiffs demonstrated ascertainability as definition of that class described set of common characteristics sufficient to allow prospective plaintiff to identify himself or herself as having right to recover based on description, and that class also met all *Fed. R. Civ. P. 23(a)* and *(b)(3)* requirements; court refused to certify second class under TCPA or class under § 17538.43 because

plaintiffs failed to establish objective way to determine class members. *Vandervort v. Balboa Capital Corp. (C.D. Cal. Oct. 23, 2012), 287 FRD 554, 83 Fed R Serv 3d (Callaghan) 1520*.

Even though certification of class in action that asserted claims under TCPA would not be denied on basis of ethical concerns with proposed class counsel, certification had to be denied because there was lack of ascertainable class since proposed imprecise and amorphous class definitions included persons that appeared to lack statutory standing to assert TCPA claim based upon unsolicited fax advertisement, and claims were inherently individualized due to statutory defense that only unsolicited faxes gave rise to claim. *Machesney v. Lar-Bev of Howell, Inc. (E.D. Mich. Apr. 22, 2013), 292 FRD 412*, vacated, *(E.D. Mich. Apr. 7, 2016), — F Supp 2d —, 317 FRD 47, 94 Fed R Serv 3d (Callaghan) 755*.

In Telephone Consumer Protection Act action, plaintiff's motion for class certification was denied because proposed class definitions included all "persons who were sent" certain fax advertisements and it was entirely unclear who that included; there was possibility of multiple plaintiffs stemming from one fax transmission—all individuals at home or employed by corporate entity, or any person who happens to intercept fax advertisement by picking it up. *Compressor Eng'g Corp. v. Mfrs. Fin. Corp. (E.D. Mich. Apr. 26, 2013), 292 FRD 433*, different results reached on reconsid., (E.D. Mich. Apr. 7, 2016), — F Supp 2d —.

Certification was not warranted in suits alleging violations of Telephone Consumer Protection Act (TCPA), *47 USCS § 227*; because there was no ascertainable class since class definitions included persons who lacked statutory standing to assert TCPA claim based upon unsolicited fax advertisement. *APB Assocs. v. Bronco's Saloon, Inc. (E.D. Mich. Apr. 26, 2013), 297 FRD 302*.

175. Drugs, generally

Proposed class of all male and female young people residing in South Dakota who have been exposed to DES as unborn children is not adequately defined; since definition does not require that members' births occurred in South Dakota, their mothers may be scattered over entire United States, large number of persons included in proposed class may never be able to determine whether they were exposed to DES and composition of class is constantly changing as unknown persons move into and from South Dakota. *McElhaney v. Eli Lilly & Co. (D.S.D. Apr. 8, 1982), 93 FRD 875, 34 Fed R Serv 2d (Callaghan) 1017*.

In tort suit brought by users of Paxil against manufacturer, class certification was inappropriate because users failed to define manageable class since users failed to define proper classes and failed to define subclasses in way that allowed determination of who would be included or excluded from putative classes. *In re Paxil Litig. (CD Cal 2003), 212 FRD 539*.

176. Environmental matters

In actions brought by residents near atomic weapons facility alleging discrimination and dangerous exposure to radioactive and other toxic substances, class certification was inappropriate because residents failed to satisfy commonality, typicality, and fair and adequate representation requirements, where each individual resident had highly individualized claim based on his or her total exposure time, exposure period, medical history, diet, sex, age, and myriad of other factors; in addition, proposed class descriptions were so vague that it would be impossible to identify potential class members. *Ball v. Union Carbide Corp. (E.D. Tenn. Sept. 17, 2002), 212 FRD 380*, aff'd, *(6th Cir. Tenn. July 15, 2004), 376 F3d 554*, aff'd, *(6th Cir. Tenn. Sept. 30, 2004), 385 F3d 713*.

Residents and homeowners who lived near certain gas station, which had underground gasoline storage tank that allegedly leaked gasoline containing methyl tertiary butyl ether (MTBE), created ascertainable class under *Fed. R. Civ. P. 23(a)*, even though every member of class had not yet been identified, because class was based on effects of MTBE leakage, and its actual membership could be definitively identified during trial. *Koch v. Hicks (In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.) (S.D.N.Y. Feb. 20, 2007), 241 FRD 185*.

In case where plaintiffs alleged that mining activities of defendants caused air, surface and groundwater, and soil contamination of their property, exposing residents to unsafe levels of lead, heavy metals and other toxins, plaintiffs' definition of proposed class was untenable with respect to its description of persons who "owned or had interest in real property;" identification of members would not have been administratively feasible; although plaintiffs contended that identities of members of Property Owners Class could be easily ascertained objectively, such as thorough examination of deeds, this conclusory statement did not withstand scrutiny. Cole v ASARCO, Inc. (2009, ND Okla) 256 FRD690.

In putative class suit alleging nuisance, trespass, strict liability, and other tort claims based on manufacturer's alleged pollution of water supply, two classes of certain residential water customers and private well owners near certain manufacturing plant were sufficiently defined for purposes of *Fed. R. Civ. P. 23(a)* because classes specified identifiable groups, locations, and times, and class membership could be ascertained by objective evidence. *Rowe v. E.I. Dupont De Nemours & Co. (D.N.J. Oct. 9, 2009), 262 FRD 451*.

In action by property-owners against paper manufacturing facility, property owners' motion for class certification was denied because it was not administratively feasible for court to determine whether particular individual met class definition, which included everyone who, as of date of complaint and second amended complaint, owned residential property within two miles of outer boundary of facility, with additional qualifiers that property was contaminated by releases of various substances into environment from facility, and property owners suffered in excess of $100 of diminution in value of real property. *Johnson v. Int'l Paper Co. (M.D. Ala. Oct. 20, 2010), 270 FRD 640*.

177. Fair Debt Collection Practices Act

Class of state residents who had received communications from bad check diversion program that allegedly violated Fair Debt Collection Practices Act, *15 USCS §§ 1692* et seq., was not adequately defined where there was no evidence to determine whether anyone other than four named individuals fell within scope of definition. *Liles v. Am. Corrective Counseling Servs. (S.D. Iowa Sept. 29, 2005), 231 FRD 565*.

Plaintiffs sufficiently defined proposed class in their Fair Debt Collection Practices Act (FDCPA), *15 USCS §§ 1692* et seq., suit when they described class as including all individuals to whom debt collector had sent purportedly misleading collection letter in connection with debts owed to identified payday loan lender; because district court presumed that recipients received letters mailed to them, class properly included all individuals to whom letter was sent, although non-recipients would later be excluded from class, and class did not have to be limited to letters that were sent out within one year of filing of suit to comply with FDCPA's one year statute of limitations because statute of limitations was affirmative defense that was properly considered in connection with merits of case, not in connection with class certification. *Hazelwood v. Bruck Law Offices SC (E.D. Wis. June 25, 2007), 244 FRD 523*.

Where patient's putative class contained several hundred members who received standard form letters from debt collector, numerosity and commonality requirements of *Fed. R. Civ. P. 23(a)(1)*, (a)(2), were met; patient also alleged that debt collector engaged in standardized conduct common to all class members in violation of Fair Debt Collection Practices Act, *15 USCS § 1692e*, and court held that patient adequately represented class; because patient also met predominance and superiority requirements of *Fed. R. Civ. P. 23(b)*, his class was certified. *Quiroz v. Revenue Prod. Mgmt. (N.D. Ill. Sept. 3, 2008), 252 FRD 438*.

Class certification was granted for consumers who sued debt collectors for violating Fair Debt Collection Practices Act, *15 USCS §§ 1692* et seq., and Illinois Collection Agency Act, 225 ILCS 425/9 (a)(20), by filing collection suits without attached written contract governing debt and by filing collection suits after statute of limitations had expired; requirements of *Fed. R. Civ. P. 23* were all met, including numerosity, which was sufficiently met with amended class definitions that ensured classes would be ascertainable based on objectively identifiable criteria, namely that issue of time-barred suits would be according to date of final statement of account as given in affidavits attached to debt collectors' state court complaints. *Herkert v. MRC Receivables Corp. (N.D. Ill. Dec. 1, 2008), 254 FRD 344, 72 Fed R Serv 3d (Callaghan) 106*.

In borrower's suit alleging violations of federal and state laws from debt collection efforts with respect to home loans, including alleged violation of Fair Debt Collection Practices Act, *15 USCS §§ 1692* et seq., class was ascertainable for purpose of *Fed. R. Civ. P. 23* certification because there were no administrative difficulties from determining if borrowers belonged in class by virtue of having purchased money security agreement or home, rather than commercial loan since these matters could be resolved by reference to universal residential loan application forms and/or by single question sent to putative class members. *Herrera v. LCS Fin. Servs. Corp. (N.D. Cal. June 1, 2011), 274 FRD 666*.

As court only needed to analyze whether creditor assignee's practice of charging-off account constituted waiver of interest, which inquiry was subject to class-wide proof in debtors' action that alleged unfair debt collection practices, class was ascertainable. *McDonald v. Asset Acceptance LLC (E.D. Mich. Aug. 7, 2013), 296 FRD 513*, vacated, (E.D. Mich. June 23, 2016), — F Supp 2d —.

178. Fraud

District court did not abuse its discretion in denying class certification under *Fed. R. Civ. P. 23(a)* based on lack of definiteness and typicality in consumer's suit against beverage manufacturer for violation of Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA) and unjust enrichment; consumer alleged that manufacturer failed to disclose difference in artificial sweeteners used in fountain and bottled versions of diet beverage, and proposed class was defined as purchasers of fountain version after certain date; proposed class could have included millions of purchasers who were not deceived and who therefore had no claim under ICFA or for unjust enrichment, and various factual defenses undermined typicality of consumer's claim. *Oshana v. Coca-Cola Co. (7th Cir. Ill. Dec. 29, 2006), 472 F3d 506*, cert. denied, *(U.S. June 11, 2007), 551 US 1115, 127 S Ct 2952, 168 L Ed 2d 264*.

Because putative class alleged duty to disclose that arose from omissions in standardized, form documents, they alleged set of uniform disclosures that were not materially varied; common questions predominated with regard to fraud claim, and certification was proper under *Fed. R. Civ. P. 23*. *Stanich v. Travelers Indem. Co. (N.D. Ohio Mar. 28, 2008), 249 FRD 506*.

Where customers of bankruptcy debtors' telephone service alleged that debtors fraudulently advertised their services by omitting fees and availability of service, certification of class of customers who were induced by debtors' fraudulent advertising to subscribe to service was not warranted since members of class were not readily ascertainable; there were no objective criteria to determine customers who were induced to subscribe through reliance on debtors' alleged omissions, and establishing class membership would require examination of each individual customer's state of mind. *In re Worldcom, Inc. (Bankr. S.D.N.Y. May 4, 2006), 343 BR 412*.

179. Housing

In action brought against federal agency by low-income tenants of housing subsidized by another federal agency, on behalf of themselves and other California residents similarly situated, challenging agency regulation which has nationwide application, class would be certified under *Rule 23(b)(2), FRCivP*, to include all persons within United States who are similarly situated, since no local issues or defendants are involved and no rational reason exists for limiting class to California residents, and in spite of litigation involving same issues pending in other circuits. *Anderson v. Butz (E.D. Cal. Aug. 29, 1975), 428 F Supp 245*, aff'd, *(9th Cir. Cal. Feb. 1, 1977), 550 F2d 459*.

Certification of national class is appropriate in action challenging HUD regulation requiring FHA mortgagees to certify that property is vacant before they can recover on FHA insurance since (1) challenged regulation is applicable nationwide, (2) no inherent management difficulties are presented by action for declaratory and injunctive relief involving federal regulations when no damages are requested, and (3) present action is not first action challenging vacancy requirement. *Metropolitan Area Housing Alliance v. United States Dep't of Housing & Urban Development (N.D. Ill. 1976), 69 FRD 633, 22 Fed R Serv 2d (Callaghan) 241*.

In Rule 23(b)(2) class action against public housing authority by public housing tenants who have been denied use of grievance procedure to pursue personal property damage claims, certifiable class consists of current and future

tenants residing in public housing owned and operated by authority, sustaining damages by reason of alleged failure of authority to maintain residences in safe condition, having their claims for compensation for such damages denied in whole or in part, and being refused use of grievance procedure to appeal denial of their damage claims. *Martin v. Housing Authority of Atlanta (N.D. Ga. 1980), 86 FRD 320, 30 Fed R Serv 2d (Callaghan) 708*.

In action against city housing authority challenging alleged policy and practice of terminating tenancies for nondesirability without sufficient evidence to support finding that offending member of household was still residing in tenant's apartment, wherein representative sought certification of class consisting of present and future tenants whose tenancies would be terminated for nondesirability, fluid composition of public housing population was particularly well suited for status as class, because nature of harm and basic parameters of group affected remained constant, even though identity of individuals involved might change. *Bruce v. Christian (S.D.N.Y. Nov. 25, 1986), 113 FRD 554*.

Court declined to certify class of plaintiffs in tenant's civil suit against landlords and others who allegedly engaged in unfair business practices and violated law by handling security deposits improperly, increasing rent unilaterally in renewal terms, imposing illegal penalties, and filing and pursuing unjustified eviction proceedings; proposed class definition was too amorphous, vague, or indeterminate for recognition as class under *Fed. R. Civ. P. 23* where tenant sought to certify class composed of all persons, who within past eight years, sustained damages as result of renting and/or who guaranteed rental of apartments from landlords and who were subjected by defendants to one or more illegal, unfair or otherwise improper practices in connection with such rentals. *Daniels v. Baritz (E.D. Pa. July 29, 2004), 59 Fed R Serv 3d (Callaghan) 201, 2004 US Dist LEXIS 14649*.

Proposed class action suit charging issuer of annuity-type investment with having misinterpreted contract language governing crediting of interest on investment, while satisfying *Fed. R. Civ. P. 23*'s numerosity and commonality criteria, did not exhibit necessary typicality because under Iowa's conflict of law rules, each putative class member's contract breach claim would have to be adjudicated based on law of state of member's domicile. Nor was proposed class representative adequate representative of class for Rule 23 purposes because his interests did not align with those of all other similarly-situated investors. *Duchardt v. Midland Nat'l Life Ins. Co. (S.D. Iowa July 23, 2009), 265 FRD 436*.

In suit by tenants alleging that landlord engaged in pattern of racketeering and deceptive acts and practices by demanding and collecting rent in amounts beyond those permitted by state law with goal of illegally increasing regulated rent and/or evicting tenants entitled to rent regulation, class definition was modified to produce ascertainable class determined by whether apartment was rent-regulated under state law, whether apartment was owned by landlord, and whether putative class member was tenant of apartment as of date of ruling. *Charrons v. Pinnacle Group NY LLC (S.D.N.Y. Apr. 27, 2010), 269 FRD 221*.

180. Insurance, generally

Where class action alleged that insurer unlawfully refused to stack medical benefits, class was properly identified as comprised of class primary class of insureds with contract claims and subclass of insureds with contract and tort claims. *Burton v. Mt. W. Farm Bureau Mut. Ins. Co. (D. Mont. Mar. 31, 2003), 214 FRD 598*.

In insureds' suit alleging breach of contract based on homeowners' insurance policy provision that amount of coverage could be increased when appraisals were conducted and when policies were renewed to reflect current costs and values, there was ascertainable class because purchasers of challenged policies during class period could be identified by reference to objective criteria. *Spagnola v. Chubb Corp. (S.D.N.Y. Jan. 7, 2010), 264 FRD 76*.

181. Labor and employment

Certification order, read in conjunction with incorporated memorandum opinion, left no doubt about which employees and former employees constituted class, defined class in manner that was readily discernible, rightfully identified two critical claims and potential for exemption defense, and found that it was all best litigated as class. *Ross v RBS Citizens, N.A. (2012, CA7 Ill) 667 F3d 900, 18 BNA WH Cas 2d 1121, 162 CCH LC P 36056, 81 FR*

Serv 3d 996, reh, en banc, den *(2012, CA7 Ill) 2012 US App LEXIS 7203* and vacated without op, remanded *(2013, US) 133 S Ct 1722, 185 L Ed 2d 782* and (Vacatur noted in *Jacob v Duane Reade, Inc. (2013, SD NY) 293 FRD 578*).

In consolidated actions involving challenge to constitutionality of provisions of Ohio Revised Code, which plaintiffs sought to maintain as class action to obtain declaratory and injunctive relief against state provisions governing suspension and dismissal of students and employees of state supported colleges and universities who had been arrested or convicted of certain specified criminal offenses, definition of class to purportedly consist of all students, faculty, and staff members of state supported or state operated colleges and universities in Ohio was too broad, where, although plaintiff who had been indicted, arrested, or threatened with prosecution would have standing, most of proposed class would not qualify under such test; court would reform class to include only those students, faculty, and staff members who had either been arrested or convicted of particular listed offense. *Kister v. Ohio Board of Regents (S.D. Ohio Aug. 16, 1973), 365 F Supp 27*, aff'd, *(U.S. Jan. 7, 1974), 414 US 1117, 94 S Ct 855, 38 L Ed 2d 747*.

In action challenging constitutionality of residency requirement for city employees in Kenosha, Wisconsin, plaintiff failed adequately to define class where he did not expressly exclude city employees not subject to requirement and where proposed subclasses—those not frequently called to duty on short notice, and those in positions of confidential nature—were described in terms inherently nonspecific. *Conway v. Kenosha (E.D. Wis. Dec. 2, 1975), 409 F Supp 344*.

In action by employees against employer for pension benefits payable upon retirement caused by alleged permanent shutdown of employer's facilities where issue is whether sale of employer's facilities, constitutes permanent shutdown, class will include employees who were covered by employer's pension plan, who worked at sold facility, and who on date of sale had requisite total years of age and service to qualify for pension benefits. *Esler v. Northrop Corp. (W.D. Mo. 1979), 86 FRD 20, 30 Fed R Serv 2d (Callaghan) 452*.

Employees' proposed class, *Fed. R. Civ. P. 23*, was not adequately defined, as proper examination of limitations period applicable to potential class members with six-month provisions in their agreements would have required determination as to which jurisdiction's law governed agreement; such inquiry would have entailed examination of state choice of law rules, which might include consideration of where contract was entered into, employee's residence, and where breach occurred, among other factors; this inquiry was necessarily individualized. *Clausnitzer v. Fed. Express Corp. (S.D. Fla. Feb. 28, 2008), 248 FRD 647*.

Employees who claimed that their employer's use of "gang time" compensation system resulted in nonpayment of wages due were entitled to certification under *Fed. R. Civ. P. 23(a)* and *(b)(3)* of their class action claim under Iowa Wage Payment Collection Law; however, employees' proposed class, which included all hourly workers at employer's pork processing plant, had to be limited to workers who were paid via gang time in order for prerequisites of Rule 23 to be satisfied. *Bouaphakeo v. Tyson Foods, Inc. (N.D. Iowa July 3, 2008), 564 F Supp 2d 870*.

Class certification was granted to non-exempt employees on issue of rest-breaks because employer could identify all employees during class period, claims were based entirely on legality of employer's uniform written rest break policy, employees were typical of proposed class because they were subject to same policy as proposed class, and liability would be based on whether rest break policy violated law or not—fact common to all class members. *In re Autozone, Inc. (N.D. Cal. Dec. 21, 2012), 289 FRD 526*.

Unpublished decision: District court's certification of class consisting of consisting, essentially, of California employees for certain period who worked Saturday meeting as instructed or split-shift without receiving full amount of mandated premium pay was not unmanageable "fail safe" class, which was class that was defined so as to preclude membership unless defendant's liability was established; rather, designation narrowed class to those working Saturdays or split shifts in certain time period, without distinguishing who was or was not entitled to premium pay. *Kamar v. Radio Shack Corp. (9th Cir. Cal. Apr. 14, 2010), 375 Fed Appx 734*.

182. —ERISA

Proposed class was not ascertainable under *Fed. R. Civ. P. 23*; although relevant plaintiffs alleged that there were "hundreds, and likely thousands" of self-funded Employee Retirement Income Security Act of 1975 health benefit plans that fit within class definition, they could not determine how many plans—or even which plans—they might potentially represent because they did not know who was participating in settlement. *In re Vioxx Prods. Liab. Litig. (E.D. La. Oct. 21, 2008), 2008 US Dist LEXIS 95097*.

In class action filed by surviving spouses of beneficiaries under pension plan alleging wrongful reduction in benefits by administrator, action under *29 USCS § 1132(a)(1)(B)* survived death and, thus, "heirs and assigns" were properly made part of *Fed. R. Civ. P. 23* class definition to extent that "heirs and assigns" of deceased beneficiaries had right to recover benefits which should have been paid to beneficiaries before their death. *Patrick v. AK Steel Corp. (S.D. Ohio Oct. 27, 2008), 2008 US Dist LEXIS 104862*.

In participant's suit alleging several breaches of fiduciary duties in violation of Employee Retirement Income Security Act, *29 USCS § 1132(a)(2)*, class was adequately defined under *Fed. R. Civ. P. 23(c)(1)(B)* because court could easily discern who was class member simply by analyzing fund report that detailed which plan participants were involved in disputed fund on date in question *Stanford v. Foamex L.P. (E.D. Pa. Sept. 24, 2009), 263 FRD 156*.

183. —Fair Labor Standards Act

Before approving proposed settlement, it was necessary to certify settlement class; court found that requirements of *Fed. R. Civ. P. 23(a)* were met because: (1) class of 11,427 persons was numerous, (2) all members shared in claim that defendant employers failed to keep accurate time records, to pay for work-related duties performed "off clock," and to comply with FLSA and state wage laws; (3) all class members alleged that they were injured by defendants' failure to compensate them for all hours worked; and (4) named plaintiffs were able to adequately represent members of putative class. *Wineland v. Casey's Gen. Stores, Inc. (S.D. Iowa Oct. 22, 2009), 267 FRD 669*.

Class certification was denied to non-exempt employees on issue of off-clock work because there was uniform policy prohibiting such work, and 133 putative class member declarations attested to never having performed or reported off-clock work; therefore, common questions did not predominate. *In re Autozone, Inc. (N.D. Cal. Dec. 21, 2012), 289 FRD 526*.

Class certification was denied to non-exempt employees on issue of meal breaks because employees failed to disclose their written agreement theory, did not demonstrate that common questions predominated, were not typical of class, and defined class too broadly. *In re Autozone, Inc. (N.D. Cal. Dec. 21, 2012), 289 FRD 526*.

Class certification was denied to non-exempt employees on issue of travel reimbursement because employer had uniform policy to provide reimbursement, employees failed to offer significant proof that employer had uniform policy or practice of denying reimbursement, and employer offered numerous putative class member declarations demonstrating that managers were routinely reimbursed. *In re Autozone, Inc. (N.D. Cal. Dec. 21, 2012), 289 FRD 526*.

184. —Labor Management Relations Act

In action brought on behalf of themselves and other similarly situated by two former employees of defendant company and members of defendant labor union against company under § 301 of Labor Management Relations Act (*29 USCS § 185(a)*) for unpaid vacation compensation and against union under §§ 7, 8(b), and 9(a) of National Labor Relations Act (*29 USCS §§ 157*, *158(b)*, and *159(a)*) for its alleged violation of its duty of fair representation, will not be defined class according to literal eligibility requirements of collective bargaining agreement since interpretation of agreement presents questions to be resolved in action and there is no practicable way for court to know which employees fell into various categories for eligibility for vacation pay under terms of agreement, but

class is defined to be comprised of all of defendant's employees during 1969 at one of its plants who were terminated between May 29, 1969 and December 27, 1969, although such definition does raise possibilities of including number of persons who might not in fact have been eligible for vacation pay for 1969. *Buchholtz v. Swift & Co. (D. Minn. 1973), 62 FRD 581, 19 Fed R Serv 2d (Callaghan) 666, 75 Lab Cas (CCH) P10479*.

In action brought for alleged violation of § 101(a)(3)(A) of Labor-Management Reporting and Disclosure Act (*29 USCS § 411(a)(3)(A)*) by defendants' increasing certain dues and contributions without giving union membership reasonable notice of intention to vote on such question, where plaintiff suing on behalf of himself and all other members of local and motion papers seeks to include in class all persons adversely affected by unlawful dues increase, including permitmen who are subject to assessment at issue, class is restricted exclusively to those who can assert federal claim, namely, persons adversely affected by dues increase during time in question who are either members of local or non-members who meet local's membership requirements, where there is no allegation of pendent jurisdiction over any non-federal claims which permitmen might have under state law, and no named plaintiff asserting such non-member, non-federal rights. *Gates v. Dalton (E.D.N.Y. 1975), 67 FRD 621, 22 Fed R Serv 2d (Callaghan) 1335, 78 Lab Cas (CCH) P11320*.

185. —Worker Adjustment and Retraining Notification Act (WARN)

In action in which plaintiff employee alleged that defendant employer violated Worker Adjustment and Retraining Notification Act (WARN Act), *29 USCS § 2102(a)*, by failing to give 60 days' notice of termination to employees whose employment was terminated due to defendant's cancellation of domestic express delivery service, plaintiff's motion to certify nationwide class was denied because there was not ascertainable class where class definition suggested by plaintiff depended upon criterion that class members were rightfully considered to be employees of defendant under WARN Act and court could not determine who would be included in class until it answered questions of whether defendant employed each worker as part of single site of employment and whether sufficient number of employees were dismissed so as to trigger WARN Act notice provisions. *Likes v. DHL Express (N.D. Ala. Dec. 21, 2012), 288 FRD 524*, dismissed, *(N.D. Ala. June 10, 2014), — F Supp 2d —, 25 F Supp 3d 1352, 164 Lab Cas (CCH) P10698*.

186. Military and veterans

In action challenging constitutionality of state statutory requirement that person be resident of state for 5 years to qualify for aid from state Veterans Trust Fund, in which plaintiff sought to represent class of all those honorably discharged veterans who might be eligible for benefits but who had not or would not be considered because of durational residency requirement, class as defined would be deemed to exist where responses to interrogatories showed that during 1 fiscal year 6 applications were denied because of durational residency requirement and that during subsequent fiscal year 14 applications were denied because of residency requirement. *Barnes v. Board of Trustees (W.D. Mich. Dec. 21, 1973), 369 F Supp 1327*.

In action brought by members of state's Air National Guard stationed for their reserve obligations at particular airfield to enjoin defendants from enforcing Air Force Regulation prohibiting reservists, with certain exceptions, from wearing wigs while attending drills, where named plaintiff suggested three definitions for class they purported to represent, any definition of class which involved retroactive inclusion of all Air National Guardsmen who during period of time prior to filing of action may have been subject to punitive measures as consequence of violation of challenged regulations was not proper definition of those similarly situated to named plaintiffs at time they instituted action, and only proper and just definition of class would be all members of state's Air National Guard units who were stationed or headquartered at same airfield as named plaintiffs at time action was filed and who were at time subject to, or in future might be subject to, punitive measures as consequence of violation of challenged regulation, or who relinquished, or might relinquish in future, alleged constitutional rights because of regulation. *Cullen v. United States (N.D. Ill. Feb. 22, 1974), 372 F Supp 441, 18 Fed R Serv 2d (Callaghan) 982*.

In action against armed services' Discharge Review Board for alleged failure to comply with *38 USCS § 3103(e)(1)*, which requires Board to publish uniform standards for determining changes in veterans' discharge status which may

result in accrual of veterans' benefits, and seeking under Freedom of Information Act, *5 USCS § 552(a)(1)* and (2), to compel Board to publish and distribute such standards, certifiable class consists of all current service members in United States armed forces and all former service members who may at some future date appear before Board, or their next of kin who are eligible to apply to Discharge Review Board; however, class comprised of service members, or their next of kin, who still retain less than Honorable Discharges and have already been denied complete relief by Board is not certifiable where there is no showing that such class members have ever been injured by Board's failure to adopt such specific standards. *National Asso. of Concerned Veterans v. Secretary of Defense (D.D.C. Nov. 16, 1979), 487 F Supp 192*.

In class action challenging state benefits program for veterans who have both resided in state for 6 months and were residents before entering service, proposed class consisting of state veterans barred from receiving benefits because of 6 month residency requirement may be redefined by court to also include veterans who entered service as citizen of another state but then became state residents. *Farrington v. Adjutant General of Michigan (W.D. Mich. July 2, 1980), 492 F Supp 1362*.

Class consisting of "all veterans who were injured by exposure to Agent Orange" is adequately defined and clearly ascertainable for purposes of Rule 23, notwithstanding defendants' contention that class definition is subjective, since subjectiveness does not affect applicability of class trial's findings to members of class and it does not prejudice defendants in any way. *In re "Agent Orange" Prod. Liab. Litig. (E.D.N.Y. Dec. 16, 1983), 100 FRD 718, 38 Fed R Serv 2d (Callaghan) 279*.

187. Prisons and jails

In class action on behalf of all inmates who are now or who may in future be incarcerated in correctional facility against facility's superintendent for violation of procedural due process requirements necessary in any disciplinary proceeding against inmate which may result in placement in solitary confinement, class certification including future inmates is appropriate, where any class consisting of inmates confined at facility is likely to include individuals who were not identifiable at time class was certified, and where constant existence of class of persons suffering deprivation of due process is certain; class members whose claims have been previously litigated in state proceedings may still retain membership in class with entitlement to class relief, except to extent that such members litigated constitutional issues now before court which have bearing upon propriety of individual relief. *Powell v. Ward (S.D.N.Y. Feb. 27, 1980), 487 F Supp 917*, modified, *(2d Cir. N.Y. Mar. 4, 1981), 643 F2d 924*.

Action by arrestee against sheriff and his subordinates challenging policy or practice under which prisoners who are discharged by judge sitting at outlying county court are sent back to county jail rather than being released at place of their discharge is certified as class action even though definition of class can effectively include all residents of county. *Lewis v. Tully (N.D. Ill. Nov. 10, 1982), 96 FRD 370, 35 Fed R Serv 2d (Callaghan) 1576*.

Action for injunctive relief challenging alleged county policy of keeping persons in custody after court has discharged them is not rendered inappropriate for class action status because membership in class is constantly shifting, since allegedly static nature of defendants' practice anchors facts on solid ground and makes case appropriate for judicial resolution. *Lewis v. Tully (N.D. Ill. Oct. 31, 1983), 99 FRD 632*.

In suit by current and future residents of residential medical treatment center that served as halfway house for pre-released or paroled former inmates of certain correctional facility alleging that systematic defects at medical facility precluded adequate and timely physical and mental healthcare, residents proposed succinct class for purposes of class certification and provided proper legal foundation upon which to measure precise nature of class claims. *Clarke v. Lane (E.D. Pa. Mar. 31, 2010), 267 FRD 180*, dismissed without prejudice, *(E.D. Pa. Feb. 24, 2012), 2012 US Dist LEXIS 23737*.

188. Public utilities

In class action challenging constitutionality of Atlanta ordinances which authorized Department of Water Works to terminate service at address without notice to actual user because of nonpayment of past due account and to

refuse to reinstate such service or open separate service account with consumer until arrears are fully discharged, District Court erred in redefining class so broadly as to include "all present and future non-commercial users of water service provided by City" where many members of such class would harbor interests antagonistic to those advanced by individual plaintiffs, and accordingly, class would be limited to residential consumers of water furnished by City who had not contracted with City for water service in their own names. *Davis v. Weir (5th Cir. Ga. July 18, 1974), 497 F2d 139, 18 Fed R Serv 2d (Callaghan) 1497*, overruled in part as stated in *O'Neal v. City of Seattle (9th Cir. Wash. Sept. 25, 1995), 66 F3d 1064*.

In action challenging constitutionality of city water department's termination procedures for service, class is certifiable as all users of water in city who had water service terminated or were threatened with such termination without adequate due process procedures and as sub-class of tenants who were denied water service to residence because of delinquent water bills owed by owner of premise, notwithstanding defendants' contention that proposed class is overly broad, where plaintiffs' class is defined by issue raised, namely, that defendants' refusal to provide water users adequate due process procedures prior to termination of water service and denial of water service to tenants because of delinquent water bills owed by owners of premises was denial of due process. *Koger v. Guarino (E.D. Pa. May 3, 1976), 412 F Supp 1375, 24 Fed R Serv 2d (Callaghan) 108*, aff'd, *(3d Cir. Pa. 1977), 549 F2d 795*, disapproved, *Sterling v. Maywood (7th Cir. Ill. July 7, 1978), 579 F2d 1350*, disapproved, *Ransom v. Marrazzo (3d Cir. Pa. May 25, 1988), 848 F2d 398*.

189. Real property

Action alleging minimum hours provision of lease agreements for tenants of shopping mall to be violative of antitrust legislation could not be maintained as class action by one tenant on behalf of all tenants as to antitrust issues, where, in light of fast that not one of approximate 90 tenants in mall other than plaintiff appeared dissatisfied with minimum hours provision, existence of class of plaintiffs had not been shown. *Amajac, Ltd. of Georgia v. Northlake Mall (N.D. Ga. 1973), 59 FRD 169, 17 Fed R Serv 2d (Callaghan) 868, 1973 Trade Cas (CCH) P74510*.

In action originally instituted in state court to obtain declaration of rights with respect to impact of land use ordinance adopted by Tahoe Regional Planning Agency, where state court made order for maintenance of action as class action, federal District Court on removal can amend class action determination and limit class to landowners in Lake Tahoe Basin whose properties are included in General Forest District and Recreation District—two of several classifications of land use districts set up by ordinance for protection of Lake Tahoe and its environment—where (1) plaintiffs' prime contention is that land use ordinance, as applied to their lands, is so restrictive as to make land unavailable for any personal, private beneficial use and that ordinance is, in effect, dedication of lands to public for use as parks, forest, or general recreation areas, (2) two most restrictive classifications of land use provided by ordinance are General Forest District and Recreation District, and (3) it is fair inference from complaint that lands owned by plaintiffs have been classified in such districts. *Brown v. Tahoe Regional Planning Agency (D. Nev. May 23, 1973), 385 F Supp 1128*.

Residents and homeowners who lived near certain gas station, which had underground gasoline storage tank that allegedly leaked gasoline containing methyl tertiary butyl ether (MTBE), created ascertainable class under *Fed. R. Civ. P. 23(a)*, even though every member of class had not yet been identified, because class was based on effects of MTBE leakage, and its actual membership could be definitively identified during trial. *Koch v. Hicks (In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.) (S.D.N.Y. Feb. 20, 2007), 241 FRD 185*.

190. —Native Americans

In action brought by Indian tribe seeking declaration of their ownership of certain alleged aboriginal territory in state, certifiable class of defendants exists, comprising state, county, and local governments, businesses and individual landowners with interest in such property, excluding individual owners who occupy 2 acres or less of any of such land which serves as principal place of residence and excluding members of Indian tribe who have individual interest in any of such land, where class membership can be administratively determined from public records concerning land involved. *Oneida Indian Nation v. New York (N.D.N.Y. Mar. 5, 1980), 85 FRD 701*.

In action by Indian nation claiming ownership and right to possess certain land allegedly reserved for them by and in state against defendant class of real property owners, class of defendants will include all persons who claim title to subject land adverse to reserved title claims of Indians, including individual Indian land owners, but class will not include persons claiming derivative interest in subject land, where such persons may intervene if they believe it necessary to protect their property interests. *Cayuga Indian Nation v. Carey (N.D.N.Y. Mar. 25, 1981), 89 FRD 627, 32 Fed R Serv 2d (Callaghan) 885*, amended, *(N.D.N.Y. Nov. 9, 1981), 33 Fed R Serv 2d (Callaghan) 272*.

191. RICO

Financially needy students could be identified so as to comprise class in civil RICO action against Education Department; plaintiffs could establish that they received need-based grants or assistance through simple documentary evidence in response to class notice. *Rodriguez v. McKinney (E.D. Pa. July 8, 1994), 156 FRD 118*.

In suit alleging racketeering with respect to sales of deferred life insurance annuities, purchasers sufficiently alleged definable class, such that parties would be able to determine who was member of classes, because they asserted recovery on behalf of nationwide class and state-wide class in California on behalf of senior citizens, who purchased deferred annuities either directly, or through surrender of existing life insurance policy, or by borrowing against existing permanent life insurance policy during class period. *In re Nat'l W. Life Ins. Deferred Annuities Litig. (S.D. Cal. July 12, 2010), 268 FRD 652*.

192. Schools and education

Class certification is inappropriate in action on behalf of all children attending state public schools who have specific learning disabilities and are not receiving adequate special education, in that proposed class is so highly diverse and so difficult to identify that it is not adequately defined or nearly ascertainable; nor would certification of defendant class consisting of local educational agencies be appropriate because of diverse nature of relationship between handicapped children and such local agencies. *Adashunas v. Negley (7th Cir. Ind. Aug. 1, 1980), 626 F2d 600*.

In consolidated actions involving challenge to constitutionality of provisions of Ohio Revised Code, which plaintiffs sought to maintain as class action to obtain declaratory and injunctive relief against state provisions governing suspension and dismissal of students and employees of state supported colleges and universities who had been arrested or convicted of certain specified criminal offenses, definition of class to purportedly consist of all students, faculty, and staff members of state supported or state operated colleges and universities in Ohio was too broad, where, although plaintiff who had been indicted, arrested, or threatened with prosecution would have standing, most of proposed class would not qualify under such test; court would reform class to include only those students, faculty, and staff members who had either been arrested or convicted of particular listed offense. *Kister v. Ohio Board of Regents (S.D. Ohio Aug. 16, 1973), 365 F Supp 27*, aff'd, *(U.S. Jan. 7, 1974), 414 US 1117, 94 S Ct 855, 38 L Ed 2d 747*.

In action brought by 3 resident aliens declared ineligible for resident status for tuition purposes at Mississippi State University, where plaintiffs challenged constitutionality of provision of Mississippi Code classifying alien students as nonresidents for purpose of charging tuition incident to attending state-supported institution of higher learning and sought to represent class of alien residents lawfully residing as permanent residents of United States who resided in Mississippi and who had been declared ineligible for admittance into Mississippi State University as residents of state for tuition purposes solely because such persons were not citizens of United States, court would not interpret class definition broadly by considering all resident aliens within Mississippi as members, or potential members, of class, since named plaintiffs were granted leave to amend to redefine class, but failed to do so, and, even if last minute interpretation were accepted, it would constitute class too indefinite in scope. *Jagnandan v. Giles (N.D. Miss. Aug. 15, 1974), 379 F Supp 1178*, aff'd, in part, *(5th Cir. Sept. 20, 1976), 538 F2d 1166*.

Civil rights action brought by students challenging authority of board of education of city school district and individual members of it to determine by majority vote which textbooks should have been purchased and used in schools under its control during academic year was maintainable as class action on behalf of all students enrolled in

schools operated and maintained by city school district, notwithstanding contention that plaintiffs' class designation was improper for reason that majority of students and parents were not in sympathy with plaintiffs' views and, therefore, not similarly situated, where all members of purported class were affected by actions taken by board of education. *Minarcini v. Strongsville City School Dist. (N.D. Ohio Aug. 9, 1974), 384 F Supp 698*, aff'd in part, vacated in part, *(6th Cir. Ohio Aug. 30, 1976), 541 F2d 577*.

Plaintiffs, state residents over age 20 but under age 22 entitled to special education and related services from defendant department of education under Individuals with Disabilities Education Act, met *Fed. R. Civ. P. 23(a)* prerequisites; Rule 23(b) requirements also were met because they were denied free and appropriate public education when they aged out under *Haw. Rev. Stat. § 302A-1134(c)*. *R.P.-K. v. Dep't of Educ. (D. Haw. Mar. 15, 2011), 272 FRD 541, 79 Fed R Serv 3d (Callaghan) 65*.

Class certification was granted to students with autism, and their parents and guardians and future class members, regarding litigation over students being transferred under school district's policy of transferring autistic students from one school to another when they completed certain grade because requirements for class certification, under *Fed. R. Civ. P. 23(a)* and *23(b)*, were met. *P.V. v. Sch. Dist. of Phila. (E.D. Pa. Feb. 19, 2013), 289 FRD 227*.

193. Social Security

Federal District Court did not err in defining class broadly in action challenging defendant Secretary's procedure for recoupment of overpayment of benefits so as to include all recoupment cases rather than merely waiver cases, since while waiver and reconsideration cases required somewhat different analysis, they were not so different that District Court erred in treating class as single large class encompassing all recoupment cases, and where defendant, in motion in opposition to plaintiff's motion for class action in District Court, did not raise contention that class order, if granted, should be limited solely to waiver cases. *Mattern v. Weinberger (3d Cir. Pa. June 3, 1975), 519 F2d 150*, vacated, *(U.S. May 24, 1976), 425 US 987, 96 S Ct 2196, 48 L Ed 2d 812*.

In light of limited appellate jurisdiction under *42 USCS § 405(g)* governing appeals arising under Social Security Act, *42 USCS §§ 401* et seq., proposed class of plaintiffs challenging provision of Social Security Act creating gender based classification involving insurance benefits will be limited as follows: (1) class will exclude husbands whose applications were never acted upon by HEW Secretary, (2) court will grant limited waiver of requirement of exhaustion of administrative remedies to permit injunction against Secretary from applying invalid statutory provisions when he takes further administrative action on pending claims, (3) class will be limited in accordance with 60 day statute of limitations of § 405(g); and (4) with respect to husbands who have exhausted administrative remedies or whose claims will receive further administrative action, class may include only those husbands whose claims were denied, either finally or at some level of administrative process, prior to date of District Court decision. *Cooper v. Califano (E.D. Pa. 1978), 81 FRD 57*.

Plaintiffs failed to raise triable issue as to fundamental premise both of their complaint and of their proposed class definition, namely that Commissioner of Social Security violated rights of applicants for childhood disability benefits by failing entirely to consider, throughout disability determination process, cumulative and interactive effects of impairments that produced only moderate functional limitations within particular domain; in light of this failure, class as was proposed to be defined, even if certified, would have no members; under this rather unique set of circumstances, class certification would be futile and, accordingly, plaintiffs' class certification motion was denied; because proposed class had no members and action failed on its merits, proposed amendment—adding another party—would have been futile. *Encarnacion ex rel. George v. Astrue (S.D.N.Y. June 22, 2007), 491 F Supp 2d 453*, aff'd, *(2d Cir. N.Y. June 4, 2009), 568 F3d 72, Unemployment Ins Rep (CCH) P14405C*.

Class in Rehabilitation Act matter could have been defined as: all current and future recipients of Social Security Administration benefits, who receive benefits based on primarily mental (invisible) disability, and who have made, are making, or in future may make attempts to work in national economy; as so modified, implied prerequisite to certification that class be sufficiently definite would have been met. *Davis v. Astrue (N.D. Cal. May 1, 2008), 250 FRD 476*.

194. —Medicare and Medicaid

In action challenging constitutionality of Social Security Act provision (*42 USCS § 1395o(2)(B)*) denying eligibility for Medicare supplemental medical insurance program to aliens 65 or older unless aliens had been admitted for permanent residence and resided in country for at least five years, District Court erred in certifying as class aliens who have been or "will be denied" enrollment because they were not admitted for permanent residence and had not resided in country for five years, and in certifying as subclass aliens who have been or "will be denied" enrollment solely because of their failure to meet residency requirement; District Court lacked jurisdiction over claims of aliens who "will be denied" enrollment, and class and subclass were too broadly defined, where complaint did not allege and record did not show that any administrative action had been taken with respect to such aliens that was tantamount to denial. *Mathews v. Diaz (U.S. June 1, 1976), 426 US 67, 96 S Ct 1883, 48 L Ed 2d 478*.

Although district court failed to properly certify class of developmentally disabled persons entitled to intermediate care facilities for mentally retarded placement who had not received placement with reasonable promptness, implied class existed since plaintiffs filed suit as class action and timely filed for class certification, magistrate judge recommended certification, parties and district court acted at all times as if relief entered would be systemwide, and plaintiffs did not occasion delay in certifying class. *Doe v. Bush (11th Cir. Fla. Aug. 14, 2001), 261 F3d 1037, 50 Fed R Serv 3d (Callaghan) 1161*, cert. denied, *(U.S. Jan. 14, 2002), 534 US 1104, 122 S Ct 903, 151 L Ed 2d 872*.

District Court denied motion for class action determination of proposed class of Medicaid recipients composed of persons having income of more than $45 per month since class has no legal meaning or significance. *Friedman v. Berger (S.D.N.Y. Mar. 17, 1976), 409 F Supp 1225*, aff'd, *(2d Cir. N.Y. Dec. 8, 1976), 547 F2d 724*.

Predominance test of Rule 23(b)(3) is not satisfied in claim against airline for breach of contract of carriage alleging that 2,083 persons were "bumped" from flights from New York to Greece and airline failed to use its best efforts to carry passengers with reasonable dispatch since determination of action would require individual inquiry into treatment received by each member of proposed class. *Wilensky v. Olympic Airways, S. A. (E.D. Pa. 1977), 73 FRD 473, 25 Fed R Serv 2d (Callaghan) 674*.

In Rule 23(b)(2) class action against Department of NEW charging that denial of Medicare patients' medical insurance claims by hearing officers appointed by insurance carriers who administer program is violation of due process, certifiable class consists of those Medicare patients whose claims were denied after administrative hearings, rather than all persons who are eligible for Medicare, since defendant's alleged practices do not affect all persons eligible for benefits, but only those whose claims are denied by hearing officers, and class will not be certified as nationwide class, but will be limited to those plaintiffs within state, where plaintiffs have failed to allege that similar conduct has occurred outside state and different insurance carriers are responsible for administration of program in different states. *Phelps v. Harris (D. Conn. 1980), 86 FRD 506*.

Former supplemental security income beneficiaries who are presumed by state to be ineligible for Medicaid because of termination of supplemental security income eligibility may constitute class to challenge state's policy of terminating Medicaid benefit for supplemental security income recipients who lose income benefits since propriety of presumption is not pertinent to determination of appropriate class. *Crippen v. Dempsey (W.D. Mich. Sept. 24, 1982), 549 F Supp 643*.

Court granted class certification in plaintiffs' action alleging that defendants, Missouri Department of Social Services and its director, placed Medicaid lien on state workers compensation settlement, in violation of *42 USCS § 1983* and *§ 1396p(a)(1)*, because (1) plaintiffs satisfied requirements of *Fed. R. Civ. P. 23(a)* as defendants' alleged assertion of hundreds of Medicaid liens on workers compensation settlements satisfied numerosity, commonality, and typicality requirements and plaintiffs were adequate class representatives as they alleged same claims and were able to protect class interests; (2) defendants did not contest certification of class under R. 23(b)(2), so court granted certification under R. 23(b)(2) for purposes of injunctive relief; and (3) court also certified class under R. 23(b)(1) because there was risk of inconsistent or varying adjudication establishing incompatible standards of

conduct for defendants as case involved interpretation of federal anti-lien statute as applied to Medicaid liens on workers compensation settlements. *Doran v. Mo. Dep't of Soc. Servs. (W.D. Mo. May 2, 2008), 251 FRD 401*.

Where three subclasses of mentally retarded adults sought certification of *42 USCS § 1983* class action against State of Alabama for failing to promptly provide home- and community-based services under Medicaid waiver program, certification was granted to those who had been determined eligible for services under waiver program but had not received with reasonable promptness, and those who had applied for services but had not received reasonably prompt claims determination; however, certification was denied with respect to those who sought comparable services. *Susan J. v. Riley (M.D. Ala. Oct. 24, 2008), 254 FRD 439*.

Court certified class of Medicare beneficiaries who were or would be subject to Medicare as Secondary Payer (MSP) recovery and from whom Secretary of Department of Health and Human Services had demanded or would demand payment of MSP claims before there was determination of correct amounts through waiver or appeal process. *Haro v. Sebelius (D. Ariz. May 5, 2011), 789 F Supp 2d 1179*, vacated, in part, rev'd, *(9th Cir. Ariz. Sept. 4, 2013), 729 F3d 993*.

195. —Supplemental Security Income

District Court did not abuse its discretion in refusing to certify class of Social Security recipients challenging Social Security Administration's program of collecting overpayments of supplemental security income benefits by withholding current old age, survivors and disability insurance benefits, where more than 6 years had elapsed with no proof by counsel of continuing live controversy or live members of class interested in purported controversy; original named plaintiffs were not adequate representatives of purported class since none had suffered any injury, their problems had all been solved to administrative process, and none had any continuing financial stake in issues raised. *Reed v. Bowen (10th Cir. Colo. June 15, 1988), 849 F2d 1307, Unemployment Ins Rep (CCH) P14013A, 11 Fed R Serv 3d (Callaghan) 501*.

In action attacking exceptions to general rule, contained in defendant Secretary's regulations, that Supplemental Security Income benefits were not to be reduced, suspended, or terminated without prior notice and opportunity to challenge proposed change in benefits, although plaintiffs purported to represent all those who had had or were threatened with having Supplemental Security Income benefits affected by challenged regulations, court would limit composition of class to those whose benefits had been affected, since if court should grant declaratory and injunctive relief requested, regulation would be invalid as to every recipient of Supplemental Security Income benefits whether or not class included those threatened with adverse action, and court would further limit class to those recipients of benefits who had had their benefits reduced or suspended, since none of named plaintiffs had had benefits terminated as term was defined in regulations. *Cardinale v. Mathews (D.D.C. Aug. 26, 1975), 399 F Supp 1163*.

In action by New York City residents against certain city, state, and federal officers and agencies for failure to properly implement interim assistance plan provided for in Supplemental Security Income Program under *42 USCS §§ 1381* et seq., certifiable class consists of all residents of New York City who are entitled to benefits under such plan, and certification of statewide class is unnecessary, since benefits of ruling favorable to plaintiffs will also benefit other applicants statewide. *Rivers v. Califano (S.D.N.Y. 1980), 86 FRD 41, 29 Fed R Serv 2d (Callaghan) 1397*.

Former supplemental security income beneficiaries who are presumed by state to be ineligible for medicaid because of termination of supplemental security income eligibility may constitute class to challenge state's policy of terminating medicaid benefit for supplemental security income recipients who lose income benefits since propriety of presumption is not pertinent to determination of appropriate class. *Crippen v. Dempsey (W.D. Mich. Sept. 24, 1982), 549 F Supp 643*.

In action challenging Secretary's regulations and practice of terminating or reducing benefits to SSI recipients for nonmedical reasons prior to hearing before Administrative Law Judge, plaintiff class is not overbroad notwithstanding Secretary's contention that it includes potential claimants who have not presented claim to

Secretary or who have not sought timely judicial review, where class is limited to persons who have requested hearing within 10 days of reconsideration decision. *Taddonio v. Heckler (E.D. Pa. Apr. 25, 1985), 607 F Supp 620*.

196. Taxes, generally

In suit on behalf of counties of certain state, alleging that online travel companies had failed to remit full value applicable tourist development taxes, counties met requirements of accurate class definition for purposes of *Fed. R. Civ. P. 23(a)* because proposed class was precise and permitted ready identification of 59 counties that sought collection of tax. *County of Monroe v. Priceline.com, Inc. (S.D. Fla. Mar. 15, 2010), 265 FRD 659*.

In suit by consumers alleging that Internet provider charged customers for taxes, fees, and surcharges on wireless Internet data plans for certain telephones and wireless computers, despite prohibition of taxation of Internet access under federal and state law, class definition was sufficiently definite for purposes of certification because it was limited to customers within certain time period who were subjected to disputed charges. *In re AT&T Mobility Wireless Data Servs.Sales Litig. (N.D. Ill. Aug. 11, 2010), 270 FRD 330*.

197. Truth in Lending Act

In action brought under Truth-in-Lending Act (*15 USCS §§ 1601* et seq.) on behalf of all persons who entered into consumer credit transactions with defendant at one of its store locations, 36 persons having delinquent accounts are excluded from class since defendant indicated it intended to file counterclaims against them, since as to such persons, common questions of law and fact do not predominate in view of variety of state law issues and, as to such class members, class action is not superior, but would absorb large amount of court's time. *Rollins v. Sears, Roebuck & Co. (E.D. La. 1976), 71 FRD 540, 21 Fed R Serv 2d (Callaghan) 1088*.

Class of plaintiffs in Truth in Lending action is limited to individuals who obtained loans from defendant within limitations period, determined with reference to date of filing of amended complaint adding class action allegations rather than date of filing of original complaint. *Perry v. Beneficial Finance Co. (W.D.N.Y. 1979), 81 FRD 490, 27 Fed R Serv 2d (Callaghan) 39*.

198. Welfare and public assistance

In action wherein challenge was asserted to 2 policies of Louisiana Division of Income Maintenance with respect to termination of food stamp benefits, and class was restricted to those who were initially denied or subsequently terminated from food stamp benefits for failure to prove management after particular date, requirements of Rule 23(a) were satisfied and group appeared to constitute well-defined class of persons. *Stokes v. Bonin (E.D. La. Sept. 1, 1973), 366 F Supp 485*.

In consolidated actions brought by public aid recipients who sought declaratory and injunctive relief against state welfare officials, and who alleged that they could not obtain housing compatible with health and wellbeing under existing shelter system provided by defendants, inability of plaintiffs to concisely define proper class to bring action precluded them from fulfilling requirements of Rule 23; each definition proffered by plaintiffs called for conclusion, so that before adequate determination could be made of who was class member, court would be required to make adjudication that particular class member was denied livelihood consistent with health and wellbeing because he was not granted shelter exception. *Metcalf v. Edelman (N.D. Ill. 1974), 64 FRD 407, 19 Fed R Serv 2d (Callaghan) 236*.

In action brought by welfare recipients on behalf of themselves and those similarly situated to obtain declaratory and injunctive relief against Secretary of State's Department of Health and Rehabilitative Services on grounds that state provisions and regulations relating to transfer of assets as exclusion from eligibility, violate Constitution and that statute and regulations were inconsistent with Social Security Act (*42 USCS §§ 301* et seq.), court would define scope of affected class to be all those Florida residents who would otherwise have been eligible for state public welfare assistance but for fact they transferred asset within 2 years immediately prior to or during receipt of

assistance in contravention of challenged statute and regulations. *Owens v. Roberts (M.D. Fla. Feb. 28, 1974), 377 F Supp 45*.

In civil rights action seeking declaration of invalidity as to certain of defendants' eligibility requirements for aid program intended to offer short term financial and other assistance to families facing crises, in which action plaintiff sought to maintain action as class action on her own behalf and on behalf of her four minor children and on behalf of all others similarly situated, plaintiff failed to adequately identify class where only reference in stipulated facts that could possibly be considered as definition of class was statement to affect that, according to statistics, there were approximately 78,849 families with children in state who earned less than $7,000 gross per year, but received no financial assistance from designated welfare programs. *Baxter v. Minter (D. Mass. July 19, 1974), 378 F Supp 1213*.

Prerequisites for class certification were present in action brought to enjoin defendant state welfare officials from continuing to require welfare recipients to report to state offices for periodic AFDC redetermination interviews without reimbursing them for travel, day-care, or other expenses involved in making required journey, where proposed class was defined as all present and future AFDC recipients in Connecticut who were required to report to State Welfare Department Offices for AFDC redetermination interviews, pursuant to written departmental policy, without being provided with travel, day-care, or automobile expenses to and from such offices. *Andrews v. Norton (D. Conn. Nov. 19, 1974), 385 F Supp 672*, aff'd, *(2d Cir. Conn. Oct. 24, 1975), 525 F2d 113*.

In action brought to challenge United States Department of Agriculture's categorical exclusion of non-school Head Start projects from higher 80 percent of food operating cost reimbursement provisions of *42 USCS § 1761(c)(2)*, court would allow action to be maintained as class action, but would define class of Head Start projects so as not to extend definition beyond Michigan, because of complexity of case and because of lack of uniformity among circuits on jurisdictional and quasi-jurisdictional questions raised. *Michigan Head Start Directors Asso. v. Butz (W.D. Mich. May 30, 1975), 397 F Supp 1124*.

In case involving welfare recipients seeking preliminary injunction against application of state regulation permitting termination or suspension of benefits without fair hearing, plaintiffs' request for relief for all public assistance recipients in state was unwarranted, in that record was inadequate to show whether all "public assistance" programs were comprised of people as needy as those representing class (who were from Aid to Dependent Children and Home Relief), so that class to be certified was made up of recipients of Aid to Dependent Children, Home Relief, Veteran's Assistance, Aid to Aged, Blind and Disabled, and Medical Assistance, but was not to include recipients of food stamps, since their need was not as great as other recipients and parameters as to termination of food stamp benefits are different from other welfare recipients in class. *Viverito v. Smith (S.D.N.Y. Oct. 26, 1976), 421 F Supp 1305*.

Class consisting of all persons within state of Vermont who were employed in CETA-funded jobs on September 30, 1978 and who have been or will be terminated subsequent to that date as result of state policy requiring termination of public service employment within one year of date of hiring is certified since action is one for declaratory and injunctive relief against implementation of stated government policy which is generally applicable to members of class and in situation where court's rulings on issues presented will apply to class as whole. *Hark v. Dragon (D. Vt. May 3, 1979), 477 F Supp 308*, aff'd, *(2d Cir. Vt. Oct. 26, 1979), 611 F2d 11*.

In action by recipient of benefits under Aid to Families With Dependent Children and Medical Assistance Programs to compel state social service department to provide all such recipients with complete access to their case records prior to hearing determining recipients' entitlement to benefits, certifiable class is composed of all those within state who presently have or will in future have hearing determining issues relating to entitlement under either program. *Bizjak v. Blum (N.D.N.Y. June 2, 1980), 490 F Supp 1297, 29 Fed R Serv 2d (Callaghan) 1037*.

In suit by several disabled welfare recipients against commissioner of city human resources administration challenging new program whereby welfare recipients who suffered from certain mental or medical conditions were able to obtain services and benefits only through three hub centers in city, rather than through 29 neighborhood

offices, recipients were granted class and subclass certification because proposed class and subclass definitions were workable even though they incorporated statutory concepts of disability. *Lovely H. v. Eggleston (S.D.N.Y. Apr. 19, 2006), 235 FRD 248*.

199. Other property

In certifying five related class action suits involving allegations that class members were deprived of royalty payments for production of coalbed methane gas (CBM), district court abused its discretion because it failed to rigorously analyze whether administrative burden of identifying class members in ownership cases would render class proceedings too onerous. *EQT Prod. Co. v. Adair (4th Cir. Va. Aug. 19, 2014), 764 F3d 347, 89 Fed R Serv 3d (Callaghan) 604*.

In case where plaintiffs alleged that mining activities of defendants caused air, surface and ground water, and soil contamination of their property, exposing residents to unsafe levels of lead, heavy metals and other toxins, plaintiffs' definition of proposed class was untenable with respect to its description of persons who "owned or had interest in real property;" identification of members would not have been administratively feasible; although plaintiffs contended that identities of members of Property Owners Class could be easily ascertained objectively, such as thorough examination of deeds, this conclusory statement did not withstand scrutiny. *Cole v. ASARCO, Inc. (N.D. Okla. Apr. 2, 2009), 256 FRD 690*.

In action by property owners against paper manufacturing facility, property owners' motion for class certification was denied because it was not administratively feasible for court to determine whether particular individual met class definition, which included everyone who, as of date of complaint and second amended complaint, owned residential property within two miles of outer boundary of facility, with additional qualifiers that property was contaminated by releases of various substances into environment from facility, and property owners suffered in excess of $100 of diminution in value of real property. *Johnson v. Int'l Paper Co. (M.D. Ala. Oct. 20, 2010), 270 FRD 640*.

In action by property owners against paper manufacturing facility, property owners' motion for class certification was denied because exclusions from class required determination of which people within geographic area who own residential property also had personal injuries caused by releases from facility, which posed causation issues, and therefore made class definition improper. *Johnson v. Int'l Paper Co. (M.D. Ala. Oct. 20, 2010), 270 FRD 640*.

200. Miscellaneous

In actions brought by plaintiffs as representatives of class comprised of licensed owners of horses who won purses at defendants' race tracks, with respect to defendants' alleged failure to pay to plaintiff purse winners monies alleged to be theirs under annual purse agreements, class comprised of group of horse owners whose identities, it was alleged, could be determined from track records, was neither ill-defined nor ephemeral, and District Court's dismissal of actions would be reversed. *Berman v. Narragansett Racing Asso. (1st Cir. R.I. July 31, 1969), 414 F2d 311, 13 Fed R Serv 2d (Callaghan) 572*, cert. denied, *(U.S. 1970), 396 US 1037, 90 S Ct 682, 24 L Ed 2d 681*.

Maintenance of class action suit in case challenging state 90 day durational residency requirement for voting is denied where plaintiff has not defined class with sufficient precision to enable court to ascertain unnotified group of people he claims he should be permitted to represent. *Deyle v. Davis (D. Vt. 1972), 16 Fed R Serv 2d (Callaghan) 862*.

Plaintiff, in action against defendants for unauthorized representations as patent practitioner and for false representation of services under Lanham Act, failed to define and identify ascertainable class where complaint alleged class to be clients who dealt with defendants and for whom defendants prepared patent applications, but very viable issue in suit was whether defendants ever prepared patent application for plaintiff or anyone else, and plaintiff presented no evidence contradicting position of defendants that patent application was prepared by registered patent attorney not part of defendant's organization. *Arnesen v. Raymond Lee Organization, Inc. (C.D. Cal. 1973), 59 FRD 145*.

In action brought by 2 couples on behalf of "all persons who wish and are legally entitled to be married by Clerk of City of New York or by his agents," to obtain compensatory and punitive damages, as well as injunctive and declaratory relief with respect to requirements which defendant clerk established in conjunction with his officiating at civil weddings, class constitutes amorphous, imprecise group which is neither distinguishable nor definable, and, although court might narrow hypothetical class to all persons imminently seeking to be married by defendant or his agents, who object to dress and ring rules he promulgated, such resultant "class" is still incapable of ascertainment since any characterization requires inquiry into state of mind of each particular individual. *Rappaport v. Katz (S.D.N.Y. 1974), 62 FRD 512, 19 Fed R Serv 2d (Callaghan) 245*.

In Rule 23(b)(2) class action against college and lending institution, by students claiming they are not obligated to repay their student loans because of fiscal misconduct of college, students may not certify class consisting of themselves and those similarly situated who have agreed to contribute to costs of bringing this suit, but class may be certified consisting of all students with similar loans enrolled at college at time of alleged misconduct since classes are to be defined in terms of issues in case, not in terms of willingness or ability of potential class members to pay attorneys' fees. *Sembach v. McMahon College, Inc. (S.D. Tex. 1980), 86 FRD 188, 30 Fed R Serv 2d (Callaghan) 123*.

Plaintiff's proposed class definition was facially defective where proposed class membership required nothing but mere purchase of fountain mixed soft drink within state of Illinois during five year period, so that existence of proposed class remained unknown because definition failed to create membership that was contingent on any objectively ascertainable factors. *Oshana v. Coca-Cola Co. (N.D. Ill. Jan. 14, 2005), 225 FRD 575*, aff'd, *(7th Cir. Ill. Dec. 29, 2006), 472 F3d 506*.

b. Constitutional Protections

201. Arrest and detention of persons

Action sought to be maintained as class action with respect to claim seeking (1) declaration of unconstitutionality as to state statute defining means which might be used in effecting arrest, and (2) injunction against enforcement of statute in form of killing or severely wounding persons who simply fled to avoid arrest when not done in defense of life or safety, was not so maintainable where membership in alleged class, consisting, among others, of those citizens of particular city who might in future be subject to application of statute, was neither distinguishable nor definable. *Cunningham v. Ellington (W.D. Tenn. Mar. 5, 1971), 323 F Supp 1072*, disapproved, *Mattis v. Schnarr (8th Cir. Mo. Dec. 1, 1976), 547 F2d 1007*, disapproved as stated in *Carter v. Chattanooga (6th Cir. Tenn. June 27, 1988), 850 F2d 1119*.

In civil rights action wherein plaintiffs attack pattern resulting in illegal detention of persons charged with crime, court defines Rule 23(b)(2) class as all persons who, within past two years, had been, were, or would be, illegally detained, rather than accepting proposed class definition, since although proposed class consisting of persons who had been, or would be, affected by conduct charged to defendants is entirely appropriate where only injunctive or declaratory relief is sought, it is unsatisfactory in terms of damage claims, and since proposed definition is too broad in terms of statute of limitations, purporting to include all persons whose rights have ever been violated in past. *Rice v. Philadelphia (E.D. Pa. 1974), 66 FRD 17*.

Individuals who were swept up by city police in mass arrest of World Trade Organization protestors met their burden of establishing prerequisites for *Fed. R. Civ. P. 23* class certification in action alleging violations of their Fourth Amendment rights by city, its mayor, and its police chief; district court addressed class management difficulties by bifurcating case into liability and damages phases, and it modified proposed class by limiting time period and geographic boundaries related to arrests. *Hickey v. City of Seattle (W.D. Wash. June 5, 2006), 236 FRD 659*.

Putative class of people unlawfully stopped and who may be stopped by city police department due to racial profiling presented class that was sufficiently ascertainable for purposes of *Fed. R. Civ. P. 23(b)(2)*. *Floyd v. City of New York (S.D.N.Y. May 16, 2012), 283 FRD 153, 82 Fed R Serv 3d (Callaghan) 833*).

202. Prisons and jails

District Court abuses its discretion by including sentenced offenders incarcerated in county jail in plaintiff class of pretrial detainees challenging denial of contact visitation in county jails, sentenced offenders rights under Eighth Amendment being fundamentally different form due process rights of pretrial detainees. *Marcera v. Chinlund (2d Cir. N.Y. Feb. 27, 1979), 595 F2d 1231, 26 Fed R Serv 2d (Callaghan) 1144*, vacated, *(U.S. June 4, 1979), 442 US 915, 99 S Ct 2833, 61 L Ed 2d 281*, disapproved as stated in *West v. Infante (2d Cir. N.Y. May 9, 1983), 707 F2d 58*, disapproved, *Block v. Rutherford (U.S. July 3, 1984), 468 US 576, 104 S Ct 3227, 82 L Ed 2d 438*.

In action challenging constitutionality of state's statutory provisions allowing imprisonment of indigents for failure to pay court costs, although language of complaint to effect that action was brought on behalf of plaintiff and "all other indigent prisoners similarly situated," was vague description of class, complaint, when read as whole, adequately defined class as those indigent persons who were presently imprisoned in state because of failure to pay costs assessed against them in criminal proceedings, and action might be maintained as class action. *Anderson v. Ellington (M.D. Tenn. June 18, 1969), 300 F Supp 789*.

In class action on behalf of all inmates who are now or who may in future be incarcerated in correctional facility against facility's superintendent for violation of procedural due process requirements necessary in any disciplinary proceeding against inmate which may result in placement in solitary confinement, class certification including future inmates is appropriate, where any class consisting of inmates confined at facility is likely to include individuals who were not identifiable at time class was certified, and where constant existence of class of persons suffering deprivation of due process is certain; class members whose claims have been previously litigated in state proceedings may still retain membership in class with entitlement to class relief, except to extent that such members litigated constitutional issues now before court which have bearing upon propriety of individual relief. *Powell v. Ward (S.D.N.Y. Feb. 27, 1980), 487 F Supp 917*, modified, *(2d Cir. N.Y. Mar. 4, 1981), 643 F2d 924*.

Court declined to certify class of persons, arrested without warrant and imprisoned at specific jail after certain date, who did not receive prompt probable cause determination because to determine whether alleged unconstitutional probable cause hearing was "prompt," court had to examine specifics of each case; thus, to determine whether person fell within class as it was defined by proposed class representatives, court had to decide merits of each case; furthermore, proposed definition of class was underinclusive of all of proposed subclasses. *Robinson v. Gillespie (D. Kan. Oct. 16, 2003), 219 FRD 179*, dismissed, *(D. Kan. Sept. 22, 2004), 2004 US Dist LEXIS 21645*.

Correctional center detainees who alleged that their Fourth, Fifth, and Fourteenth Amendment rights were violated by unreasonable delays in being released from custody and by being strip-searched without individualized suspicion were certified as two separate classes because they met *Fed. R. Civ. P. 23(a)*'s numerosity, commonality, typicality, and adequacy of representation requirements. *Barnes v. District of Columbia (D.D.C. Mar. 26, 2007), 242 FRD 113*.

203. Privacy

Class action complaint for civil rights action against sheriff with respect to alleged violation of constitutional right to privacy and freedom to travel would be dismissed where plaintiffs, who could only be found to be representative of class of persons like themselves who were stopped at roadblocks but not harassed or searched, having failed to present claim individually, also failed to make out class, of which they were representative, which had cause of action. *Murtha v. Quinlan (S.D.N.Y. 1970), 50 FRD 292, 14 Fed R Serv 2d (Callaghan) 740*.

In action challenging constitutionality of Wisconsin statute placing limitations on sale and exhibition of devices designed to procure miscarriages or prevent pregnancy, there was sufficiently precise definition of class of all unmarried persons who wished to obtain contraceptive devices, notwithstanding that content of class would change when persons who were single became married and when persons who were married became single. *Baird v. Lynch (W.D. Wis. Nov. 26, 1974), 390 F Supp 740*.

204. Schools and education

In action brought by 3 resident aliens declared ineligible for resident status for tuition purposes at Mississippi State University, where plaintiffs challenged constitutionality of provision of Mississippi Code classifying alien students as nonresidents for purpose of charging tuition incident to attending state-supported institution of higher learning and sought to represent class of alien residents lawfully residing as permanent residents of United States who resided in Mississippi and who had been declared ineligible for admittance into Mississippi State University as residents of state for tuition purposes solely because such persons were not citizens of United States, court would not interpret class definition broadly by considering all resident aliens within Mississippi as members, or potential members, of class, since named plaintiffs were granted leave to amend to redefine class, but failed to do so, and, even if last minute interpretation were accepted, it would constitute class too indefinite in scope. *Jagnandan v. Giles (N.D. Miss. Aug. 15, 1974), 379 F Supp 1178*, aff'd, in part, *(5th Cir. Sept. 20, 1976), 538 F2d 1166*.

District court certified class of all present and future parents or guardians of African-American children enrolled or eligible to be enrolled within Georgia school district where plaintiffs claimed that school district maintained racially segregated school system that deprived African-American children their constitutional rights. *Thomas County Branch of the NAACP v. City of Thomasville Sch. Dist. (M.D. Ga. Feb. 5, 2004), 299 F Supp 2d 1340*, aff'd in part and rev'd in part, vacated, in part, *(11th Cir. Ga. Sept. 23, 2005), 425 F3d 1325*.

205. Search and seizure

District court properly denied class certification challenging municipal court judge's order directing police to impound any vehicle stopped for violating any one of some 14 state statutes since plaintiff failed to establish existence of group of identifiable plaintiffs appropriate for class certification; plaintiff did not support claim of numerosity with any reliable standards or estimates, and, in light of widely varying circumstances which might trigger order's mandatory impoundment provisions, plaintiff failed to meet requirements of commonality and typicality. *Coleman v. Watt (8th Cir. Ark. Oct. 25, 1994), 40 F3d 255, 30 Fed R Serv 3d (Callaghan) 982*.

In action brought to have state claim and delivery statute declared unconstitutional, class consisting of those persons in county whose property had been seized since action was instituted was capable of precise enough definition to allow suit to be pursued as class action if requirements of Rule 23 were met since all which was necessary to determine whether person was in or out of class was determination of when his property was seized. *Thomas v. Clarke (D. Minn. 1971), 54 FRD 245, 15 Fed R Serv 2d (Callaghan) 1579*.

Suit to enjoin continued execution of system of inspection of packages and briefcases carried into federal courthouse, although not maintainable as class action with respect to classes of litigants and spectators, was maintainable as class action with respect to class of attorneys who practiced in courthouse where identity of such attorneys was readily ascertainable in that they were listed by name on roll of attorneys as part of permanent court records. *Barrett v. Kunzig (M.D. Tenn. Aug. 11, 1971), 331 F Supp 266*, cert. denied, *(U.S. 1972), 409 US 914, 93 S Ct 232, 34 L Ed 2d 175*.

In action challenging constitutionality of self-help repossession and disposition provisions of Uniform Commercial Code provisions enacted in Michigan, where named plaintiffs, owners of automobiles which were repossessed without previous notice and opportunity for judicial hearing under challenged provisions, sought to represent class composed of themselves and all others whose automobiles were subject to repossession by named defendants without prior notice and opportunity for judicial hearing under challenged provisions, two of named plaintiffs who had no unpaid loan or outstanding security agreement with one of defendants and whose automobile was not subject to seizure and sale by defendant could not represent class, but where other named plaintiffs, individuals who had unpaid loans and outstanding security agreements at date complaints were filed, might represent class, and class would, accordingly, be defined in terms of latter named plaintiffs and other natural persons similarly situated whose automobiles were subject to repossession and final disposition by named defendants under color of challenged statutes without resort to judicial process. *Watson v. Branch County Bank (W.D. Mich. Aug. 12, 1974), 380 F Supp 945*, rev'd, *(6th Cir. Mich. 1975), 516 F2d 902*.

Members of proposed subclass of individuals in suit against various present and former federal, state and municipal officials for alleged illegal electronic surveillance, wiretapping and harassment are identified with substantial certainty for purposes of class action certification where plaintiff marshals array of evidence establishing identity of at least 500 individuals whose wire communications were intercepted. *Abramovitz v. Ahern (D. Conn. Dec. 14, 1982), 96 FRD 208, 35 Fed R Serv 2d (Callaghan) 1056*.

After narrowing definition of proposed plaintiff class by eliminating general jail population and persons charged with drug and violent offenses, court approved certification of plaintiff class of arrestees who were temporarily detained in jail, who shared common legal theory, namely, that county sheriff's blanket policy of body cavity and visual searches was unconstitutional because searches were not based on reasonable suspicion that individuals searched were concealing weapons or contraband. *Tardiff v. Knox County (D. Me. Nov. 5, 2003), 218 FRD 332, 57 Fed R Serv 3d (Callaghan) 308*, aff'd, *(1st Cir. Me. Apr. 9, 2004), 365 F3d 1, 58 Fed R Serv 3d (Callaghan) 513*.

In arrestees' class action lawsuit against city and police officer (defendants) regarding defendants' failure to notify arrestees when their seized cash could be reclaimed, court redefined due process class pursuant to *Fed. R. Civ. P. 23* to include only those arrestees who never received notice that their property was ready for return despite fact that city and police officers issued inventory receipts representing that they would be so notified; further, court redefined conversion and replevin supplemental class to include requirement that arrestees demanded return of money seized, unless such demand would have been futile under circumstances, which was element of conversion and replevin actions; additionally, arrestees whose claims accrued more than one year before filing were barred by statute of limitations, *745 Ill. Comp. Stat. 10/8-101(a)*, and could be members of conversion and replevin supplemental class. *Gates v. Towery (N.D. Ill. Oct. 16, 2006), 456 F Supp 2d 953*.

206. —Strip searches

Class was sufficiently ascertainable and definable in action challenging county detention center's policy of conducting strip searches of temporary detainees absent probable cause to believe that they possessed either weapons or contraband, since, notwithstanding center's contention that its records did not explicitly detail existence of probable cause or lack thereof, court concluded that existence of probable cause could be determined from center's data detailing nature of charge and reason for release, and subsequent history of detainee. *Smith v. Montgomery County (D. Md. Oct. 26, 1983), 573 F Supp 604, 37 Fed R Serv 2d (Callaghan) 1296, 14 Fed R Evid Serv (CBC) 1591*, dismissed, *(D. Md. Apr. 30, 1985), 607 F Supp 1303*.

Where former inmates alleged that county and its sheriff violated Fourth and Fourteenth Amendment rights of male inmates at county jail by subjecting them to strip search after judicial release from custody, inmates were entitled to class certification under *FRCP 23* because their proposed class—inmates who returned to jail following court order for their release and were strip searched upon that return—was sufficiently well-defined. *Bullock v. Sheahan (N.D. Ill. Nov. 19, 2004), 225 FRD 227*.

Correctional center detainees who alleged that their Fourth, Fifth, and Fourteenth Amendment rights were violated by unreasonable delays in being released from custody and by being strip-searched without individualized suspicion were certified as two separate classes because they met *Fed. R. Civ. P. 23(a)*'s numerosity, commonality, typicality, and adequacy of representation requirements. *Barnes v. District of Columbia (D.D.C. Mar. 26, 2007), 242 FRD 113*.

207. Speech and assembly

Civil rights action alleging conspiracy on part of defendants, persons charged with governing city's police department, and attacking constitutionality of city's ordinances could not be maintained as class action with class described as "other citizens who, like plaintiffs, belonged to organizations which it is alleged are unpopular with defendants, and who have participated and wish to continue participating by speech and conduct in activities which are controversial and unpopular with defendants but nevertheless lawful," where description was vague and indefinite and depended upon state of mind of particular individual, but action itself was maintainable as class

action, where proper class was shown to exist under evidence presented at trial. *Koen v. Long (E.D. Mo. Aug. 4, 1969), 302 F Supp 1383, 13 Fed R Serv 2d (Callaghan) 471*, aff'd, *(8th Cir. Mo. June 30, 1970), 428 F2d 876*.

In action brought under federal civil rights legislation for alleged deprivation of right to assemble peacefully and to be free from illegal practices, in which action plaintiff sought to represent class which would encompass all persons of political or social persuasion different than that of government officials and officers of city's police department, class as defined was not shown to exist where definition was based upon such general and indefinite state of mind, encompassing kaleidoscopic variety of mental positions which could be included, that there was no rational or reasonable process of defining and determine extent and character of class, and what individuals were in class or not in it. Vietnam Veterans against *War v Benecke (DC Mo 1974), 63 FRD 675*.

In civil rights class action brought on behalf of class which would encompass all persons of political or social persuasion different from that of government officials and officers of city's police department, class as defined was not shown to exist where it was clear that many, if not most all individuals who would be included in indefinite purported class, would lack standing to bring such suit in their own right. Vietnam Veterans against *War v Benecke (DC Mo 1974), 63 FRD 675*.

Action challenging constitutionality of city ordinance making it unlawful for habitual drunkards, known narcotic addicts, prostitutes, or convicted felons to assemble or congregate with other like persons was maintainable as class action with class defined as those persons who had been arrested pursuant to challenged ordinance, notwithstanding defendants' contention that class was too large, since there was substantial evidence that ordinance had been used primarily as dragnet device to clear streets and public places of undesirables, and good proportion of estimated 165,000 arrests were of repeaters. *Farber v. Rochford (N.D. Ill. Nov. 25, 1975), 407 F Supp 529*.

208. Miscellaneous

Requirement for maintenance of class action that class sought to be represented be adequately defined and clearly ascertainable was not satisfied in action brought by university professor and his daughter to enjoin alleged police intimidation where class was defined by plaintiff as being made up of residents of state active in peace movement. *DeBremaecker v. Short (5th Cir. Tex. Nov. 3, 1970), 433 F2d 733, 14 Fed R Serv 2d (Callaghan) 835*.

In action sought to be maintained as class action where declaratory and injunctive relief was requested regarding defendants' keeping of checklist of person likely to attempt entry into United States who might be subject to exclusion or in whom government agency might be interested, purported class consisting of "All American citizens whose names and certain information pertaining to them and their First Amendment activities are contained on checklist maintained by defendants. . . and who are not the subjects of any current and outstanding federal arrest warrant, indictment, or information, nor of any court order in connection with bail, parole or probation" was too amorphous to qualify for class action procedures. *Becket v. Marks (S.D.N.Y. May 14, 1973), 358 F Supp 1180*.

Plaintiff teacher's allegation of class action status for action claiming denial of constitutional rights in plaintiff's termination of employment by school board would be dismissed where plaintiff sought to represent all other similarly situated, but record revealed that there were no other teachers similarly situated as plaintiff. *Humphrey v. Highland Park Independent School Dist. (N.D. Tex. July 2, 1973), 361 F Supp 451*, aff'd, *(5th Cir. Tex. 1974), 489 F2d 1311*.

In civil rights action alleging that assessment of additional rent charges, imposition of fines, and other actions taken by defendant housing authority do not comply with procedural safeguards of due process clause and rules and regulations promulgated by Department of Housing and Urban Development, sub-classes consisting of all past and present tenants living in state financed housing operated by defendant housing authority and sub-class consisting of all past and present tenants residing in federally financed or leased housing operated by defendant housing authority are appropriate insofar as definition of class is concerned. *Braxton v. Poughkeepsie Housing Authority (S.D.N.Y. Mar. 22, 1974), 382 F Supp 992*.

In action under *42 USCS § 1983* where plaintiff's claim that defendants violated her First Amendment right to petition government focuses on defendants' alleged attempt to obstruct prior class action proceeding, class certified as to this claim is identical with that recognized in such prior proceeding. *Roselli v. Noel (D.R.I. May 25, 1976), 414 F Supp 417*.

Class certification is not appropriate in action by inmates of state mental health facility alleging that state's refusal to allow them to reside in less restrictive settings in community violates their constitutional rights; class of plaintiffs is ill-defined and not susceptible to accurate delineation since in light of evidence presented it is difficult to articulate what criteria and procedures underlie determination that mentally retarded resident of facility is not eligible for placement in alternative community setting. *Philipp v. Carey (N.D.N.Y. June 30, 1981), 517 F Supp 513*.

In suit brought by organization and parents against child welfare agency alleging constitutional rights violations regarding policies of agency in removing children from parental custody, court determined that portions of plaintiffs' proposed class definition accurately reflected plaintiffs' allegations. *People United for Children, Inc. v. City of New York (S.D.N.Y. Apr. 21, 2003), 214 FRD 252*.

c. Discrimination

(1) In General

209. Housing

Although action involving alleged residential racial discrimination was maintainable as class action on behalf of class whom plaintiff sought to represent, appropriate defendant class was not identified where, because defendants were named individually as defendants, there was no substantial reason to define them as class, and because of such lack of reason to define named defendants as class, it was most consistent with process to focus on group of named defendants as individuals in light of nature of allegations, particularly with respect to allegations of fraud and overreaching. *Contract Buyers League v. F & F Inv. (N.D. Ill. 1969), 48 FRD 7, 13 Fed R Serv 2d (Callaghan) 590, 1969 Trade Cas (CCH) P72754*.

In civil rights action involving alleged race discrimination in housing where one plaintiff, black woman, sought to represent class of all Negroes in Philadelphia metropolitan area who had in past or might desire in future to rent apartments in buildings owned, rented, managed, or controlled by defendants, and where white woman sought to represent all members of Caucasian race residing in buildings owned, rented, managed, or controlled by defendants who wished to live in integrated housing, court could not define class which black plaintiff represented in such way to include blacks who might desire in future to rent apartments because it could not determine whether or not such individuals existed by any objective criteria and, with respect to sub-class sought to be represented by white woman, class as defined was too vague because court could not objectively determine which Caucasians living in defendants' buildings might wish to live in integrated housing; however, court would order action to be proper class action under Rule 23(b)(2) with respect to class of all Negroes who applied for and had been denied apartments in defendants' building since particular date because of racial discrimination and class of all Caucasians living at time in defendants' building since particular date who wrongfully had been denied opportunity to live in integrated housing as result of racial discrimination. *Harris v. Dumont Co. (D. Pa. 1973), 61 FRD 423*.

Class defined as African-Americans whose home mortgage loan applications were denied by defendant bank on or after specified date, or who lived in predominantly minority neighborhoods at time their applications were denied, met definiteness requirement. *Buycks-Roberson v. Citibank Fed. Sav. Bank (N.D. Ill. June 29, 1995), 162 FRD 322*.

210. Public accommodations

In suit alleging violation of *42 USCS § 1981* by hotel's refusal to provide lodging for African-American church group, class was sufficiently ascertainable from list of church members who had intended to attend meeting at hotel, and as putative class members were intended third-party beneficiaries of contract between church and hotel, they were

entitled to bring suit under contract. *Macedonia Church v. Lancaster Hotel, L.P. (D. Conn. Sept. 30, 2010), 270 FRD 107*.

211. Schools and education, generally

Class definition was fatally indefinite, claims lacked commonality required by *Fed. R. Civ. P. 23(a)(2)*, and it was not possible to order final injunctive or corresponding declaratory relief on class-wide basis, as required by Rule 23(b)(2); as class should not have been certified, liability and remedial orders had to be vacated as well. *Jamie S. v. Milwaukee Pub. Schs (7th Cir. Wis. Feb. 3, 2012), 668 F3d 481, 81 Fed R Serv 3d (Callaghan) 890*.

Although class action brought by black and white parents of public school children in metropolitan area attempting to represent class of others similarly situated to obtain redress for alleged racially segregated public schools in City of Buffalo and in Buffalo Metropolitan area is maintainable as class action, certified class is restricted to parents of children attending Buffalo public schools, since little evidence is presented at trial regarding non-Buffalo Public School System policies and practices. *Arthur v. Nyquist (W.D.N.Y. Apr. 30, 1976), 415 F Supp 904*.

It is unfair and unrealistic to judge handling of class action portion of school desegregation case in 1951 by class certification standard which did not come into existence until nearly 15 years later; clarifying class definition to include future members of class of black students discriminated against by school district is not improper where relief originally ordered makes it obvious that class consisted of black students attending elementary schools in school district and, in light of respective nature of relief ordered, it is further obvious that class definition was intended to include future members of class. *Brown v. Board of Educ. (D. Kan. 1979), 84 FRD 383*.

Proposed definition of Spanish-speaking class of children alleging discrimination in education was flawed in including children no longer eligible to attend Illinois public schools, but could be altered to avoid defect, thus creating identifiable class. *Gomez v. Illinois State Bd. of Education (N.D. Ill. Aug. 26, 1987), 117 FRD 394*.

212. Sports and athletics

District court should have certified subclass of current and future women interested in playing varsity softball, rather than certifying only one class and excluding from it members of second class, where it found potential conflicts between members of class that included women interested in playing varsity lacrosse and women who wished to play varsity softball. *Boucher v. Syracuse Univ. (2d Cir. N.Y. Jan. 6, 1999), 164 F3d 113, 42 Fed R Serv 3d (Callaghan) 659*.

In suit by mother and daughter for alleged deprivation of rights in violation of Civil Rights statutes on account of school athletic association's requirement of separate girls' and boys' teams for interscholastic sports, where daughter sought to represent class of all female students of school district, there was not proper delineation of class action since it could not be determined whether class was composed of females who participated in interscholastic athletic contests, or of those who wished to participate in team sports only if they could do so in competition with males. *Ritacco v. Norwin School Dist. (W.D. Pa. Aug. 3, 1973), 361 F Supp 930*.

213. Miscellaneous

Civil rights action brought by white Roman Catholic allegedly expelled from membership in country club for advocating suspension of club's exclusionary policy of denying membership to Jews could not be maintained as class action where complaint did not allege facts showing or identifying class having common characteristics with individual or class having members similarly situated. *MacDonald v. Shawnee Country Club, Inc. (6th Cir. Ohio Feb. 16, 1971), 438 F2d 632*, cert. denied, *(U.S. 1971), 403 US 932, 91 S Ct 2255, 29 L Ed 2d 711*.

District court did not abuse its discretion in refusing to certify class in police officers' disability discrimination case since it would have had to individually consider whether each proposed class member was disabled under Americans with Disabilities Act, rendering proposed definition untenable. *Davoll v. Webb (10th Cir. Colo. Oct. 25, 1999), 194 F3d 1116, 45 Fed R Serv 3d (Callaghan) 441, 52 Fed R Evid Serv (CBC) 1662*.

In action alleging that student and youth fares of defendant airlines constituted discrimination in violation of Federal Aviation Act provision (49 USCS § 1374(b)) and Civil Rights Act (*42 USCS § 1985(3)*), which action was brought by 28-year-old woman and 2-year-old boy as representatives respectively of 2 different age classes, neither plaintiff could maintain class action on behalf of members of their class who would purchase tickets from defendants in future, in light of impossibility for court to determine who or how many plaintiffs would fall within such amorphous classes. *Eisman v. Pan American World Airlines (E.D. Pa. Dec. 22, 1971), 336 F Supp 543, 15 Fed R Serv 2d (Callaghan) 1060*.

In action challenging policies and practices resulting in disparate allocation of programs, facilities and services in city parks servicing wards inhabited predominantly by black citizens, proposed class may be defined by wards in which its members reside, where affected wards are enumerated and their geographic boundaries are described in terms of ordinance that fixes them, and where policies and practices of defendant city park district shape geographic contours of class, attacks on definiteness of class are not entitled to weighty consideration provided all other requirements for class certification are established. *Midwest Community Council, Inc. v. Chicago Park Dist. (N.D. Ill. 1980), 87 FRD 457, 30 Fed R Serv 2d (Callaghan) 1499*.

In actions brought by residents near atomic weapons facility alleging discrimination and dangerous exposure to radioactive and other toxic substances, class certification was inappropriate because residents failed to satisfy commonality, typicality, and fair and adequate representation requirements, where each individual resident had highly individualized claim based on his or her total exposure time, exposure period, medical history, diet, sex, age, and myriad of other factors; in addition, proposed class descriptions were so vague that it would be impossible to identify potential class members. *Ball v. Union Carbide Corp. (E.D. Tenn. Sept. 17, 2002), 212 FRD 380*, aff'd, *(6th Cir. Tenn. July 15, 2004), 376 F3d 554*, aff'd, *(6th Cir. Tenn. Sept. 30, 2004), 385 F3d 713*.

Plaintiff's motion for class certification under *Fed. R. Civ. P. 23* was denied in plaintiff's action alleging that defendants discriminated against him on basis of his race when one of their waiters refused to accept his tribal identification card as proof that he was old enough to buy alcohol, plaintiff's proposed class definitions were too broad because they included untold number of persons who were at no risk of suffering injury about which plaintiff complained because they had one of forms of identification acceptable under defendants' policy. *O'Neill v. Gourmet Sys. of Minn., Inc. (W.D. Wis. Mar. 4, 2002), 219 FRD 445*.

(2) Employment

(i) In General

214. Title VII, generally

In employment discrimination case, court must interpret Rule 23 to accommodate substantive policies of Title VII. *Payne v Travenol Laboratories, Inc. (1982, CA5 Miss) 673 F2d 798, 28 BNA FEP Cas 1212, 28 CCH EPD P 32647, 33 FR Serv 2d 1582*, reh den *(1982, CA5 Miss) 683 F2d 417* and cert den *(1982) 459 US 1038, 103 S Ct 451, 103 S Ct 452, 74 L Ed 2d 605, 30 BNA FEP Cas 440, 30 CCH EPD P 33157* and (criticized in *Sheffield v Homeside Lending, Inc. (In re Sheffield) (2000, BC SD Ala) 281 BR 24*).

Permissible scope of Civil Rights Act Title VII (*42 USCS §§ 2000e* et seq.) sex discrimination class should be determined pursuant to specific requirements of Rule 23 and not pursuant to overly technical applications of procedural limitations time periods. *Piva v. Xerox Corp. (N.D. Cal. Dec. 9, 1975), 70 FRD 378, 11 Empl Prac Dec (CCH) P10673*.

Proposed definition of class in sex discrimination action according to which there would be no cut-off date for class membership other than effective date of Title VII is not appropriate. *Christman v. American Cyanamid Co. (N.D. W. Va. Nov. 17, 1981), 92 FRD 441, 28 Empl Prac Dec (CCH) P32473, 33 Fed R Serv 2d (Callaghan) 737*.

In Seventh Circuit, temporal beginning of Title VII class can be controlled by complainants who filed administrative complaints earlier than date on which class representative filed. *Allen v. Isaac (N.D. Ill. Aug. 2, 1983), 99 FRD 45,*

39 Empl Prac Dec (CCH) P35989, 37 Fed R Serv 2d (Callaghan) 351, amended, *(N.D. Ill. Nov. 22, 1983), 100 FRD 373*.

215. EEOC complaints or charges

While complaint filed with EEOC by aggrieved employee limits to some extent scope of class which may be certified pursuant to *Rule 23, FRCivP*, in judicial proceedings, district court should not restrict scope of class more narrowly than ambit of EEOC investigation which complaint might be expected to stimulate. *McBride v. Delta Air Lines, Inc. (6th Cir. Tenn. Mar. 11, 1977), 551 F2d 113, 13 Empl Prac Dec (CCH) P11566*, vacated, *(U.S. Oct. 31, 1977), 434 US 916, 98 S Ct 387, 54 L Ed 2d 273*.

Named plaintiff in class action under Rule 23 may represent class composed of all those who could have filed charges of sex discrimination as of date on which named plaintiff filed charge. *Kyriazi v. Western Electric Co. (D.N.J. Oct. 30, 1978), 461 F Supp 894, 18 Empl Prac Dec (CCH) P8700*, vacated, in part, *(D.N.J. July 17, 1979), 473 F Supp 786, 21 Empl Prac Dec (CCH) P30300*.

Although representative parties in Title VII sex discrimination suit contend that their class definition reaches back 300 days prior to date when putative class member filed charges of discrimination before state administrative body, temporal scope of class definition must be governed by filing of administrative charges by one or more of representative parties. *Zahorik v. Cornell University (N.D.N.Y. Jan. 21, 1982), 1982 US Dist LEXIS 17630*.

216. Multiple-based discrimination

In civil rights action brought with respect to alleged race and sex discrimination in employment, Federal District Court errs in limiting and restricting classes by rejecting plaintiffs' attempt to represent all females, blacks and Spanish-Americans, and in limiting plaintiffs to representation of four subclasses which reflect occupations of named plaintiffs, where plaintiffs make broad scale attack on defendant's employment and promotion practices, with complaint extending beyond challenging promotional practices in plaintiffs' own departments and alleging that promotional policies throughout defendant's plant have discriminatory effect. *Rich v. Martin Marietta Corp. (10th Cir. Colo. Aug. 1, 1975), 522 F2d 333, 10 Empl Prac Dec (CCH) P10339, 21 Fed R Serv 2d (Callaghan) 509*, disapproved as stated in *Griffin v. Dugger (11th Cir. Fla. Aug. 7, 1987), 823 F2d 1476, 44 Empl Prac Dec (CCH) P37334, 8 Fed R Serv 3d (Callaghan) 782*.

In action under *42 USCS §§ 2000e* et seq. against state department of human resources for alleged racial discrimination in employment, plaintiff black female employee is not entitled to certification of class including employees discriminated on basis of sex, where plaintiff's charge filed with EEOC and investigation of EEOC was limited to allegations of racial discrimination. *Whittaker v. Department of Human Resources (N.D. Ga. May 15, 1980), 86 FRD 689*.

In action for discrimination in employment on basis of sex and national origin, court will certify class consisting of all past and present female employees nationwide where it appears that challenged practices are common to all defendant's United States offices and that defendant's offices lack autonomy in respects critical to case, although plaintiffs have made no specific allegations of discrimination in locations other than New York; however, court will expressly note that this determination, like all aspects of class certification order, is subject to subsequent modification or decertification as appropriate. *Avagliano v. Sumitomo Shoji America, Inc. (S.D.N.Y. Nov. 7, 1984), 103 FRD 562, 35 Empl Prac Dec (CCH) P34866*.

217. Inclusion of past or future employees, generally

Class of future employees is approved under Rule 23, in Title VII suit where plaintiff representative alleges "all-pervasive" discrimination on part of defendant. *Johnson v. Georgia Highway Express, Inc. (5th Cir. Ga. Oct. 30, 1969), 417 F2d 1122, 2 Empl Prac Dec (CCH) P10119, 13 Fed R Serv 2d (Callaghan) 511, 61 Lab Cas (CCH) P9355*, disapproved as stated in *Wheeler v. Columbus (5th Cir. Miss. Apr. 25, 1983), 703 F2d 853, 31 Empl Prac Dec (CCH) P33560, 36 Fed R Serv 2d (Callaghan) 405*, disapproved as stated in *Griffin v. Dugger (11th Cir. Fla.*

Aug. 7, 1987), 823 F2d 1476, 44 Empl Prac Dec (CCH) P37334, 8 Fed R Serv 3d (Callaghan) 782 (criticized in *Gen. Tel. Co. of Southwest v Falcon (1982) 457 US 147, 102 S Ct 2364, 72 L Ed 2d 740, 28 BNA FEP Cas 1745, 29 CCH EPD P 32781, 34 FR Serv 2d 371*).

Proposed class in Title VII suit, under Rule 23, excludes job applicants, since, if plaintiff employees are ultimately successful, court's decision automatically runs to benefit of applicants. *Barrett v. United States Civil Service (D.D.C. Dec. 10, 1975), 69 FRD 544, 10 Empl Prac Dec (CCH) P10586, 21 Fed R Serv 2d (Callaghan) 521*.

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Rule 23 does not include future employees where inclusion of such class is unnecessary for its members to be benefited by Title VII suit, and/or excluding such persons protects them against adverse consequences of unsuccessful suit. *Williams v. Wallace Silversmiths, Inc. (D. Conn. Nov. 11, 1976), 75 FRD 633, 22 Fed R Serv 2d (Callaghan) 1138*.

Under Rule 23, future employees are not properly includible within class in Title VII action if plaintiff employees seek to represent class comprising amorphous, phantom group, incapable of identification in terms of both individuals and numbers, and too ill defined to support class suit. *Moore v. Western Pennsylvania Water Co. (W.D. Pa. Jan. 20, 1977), 73 FRD 450, 22 Fed R Serv 2d (Callaghan) 1131*.

Proposed class of Title VII plaintiffs, including future employees is too broad under Rule 23, since future employees are not entitled to retroactive promotions or backpay relief, but would benefit from any declaratory and prohibitory injunctive relief which court directs at alleged discriminatory practices. *Rowinski v. Vaughn (D.D.C. Dec. 19, 1977), 77 FRD 406, 24 Fed R Serv 2d (Callaghan) 1091*.

Plaintiff class consisting of all past, present, and future individuals who have been denied unemployment benefits in state because of their inability to produce Immigration and Naturalization Service Work Authorization is properly certified under Rule 23(b)(2) in action challenging state employment commission requirement that all applicants for unemployment benefits produce such documentation. *Ibarra v. Texas Employment Com. (E.D. Tex. Oct. 4, 1984), 598 F Supp 104, 40 Fed R Serv 2d (Callaghan) 634*.

218. National origin or ethnic discrimination

In action against city fire department charging discrimination against Mexican-Americans in promotion and hiring practices, class certified would not include future job applicants. *League of United Latin American Citizens (LULAC) v. Salinas Fire Dep't (N.D. Cal. Aug. 19, 1980), 88 FRD 533*, aff'd, *League of United Latin American Citizens (LULAC), Monterey Chapter 2055 v. Salinas Fire Dep't (9th Cir. Cal. Aug. 24, 1981), 654 F2d 557, 26 Empl Prac Dec (CCH) P32067*.

In action for discrimination in employment on basis of sex and national origin, court will certify class consisting of all past and present female employees nationwide where it appears that challenged practices are common to all defendant's United States offices and that defendant's offices lack autonomy in respects critical to case, although plaintiffs have made no specific allegations of discrimination in locations other than New York; however, court will expressly note that this determination, like all aspects of class certification order, is subject to subsequent modification or decertification as appropriate. *Avagliano v. Sumitomo Shoji America, Inc. (S.D.N.Y. Nov. 7, 1984), 103 FRD 562, 35 Empl Prac Dec (CCH) P34866*.

Current and former employees of defendant, who brought action alleging employment discrimination based on national origin, do not have standing to maintain class action on behalf of individuals who were initially denied employment with defendant or who might be denied employment in future. *Reyes v. Walt Disney World Co. (M.D. Fla. Feb. 3, 1998), 176 FRD 654, 74 Empl Prac Dec (CCH) P45533, 40 Fed R Serv 3d (Callaghan) 430*.

219. Miscellaneous

In action brought by former Civil Service employee to challenge policy of Civil Service Commission of excluding from government employment all persons who engaged in or solicited others to engage in homosexual acts, where (1) plaintiff seeks to represent class of all persons who were at time, in past, or in future, employees of federal government and who engaged, or might engage, in acts of private, consensual homosexual conduct, and who are qualified to perform duties connected with employment position to which they had been, or would be, appointed, and whose discharges were, or would be, reviewed by Civil Service Commission, and (2) plaintiff requests court to order defendants to reinstate and reimburse wage losses of all members of such class previously discharged and for court to enjoin further discharges of members of class, retroactive relief cannot be granted to such class in view of difficulties of discovering members and giving them appropriate notice; however, there is narrower class on whose behalf it is appropriate to grant prospective relief: homosexual persons whom Civil Service Commission would deem unfit for government employment for sole reason that employment of homosexuals in government service might bring such service into type of public contempt which might reduce government's ability to perform public business with essential respect and confidence of citizens which it serves. *Society for Individual Rights, Inc. v. Hampton (N.D. Cal. Oct. 31, 1973), 63 FRD 399, 6 Empl Prac Dec (CCH) P8934*, aff'd, in part, *(9th Cir. Cal. Dec. 19, 1975), 528 F2d 905, 11 Empl Prac Dec (CCH) P10649, 21 Fed R Serv 2d (Callaghan) 171*.

In age discrimination action challenging mandatory retirement provision of § 632 of Foreign Service Act of 1946 (22 USCS § 1002), past employees who had already been retired were not properly includable in class with present employees since (1) none of named plaintiffs who purported to represent past employees had complied with statutory notice requirements of *29 USCS § 633a(d)* so that no representative of that group was properly before Court, and (2) interests of two groups might well conflict in view of fact that reinstatement was sought as remedy for past employees. *Bradley v. Kissinger (D.D.C. June 30, 1976), 418 F Supp 64, 12 Empl Prac Dec (CCH) P11054*.

Class alleging discriminatory hiring practices could not include potential applicants who were deterred from applying since it was too imprecise and speculative to be certified. *Harris v. General Dev. Corp. (N.D. Ill. Oct. 25, 1989), 127 FRD 655*.

Definition of proposed class in employment discrimination action was inadequate where there was no effort to limit time frame, to specify which plant or facility of employer was at issue, or to define class of employees with respect to department they worked in, their status as non-exempt or non-supervisory employees, their membership in union, or types of promotions for which they applied. *Brown v. Worthington Steel, Inc. (S.D. Ohio Oct. 8, 2002), 211 FRD 320*.

(ii) Race Discrimination

220. "Across the board" discrimination

In "across board" action under *42 USCS §§ 1981*, *2000e* to redress alleged continuous racial and sexual discrimination in employment practices, class is defined as all persons presently subject to alleged discriminatory policies of defendant and all who have been so subjected since effective date of equal employment opportunity provisions of Civil Rights Act of 1964 and continue to be adversely affected by such policies. *Briggs v. Brown & Williamson Tobacco Corp. (E.D. Va. May 19, 1976), 414 F Supp 371, 12 Empl Prac Dec (CCH) P11036*.

Since plaintiff must present facts which show existence of class, court must be presented with evidence, usually statistical, of reasonable across board discrimination before certifying broad across board class; thus, class action certification is denied in action by EEOC where (1) statistics presented by EEOC fail to include breakdown of departments and present no data on available minority work force, (2) assertion that 80 percent of black employees were concentrated in "operations classifications" does not define that term and does not state percentage of whites in those classifications, (3) EEOC fails to present statistics of number of white and black applicants actually hired, (4) although over 200 job classifications allegedly have never been held by black employee, there is no further explanation and defendants proffer statistics as to number of job classifications having only few employees, and (5)

binomial distribution analysis by defendants shows no inference of across board discrimination. *EEOC v. Westinghouse Electric Corp., Nuclear Turbine Plant (M.D.N.C. Jan. 3, 1979), 81 FRD 528*.

Class in racial discrimination in employment class action is restricted to salaried, non-exempt black employees at defendant's Lester, Pennsylvania plant since, while courts have applied across-the-board approach in multiplant employment discrimination cases, they insist on showing of factual nexus between claims of plaintiffs and claims of geographically disbursed class members and plaintiffs in case at bar fail to state facts demonstrating existence of such nexus. *Gramby v. Westinghouse Electric Corp. (E.D. Pa. Dec. 6, 1979), 84 FRD 655, 29 Fed R Serv 2d (Callaghan) 1356*.

221. Inclusion of past or future employees

In class action under *42 USCS § 2000e-2* against employer and employees' union charging that employer has engaged in racial discrimination regarding types of employment available to black people, training, promotions, transfers, compensation, and terminations, and that union has discriminatorily and in bad faith failed to properly represent black employees to protect them from such discriminatory conduct of employer, certifiable class consists of both past, present and prospective black employees of employer and past, present and prospective black members of union who have suffered or may suffer by reason of alleged discriminatory practices which are within scope of EEOC investigations of charges made by class representatives. *Newman v. Avco Corporation-Aerospace Structures Div. (M.D. Tenn. Dec. 18, 1973), 491 F Supp 89, 7 Empl Prac Dec (CCH) P9117*, amended, (M.D. Tenn. Feb. 8, 1974).

In civil rights action brought with respect to alleged race discrimination, on behalf of class composed of all present black employees of Richmond Bureau of Police, all past black employees of Bureau, all potential black employees and applicants for employment with Bureau, past, present, and future, as well as all black persons residing in City of Richmond entitled to police protection, class is reduced and will not include group of persons comprising all blacks in city entitled to police protection or group of persons comprising all past black employees and applicants for employment with Bureau, where former group of black persons lack proper standing before court and fail to satisfy prerequisite of Rule 23(a)(2), and latter group of persons is deficient with respect to Rule 23(a)(4) requirement, but class will include all present black employees of Bureau where general requisites necessary to maintenance of action are met, and also group of all future employees and applicants for employment with Bureau, even though such group is necessarily vague and amorphous, in light of purpose of Rule, ultimate outcome of litigation, res judicata effect of Rule 23(b)(2) class actions, and public interest in judicial economy. *Richmond Black Police Officers Ass'n v. City of Richmond (E.D. Va. Nov. 18, 1974), 386 F Supp 151, 10 Empl Prac Dec (CCH) P10268, 19 Fed R Serv 2d (Callaghan) 1296*.

Inclusion of potential future black applicants for employment in class of plaintiffs in race discrimination suit is permissible to enforce injunction against discrimination; blacks who not denied promotion or who are in upper level positions are includable in class; regional class is proper in suit alleging employment discrimination by Custom Service where hiring and promotion are regional; blacks applying for jobs or promotions after affirmative action plan began are not excludable from class; employees who left employ of customs service before suit was commenced are not members of class. *Beasley v. Griffin (D. Mass. Jan. 17, 1979), 81 FRD 114*.

222. Hiring

In action brought for alleged race discrimination in employment by black employees of defendant, where District Court did not enter order making class action determination as required by Rule 23(c)(1), but did, in its final decision, refer to class as all black citizens whom defendant company refused to hire, discharged from employment, discriminated against with respect to compensation, terms, conditions, and terms of employment, and otherwise segregated, classified, or deprived of employment opportunities because of race or color, Court of Appeals can limit class to actual employees of defendant company, since inclusion of rejected black applicants for employment and those black citizens who were deterred from applying because of defendant company's reputation in community raise doubt as to whether representation would be proper under Rule 23(a)(4), and since inclusion of class of

blacks who would have applied for employment except for defendant's reputation would create serious problems in terms of identification of individual members and determination of availability of openings for such persons. *EEOC v Detroit Edison Co. (1975, CA6 Mich) 515 F2d 301, 10 BNA FEP Cas 239, 10 BNA FEP Cas 1063, 9 CCH EPD P 9997, 19 FR Serv 2d 1502*, vacated on other grounds *(1977) 431 US 951, 97 S Ct 2668, 53 L Ed 2d 267, 14 BNA FEP Cas 1686, 14 CCH EPD P 7580* and (superseded by statute on other grounds as stated in *Dickinson v Ohio Bell Communications (1993, CA6 Ohio) 1993 US App LEXIS 17878*).

In action which District Court permitted as class action on behalf of class of all black persons who are either capable of performing work in skilled crafts positions, or are capable of being trained to do so, and who have been or would be denied employment in such positions because of their race, class does not have to be confined more precisely to those who are like plaintiff, namely, adult black man who completed apprenticeship as bricklayer mason, but was denied employment because he did not have five years' experience as journeyman, or possibly black man who kept from job with experience and apprenticeship requirements, where it is reasonable view that there are questions of law and fact as to existence of racial discrimination common to class described, that plaintiff's claim is typical of claims of class, that plaintiff will adequately protect class interest, and that, as so defined, class is so numerous that joinder was impracticable. *Crockett v. Green (7th Cir. Wis. Mar. 19, 1976), 534 F2d 715, 11 Empl Prac Dec (CCH) P10781, 21 Fed R Serv 2d (Callaghan) 502*.

In action brought to redress alleged racially discriminatory employment practices under *42 USCS §§ 1981* and *2000e*, where plaintiff seeks to represent class of all Negro persons who had been, continued to be, or would be denied employment and other equal employment opportunities with defendant because of defendant's acts, policies, practices, customs, and usages, although plaintiff has not shown that class he purported to represent satisfied prerequisites to class action in Rule 23(a)(2) and (3), plaintiff has shown that he satisfies all prerequisites of Rule 23(a) and (b)(2) when class is delineated to consist of those Negroes denied employment at defendant's general office because of defendant's alleged policy of refusing to hire persons arrested and convicted of criminal offense other than minor traffic violation, and when class is limited to appropriate time frame with respect to when members of class were allegedly denied employment because of defendant's policy, court conditionally allows action to be maintained as class action. *Green v. Missouri P. R. Co. (E.D. Mo. Apr. 13, 1973), 62 FRD 434, 7 Empl Prac Dec (CCH) P9235*.

Action instituted as class action for alleged discrimination employment in violation of Federal Civil Rights Act would not be certified as Rule 23(b)(2) or (3) action where plaintiff was unable to establish that defendant employed racially discriminatory hiring or personnel practices and did not come forward with any indication of others in her class, despite ample opportunity to do so, thus warranting conclusion that plaintiff failed to show existence of class. *McAdory v. Scientific Research Instruments, Inc. (D. Md. Feb. 23, 1973), 355 F Supp 468, 5 Empl Prac Dec (CCH) P8524, 16 Fed R Serv 2d (Callaghan) 1502*.

In action alleging racial discrimination in employment practices in operation of two company plants, previous class certification is amended to restrict class to department of plant in which plaintiff was employed on findings by court that plaintiff was not discriminated against with respect to hiring, that sole basis to support charge of racial discrimination was discharge because of race, and that hiring at each plant is separate and working conditions different. *Carpenter v. Herschede Hall Clock Div., Arnold Industries (N.D. Miss. Oct. 13, 1977), 77 FRD 700, 25 Fed R Serv 2d (Callaghan) 994*.

In Title VII action in which plaintiffs, African American truck drivers, filed suit against defendants, transportation company and its parent company, after being rejected for positions as over-the-road truck drivers at transportation offices operated by transportation company, plaintiffs presented sufficiently precise class definition to meet implied requirement of *Fed. R. Civ. P. 23(a)* where proposed class of deterred applicants was limited to African Americans possessing sufficient experience and training to meet company's minimum qualifications for over-the-road truck drivers but who were deterred or thwarted, because of company's reliance on word-of-mouth recruitment, from making timely applications for employment. *Nelson v. Wal-Mart Stores, Inc. (E.D. Ark. May 16, 2007), 245 FRD 358, 69 Fed R Serv 3d (Callaghan) 77* (criticized in *Ellis v Costco Wholesale Corp. (2012, ND Cal) 285 FRD 492, 116 BNA FEP Cas 118, 96 CCH EPD P 44630*).

223. Promotions

In civil rights action alleging unlawful discriminatory practices with respect to employment, transfer, and promotion of black and other minority persons in classified service of county, proposed class composed of Black, Spanish surnamed, and American Indian persons is sufficiently well-defined and identifiable, notwithstanding inclusion of Spanish surnamed and American Indian persons, and notwithstanding inclusion of those discouraged from applying for employment, or transfer, or promotion because of race or national origin. *Jones v. Milwaukee County (E.D. Wis. Sept. 26, 1975), 68 FRD 638, 10 Empl Prac Dec (CCH) P10448, 20 Fed R Serv 2d (Callaghan) 1339*.

Class of black employees of Tennessee Department of General Services who were qualified for desired promotions but were denied such promotions into positions that were subsequently filled by whites due to alleged discrimination is certified but class of applicants denied positions with department due to alleged discriminatory hiring and recruiting practices is not certified where plaintiff has made no showing that there are any discriminatees in this category. *Duncan v. Tennessee (M.D. Tenn. Mar. 2, 1979), 84 FRD 21, 19 Empl Prac Dec (CCH) P9087, 27 Fed R Serv 2d (Callaghan) 1251*.

224. Union activities

Action brought by plaintiff, Negro, in which it was alleged that defendant union had excluded Negroes from its membership because of race and that racial discrimination was also involved in referral practices, could not be maintained as class action where there was no one other than plaintiff in class. *Dobbins v. International Brotherhood of Electrical Workers (S.D. Ohio Sept. 12, 1968), 292 F Supp 413, 1 Empl Prac Dec (CCH) P9912, 58 Lab Cas (CCH) P9158*.

In civil rights action attacking pipefitters union's alleged policies of racial discrimination, class was not definite and identifiable, nor was its membership capable of definite identification, where complaint alleged that class to be represented was composed of "(a) all black persons who currently have skills, when measured by objective standards, to do journeymen pipefitters' work; (b) black persons who are partially skilled, when measured by objective standards, in pipefitting trade and who wish to expand their skills in pipefitting trade to reach at least that level of skill which is reflected in everyday work of average pipefitter journeyman; and (c) all black persons who wish to acquire skills in pipefitters' trade and who are physically capable of acquiring such skills and performing pipefitting work." *Allen v. Pipefitters Local Union etc. (D. Colo. Aug. 22, 1972), 56 FRD 473, 5 Empl Prac Dec (CCH) P8000, 16 Fed R Serv 2d (Callaghan) 876*.

In class action under *42 USCS § 2000e-2* against employer and employees' union charging that employer has engaged in racial discrimination regarding types of employment available to black people, training, promotions, transfers, compensation, and terminations, and that union has discriminatorily and in bad faith failed to properly represent black employees to protect them from such discriminatory conduct of employer, certifiable class consists of both past, present and prospective black employees of employer and past, present and prospective black members of union who have suffered or may suffer by reason of alleged discriminatory practices which are within scope of EEOC investigations of charges made by class representatives. *Newman v. Avco Corporation-Aerospace Structures Div. (M.D. Tenn. Dec. 18, 1973), 491 F Supp 89, 7 Empl Prac Dec (CCH) P9117*, amended, (M.D. Tenn. Feb. 8, 1974).

225. Miscellaneous

While evidence supporting finding of liability in Title VII race discrimination suit against state Department of Corrections may have been less substantial with respect to some facilities than others, that does not support finding that class was overbroad, since, at remedial phase of suit, District Court can cure any overbroadness of class which might exist by carefully scrutinizing evidence then presented in light of evidence already adduced and tailoring remedy in way that only those harmed by discriminatory practices will be compensated. *Jones v Hutto (1985, CA8 Ark) 763 F2d 979, 45 BNA FEP Cas 651, 37 CCH EPD P 35371*, vacated without op, remanded *(1985) 474 US 916, 106 S Ct 242, 88 L Ed 2d 251, 45 BNA FEP Cas 776, 38 CCH EPD P 35560* and (criticized in *Smilow v Southwestern Bell Mobile Sys. (2001, DC Mass) 200 FRD 5*).

In action brought under Title VII of Civil Rights Act of 1964 with respect to alleged discrimination against Negroes in employment, in which action plaintiff class was originally defined as being Negro persons who were, or might be, employed by defendant at one of its plants, who had been and continued to be, or might be, adversely affected by complained of practices, court can find no reason why class, as originally defined, should be modified where court has no reason to be concerned about quality of legal representation in case and has been advised that there is no conflict of interest as between plaintiff and intervenors. *Godbolt v. Hughes Tool Co. (D. Tex. Dec. 18, 1972), 63 FRD 370*.

In action brought for alleged race discrimination in employment under Title VII of Civil Rights Act of 1964 (*42 USCS §§ 2000e* et seq.) on behalf of class consisting of all black persons, whether then employed or retired, who were employees of company on or after certain date and who were either (1) hired before date of merger of pool jobs under segregated lines of progression or (2) hired on or after date of merger of pool jobs under segregated lines of progression, but who nevertheless occupied permanent jobs in all-black line of progression, although precise definition of class varies from one department to another, class is not narrowed to exclude those black employees hired on or after date of merger of pool jobs on ground that those blacks were free to enter all-white lines. *Bush v. Lone Star Steel Co. (E.D. Tex. Jan. 16, 1974), 373 F Supp 526, 7 Empl Prac Dec (CCH) P9179*.

In civil rights action alleging race discrimination in employment, court defines class to include all black employees of defendant employer, excluding office and supervisory personnel, who are or were employed and were discharged or laid off since particular date, notwithstanding defendants' objection to defining class to include all past and future applicants for employment and notwithstanding plaintiffs' contention that they might represent and assert claims of past and prospective job applicants who were never employed in any capacity by defendant, but definition will be subject to modification, either by restriction, expansion, subdivision, or otherwise as need for such action becomes apparent. *Freeman v. Motor Convoy, Inc. (N.D. Ga. Jan. 9, 1975), 68 FRD 196, 8 Empl Prac Dec (CCH) P9798, 19 Fed R Serv 2d (Callaghan) 650, 19 Fed R Serv 2d (Callaghan) 650, 21 Fed R Serv 2d (Callaghan) 13, 21 Fed R Serv 2d (Callaghan) 13*, aff'd, *(11th Cir. Ga. Mar. 21, 1983), 700 F2d 1339, 31 Empl Prac Dec (CCH) P33455, 36 Fed R Serv 2d (Callaghan) 185*.

(iii) Sex Discrimination

226. "Across the board" discrimination

Plaintiff with sex discrimination employment claim was not entitled to class certification where she relied solely on rejected "across-the-board" theory that all suits alleging discrimination on basis of membership in protected class are by definition class actions. *Coon v. Georgia Pac. Corp. (11th Cir. Fla. Oct. 21, 1987), 829 F2d 1563, 44 Empl Prac Dec (CCH) P37513, 9 Fed R Serv 3d (Callaghan) 425*.

In "across board" action under *42 USCS §§ 1981*, *2000e* to redress alleged continuous racial and sexual discrimination in employment practices, class is defined as all persons presently subject to alleged discriminatory policies of defendant and all who have been so subjected since effective date of equal employment opportunity provisions of Civil Rights Act of 1964 and continue to be adversely affected by such policies. *Briggs v. Brown & Williamson Tobacco Corp. (E.D. Va. May 19, 1976), 414 F Supp 371, 12 Empl Prac Dec (CCH) P11036*.

227. Coverage for contraceptives

Employee was entitled to certification of class in suit against employer, which operated nationwide retail chain, alleging that employer's refusal to provide health insurance coverage for prescription contraceptives constituted sex discrimination; court narrowed class to female employees who had been covered by insurance plan during time period defined by employee's Equal Employment Opportunity Commission filing, and who used prescription contraceptives during relevant period. *Mauldin v. Wal-Mart Stores, Inc. (N.D. Ga. Aug. 23, 2002), 2002 US Dist LEXIS 21024* (criticized in *Standridge v Union Pac. R.R. Co. (In re Union Pac. R.R. Empl. Practices Litig.) (2007, CA8 Neb) 479 F3d 936, 89 CCH EPD P 42739*).

228. Inclusion of past or future employees

In action brought under Title VII of Civil Rights Act of 1964 (*42 USCS §§ 2000e* et seq.) for casualty insurance company's alleged sex discrimination with respect to its female technical employees, where District Court determined plaintiff class to be composed of past, present, and future female technical employees in defendant's claim department in entire geographical area where defendant did business, employees whose claims were time barred by statute of limitations contained in Title VII—those who left employ of defendant more than 210 days before filing of charges with Equal Employment Opportunity Commission by named representatives—should have been excluded from class, and part of District Court order including in class past employees whose claims were time barred would be vacated. *Wetzel v Liberty Mut. Ins. Co. (1975, CA3 Pa) 508 F2d 239, 9 BNA FEP Cas 211, 9 CCH EPD P 9931, 19 FR Serv 2d 1073*, cert den *(1975) 421 US 1011, 95 S Ct 2415, 44 L Ed 2d 679, 10 BNA FEP Cas 1056, 9 CCH EPD P 10176* and (superseded by statute on other grounds as stated in *Miller v Hygrade Food Prods. Corp. (2001, ED Pa) 198 FRD 638, 84 BNA FEP Cas 1755*).

Under Rule 23, in Title VII suit, class does not include women who might apply for positions in future because of difficulty in identifying members of such class. *O'Bannon v. Merrill Lynch (W.D. Pa. June 5, 1975), 1975 US Dist LEXIS 16867*.

In action brought by former college professor under Title VII of Civil Rights Act of 1964 (*42 USCS §§ 2000e* et seq.) for alleged sex discrimination in employment, although plaintiff seeks to represent all future employees of college from which she was discharged, as well as all former employees and unsuccessful applicants since effective date of Civil Rights Act, class would not include those persons who could not have filed charge with Equal Employment Opportunity Commission on date plaintiff's charge was filed with Commission, and class would include only those employees who left employ of college on or subsequent to date when educational institution exemption from Title VII was deleted and only those applicants for faculty positions who applied and were rejected on or subsequent to such deletion date. *Presseisen v. Swarthmore College (E.D. Pa. Mar. 25, 1976), 71 FRD 34*, disapproved as stated in *Al-Khazraji v. St. Francis College (3d Cir. Pa. Mar. 3, 1986), 784 F2d 505, 39 Empl Prac Dec (CCH) P35960*, superseded by statute as stated in , *Savko v. Port Auth. of Allegheny County (W.D. Pa. May 22, 1992), 800 F Supp 268, 9 Empl Prac Dec (CCH) P41677* (superseded by statute on other grounds as stated in *Savko v Port Auth. of Allegheny County (1992, WD Pa) 800 F Supp 268, 58 BNA FEP Cas 1641, 59 CCH EPD P 41677*).

Employment sex discrimination class action may be maintained pursuant to Rule 23(b)(2) on behalf of all past, present and future women employees by former female employee of defendant; whether plaintiff may proceed on behalf of nationwide class is dependent upon showing that nationwide criteria exist which have discriminatory impact, or that pervasive practice of discriminatory exercises of discretion by district or regional supervisors throughout country exists; in absence of such showing, recognition of nationwide class of plaintiffs is clearly improper. *Canty v. Philip Morris U. S. A. (E.D. Pa. 1978), 26 Fed R Serv 2d (Callaghan) 975, 1978 US Dist LEXIS 16626*.

To extent that future employees would be affected by sexual discrimination subsequent to action, injunctive relief will adequately protect their interests regardless of whether such presently unascertainable persons are class members. *Foster v. Bechtel Power Corp. (E.D. Ark. Mar. 24, 1981), 89 FRD 624, 32 Fed R Serv 2d (Callaghan) 867*.

Class certified in sex discrimination in employment action would exclude future employees since no benefits could accrue to them that would not accrue in absence of class membership. *Avagliano v. Sumitomo Shoji America, Inc. (S.D.N.Y. Nov. 7, 1984), 103 FRD 562, 35 Empl Prac Dec (CCH) P34866*.

229. Different job positions

In action brought by female former ground employee of defendant airline under Title VII of Civil Rights Act of 1964 (*42 USCS §§ 2000e* et seq.) because of defendant's alleged sex discrimination in its maternity leave policy, where plaintiff seeks to represent both flying personnel and ground employees, while challenge to maternity leave policy involves some common issues of law affecting all female employees, it is clear that there were important factual

differences pertaining to stewardesses, and plaintiff's class will accordingly be limited to ground employees. *Newmon v. Delta Air Lines, Inc. (N.D. Ga. Dec. 31, 1973), 374 F Supp 238, 7 Empl Prac Dec (CCH) P9154*.

In civil rights action brought by flight attendants employed by defendant airline to challenge maternity policies of airline as applied to female employees, class to be represented by plaintiffs will be limited to flight attendants, to exclusion of ground employees, where issues applicable to flight attendants were not applicable to ground employees, relief sought in form of transfer of pregnant flight attendants to available ground jobs would likely conflict with interests of ground personnel in job security, and validity of airline's maternity policies for ground personnel is pending at time in other action; class will be further limited by excluding those who terminated their employment with airline and failed to file timely charge of sex discrimination. *Burwell v. Eastern Airlines, Inc. (E.D. Va. Oct. 9, 1975), 68 FRD 495, 20 Fed R Serv 2d (Callaghan) 1226*.

In action by female physicians on faculty of medical college, alleging sex discrimination in employment practices of college, recertification of class to include female nonphysicians on faculty is inappropriate, since typicality and commonality requirements of Rule 23 are unsatisfied; qualifications and responsibilities of two groups differ significantly, earnings and employment possibilities vary, motion was brought 4½ years after commencement of action and inclusion of female nonphysicians will double size of class, substantially prolonging and complicating trial. *Sobel v. Yeshiva University (S.D.N.Y. Jan. 28, 1980), 85 FRD 322, 22 Empl Prac Dec (CCH) P30653, 28 Fed R Serv 2d (Callaghan) 1110*.

In action alleging sex discrimination against female employees, class may be defined to include department chairpersons and program directors, notwithstanding that they are supervisors of other members of class, since (1) plaintiffs' claim that employer has formulated policies which discriminate against women, (2) female department chairpersons and program directors may be subject to and injured by such policies, and (3) whether or not such policies impact female department chairpersons and program directors discriminatorily is question of fact; for similar reasons, class may also include persons in other job categories, notwithstanding employer's claim that named plaintiffs cannot represent such categories because they have never been members of those categories. *Penk v. Oregon State Bd. of Higher Education (D. Or. Sept. 28, 1982), 99 FRD 501*.

230. Hiring

In civil rights class action brought by female who had been refused employment as assistant professor at college, where plaintiff alleged discrimination on basis of sex and sought to represent females who were employed by college and who had been denied opportunities for positions leading to tenure based on sex and females who had applied for and been refused employment based on sex, plaintiff had not made any satisfactory showing that there was class, or at least that there was class sufficiently numerous to justify class action treatment, in light of fact that complainant regarding sex discrimination under Title VII of Civil Rights Act of 1964 (*42 USCS §§ 2000e* et seq.) must file complaint with Equal Employment Opportunity Commission before bringing court action and no person other than plaintiff had filed any such complaint with Commission regarding defendant college. *O'Connell v. Teachers College (S.D.N.Y. July 8, 1974), 63 FRD 638, 8 Empl Prac Dec (CCH) P9518, 18 Fed R Serv 2d (Callaghan) 1374*.

In class action, under Rule 23, alleging sex discrimination in employment, females allegedly "chilled" from applying for employment by defendants' discriminatory practices may not be certified as members of plaintiffs class because such group was indefinable and unidentifiable. *Capaci v. Katz & Besthoff, Inc. (E.D. La. July 31, 1976), 72 FRD 71, 23 Fed R Serv 2d (Callaghan) 785*.

Class, if any, of plaintiffs in action alleging sex discrimination in employment, should not be restricted to field office in which plaintiff applied for job with insurance company, where (1) interviewer told plaintiff he had to check with home office before talking with her further, (2) field manager's guide was prepared by home office to assist recruitment, hiring, and promotion, and (3) field manager's autonomy in making employment decisions was bridled by home office control. *Consor v. Occidental Life Ins. Co. (N.D. Tex. Mar. 19, 1979), 469 F Supp 1110, 19 Empl*

Prac Dec (CCH) P9162, 27 Fed R Serv 2d (Callaghan) 1016, 27 Fed R Serv 2d (Callaghan) 1016, 28 Fed R Serv 2d (Callaghan) 204, 28 Fed R Serv 2d (Callaghan) 204.

In action alleging sex discrimination in employment, evidence supports inclusion of both applicants and employees in class which employee seeks to represent, where evidence reflects (a) reciprocal relationship between hiring and transfer and promotion opportunities, and (b) overarching subjective decision making process affecting both applicants and employees; while there may be distinct issues related to merits of claims of individuals or type of relief to be afforded them, such issues of proof and remedy are not due to be resolved on motion for class certification, and it is sufficient that claims, injuries alleged, and remedies sought weave together issues of fact and law common to all putative class members. *Johnson v. Montgomery County Sheriff's Dep't (M.D. Ala. Sept. 12, 1983), 99 FRD 562, 37 Fed R Serv 2d (Callaghan) 959*.

231. Miscellaneous

In action brought by several individual female employees of corporation and by union and its locals representing individuals against corporation for alleged violations of Title VII of Civil Rights Act of 1964 [*42 USCS § 2000e*], there is no sufficient reason to expand scope of class beyond those statutorily entitled to be plaintiffs therein, even though as practical matter injunctive relief, if granted, could ultimately benefit all female employees of corporation. *Grogg v. General Motors Corp. (S.D.N.Y. Aug. 17, 1976), 72 FRD 523, 12 Empl Prac Dec (CCH) P11204, 24 Fed R Serv 2d (Callaghan) 293*, disapproved, *Northwest Airlines, Inc. v. Transport Workers Union (U.S. Apr. 20, 1981), 451 US 77, 101 S Ct 1571, 67 L Ed 2d 750*.

In class action challenging airline's no-marriage rule for flight cabin attendants, definition of class must be limited to those persons who are capable of filing EEOC charges on or after date named representative filed; but where earlier-filing is properly allowed to intervene on behalf of herself and all other similarly situated, all those persons who were capable of filing EEOC charges at or after time she filed her charges are legitimate members of litigating class; until such intervention takes place, limits of district court's jurisdiction must be measured by jurisdictional time period applicable to named representative's EEOC filing. *Inda v. United Air Lines, Inc. (N.D. Cal. Apr. 16, 1979), 83 FRD 1, 20 Empl Prac Dec (CCH) P30194, 28 Fed R Serv 2d (Callaghan) 58*.

Motion to change definition of class from "full-time" women faculty members to all women faculty members who have worked .50 FTE (full-time equivalency) or more is appropriately granted in job discrimination suit against state board of higher education, where plaintiffs claim that .50 FTE to .99 FTE women faculty members are discriminated against in same ways as full-time women faculty members, and where only real differences pointed out by defendant are that only full-time faculty members are prohibited from having outside employment and are entitled to sabbaticals. *Penk v. Oregon State Bd. of Higher Education (D. Or. Aug. 12, 1982), 99 FRD 495*.

d. Securities, Stocks and Bonds

232. Fraud, generally

In action brought for violation of Securities Exchange Act in connection with alleged securities fraud, plaintiffs could not represent purchasers of stock of corporate defendant's subsidiaries and affiliates, including, but not limited to, those stock of which plaintiffs themselves were open-market purchasers, since purported "class" was too amorphous and imprecise and was totally unmanageable as plaintiffs did not specify which shareholders of exactly which corporation they wished to include, but class action could still be maintained on behalf of separate classes consisting of open-market purchasers of stock of parent corporation and certain subsidiaries and affiliates. *Price v. Skolnik (S.D.N.Y. 1971), 54 FRD 261, 15 Fed R Serv 2d (Callaghan) 409, Fed Sec L Rep (CCH) P93149*.

In securities action based on fraud-on-the-market theory, court will include in class those who purchased and sold stock in question during relevant period and those who only purchased during this time, but it will not include those who only sold during this time; court will designate, as beginning date of relevant period, date on which alleged fraudulent activities began, notwithstanding that it is doubtful that market prices incorporated fraudulent information on same day fraudulent activities began, where court expects plaintiffs' case to include some proof as to impact on

market prices on various dates throughout period in question; as ending date, court will select date on which SEC suspended trading in stock in question. *Healy v. Loeb Rhoades & Co. (N.D. Ill. June 20, 1983), 99 FRD 540, 37 Fed R Serv 2d (Callaghan) 1078, Fed Sec L Rep (CCH) P91452*.

Complaint in securities fraud case against 3 companies sufficiently identifies class by statement that it is made up of persons who purchased stock in each of 3 companies between date of public offering made by 3 companies and date complaint was filed; to require plaintiff to identify every potential member of class at pleading stage of litigation would make maintenance of class actions in large securities fraud cases very difficult, if not impossible. *Somerville v. Major Exploration, Inc. (S.D.N.Y. May 4, 1984), 102 FRD 500, Fed Sec L Rep (CCH) P91473*.

In securities fraud class action, requirements of numerosity, commonality, and superiority were not seriously contested since total number of outstanding shares during class period was greater than 4.2 billion, fund pointed to at least five common questions of law and fact, and there was little question that suits on behalf of shareholders alleging violations of federal securities laws were prime candidates for class action treatment, and thus, class action was clearly superior to other available methods for fair and efficient adjudication of controversy. *In re Credit Suisse-AOL Secs. Litig. (D. Mass. Sept. 26, 2008), 253 FRD 17, Fed Sec L Rep (CCH) P94859*.

Motion for class certification of securities fraud action was granted because major questions regarding alleged false and misleading statements were common to class members and pension funds suffered same or greater losses as other members of proposed class and interests of class representatives were aligned with rest of class, and there was little doubt that class representatives would fairly and adequately represent interests of proposed class. *In re Cooper Cos. Sec. Litig. (C.D. Cal. Jan. 6, 2009), 254 FRD 628*.

With respect to scope of class in securities fraud case, litigants from another class action case against same company were not excluded because class in that case was *Fed. R. Civ. P. 23(b)(1)* class whose members had no opportunity to opt out, and thus, barring class from instant action without evidence that class had prior notice of potential for res judicata and opportunity to opt out would wreak unfair prejudice. *Makor Issues & Rights, Ltd. v. Tellabs, Inc. (N.D. Ill. Feb. 23, 2009), 256 FRD 586, Fed Sec L Rep (CCH) P95085*.

In securities fraud case, putative class was sufficiently numerous, allegations of single scheme violating federal securities law met commonality requirements of *Fed. R. Civ. P. 23*, lead plaintiffs' claims were typical of proposed class, and relationship between lead plaintiffs and lead counsel ensured that claims would be pursued with vigor. *Local 703, I.B. v. Regions Fin. Corp. (N.D. Ala. June 14, 2012), 282 FRD 607*, aff'd in part, vacated in part, *(11th Cir. Ala. Aug. 6, 2014), 762 F3d 1248, Fed Sec L Rep (CCH) P98132*.

In securities fraud case, existing relationship between named plaintiffs and lead counsel was not without question, but nothing in such relationship per se impacted quality of representation that absent class members would receive; instead, nature of ongoing relationship between lead plaintiffs and lead counsel carried with it that lead counsel would pursue claims with vigor, as their future relationship with named plaintiffs depended on same. *Local 703, I.B. v. Regions Fin. Corp. (N.D. Ala. June 14, 2012), 282 FRD 607*, aff'd in part, vacated in part, *(11th Cir. Ala. Aug. 6, 2014), 762 F3d 1248, Fed Sec L Rep (CCH) P98132*.

233. *15 USCS § 78j* and SEC Rules 10b

Contention that plaintiffs' class was not defined adequately to permit action to be maintained as class action under Rule 23 was rejected where plaintiffs, purporting to sue on behalf of themselves and other holders of shares, notes, and debentures issued by defendants, alleged two separate causes of action, each pursuant to § 10(b) of Securities Exchange Act of 1934 (*15 USCS § 78j(b)*) and SEC Rules 10b-3 and 10b-5, and court could divide action into two subclasses, one for each issue of securities. *Kronenberg v. Hotel Governor Clinton, Inc. (S.D.N.Y. 1966), 41 FRD 42, 10 Fed R Serv 2d (Callaghan) 623, Fed Sec L Rep (CCH) P91813*.

In action brought for alleged violations of § 10(b) of Securities Exchange Act (*15 USCS § 78j(b)*) and SEC Rule 10b-5, with respect to written exchange offer made by defendant corporation to holders of common stock of insurance company, where plaintiff sought to represent all persons who exchanged insurance company common

stock for defendant corporation's preferred pursuant to exchange offer, class would not have to be narrowed, notwithstanding that plaintiff in action no longer retained defendant corporation's stock received in exchange for her insurance company stock, while class included persons who had retained shares of defendant corporation obtained through exchange offer, and notwithstanding that at time of exchange there was different tax status among shareholders of insurance company. *Herbst v. International Tel. & Tel. Corp. (D. Conn. 1973), 65 FRD 13, 18 Fed R Serv 2d (Callaghan) 779*, aff'd, *(2d Cir. Conn. Apr. 3, 1974), 495 F2d 1308, 18 Fed R Serv 2d (Callaghan) 768, Fed Sec L Rep (CCH) P94481*.

In action declared as class action on behalf of two classes, (1) purchasers who bought securities directly from underwriter on basis of registration statement which became effective January 27, 1970, and who sued under §§ 11 and 17 of Securities Act (*15 USCS §§ 77k* and *77q*), § 10(b) of Securities Exchange Act (*15 USCS § 78j(b)*), and SEC Rule 10b-5, and (2) purchasers who, after January 27, 1970 and until July 2, 1970 (when certain financial disclosures were made), bought, on open market, similar securities which were not subject of registration statement, and who were unable to avail themselves of claim under § 11, court would grant motion to modify class determination so that class would begin on January 5, 1970, in light of fact that complaints filed by Securities and Exchange Commission against certain of defendants, and which resulted in consent judgment, charged over-the-counter market manipulation of price of securities by certain of defendants several weeks prior to effective date of registration. *Wolfson v. Solomon (S.D.N.Y. 1974), 64 FRD 399, 19 Fed R Serv 2d (Callaghan) 292, Fed Sec L Rep (CCH) P94790*.

Definition of proposed class with respect to plaintiffs' claims under *15 USCS § 78j(b)* is sufficient to meet requirement that readily identifiable class exist, notwithstanding defendants' contention that definition is vague due to its requirement that class member have "sustained damage." *Grossman v. Waste Management, Inc. (N.D. Ill. Feb. 6, 1984), 100 FRD 781, 38 Fed R Serv 2d (Callaghan) 1550, Fed Sec L Rep (CCH) P99661*.

234. —Disclosure and nondisclosure

In action brought against defendant corporation and others, where plaintiff's first cause of action alleged that defendant and certain of its officers and directors violated SEC Rule 10b-5 by failing, beginning on June 17, 1972, to publicly disclose substantial declines in corporation's earnings, and where plaintiff's second cause of action alleged that defendants tipped selected brokers by disclosing non-public information regarding decline of corporation's earnings, court would not define class as to defendant corporation to include all persons who purchased defendant's stock on open market between June 19, 1972 and July 18, 1972, but would denominate separate classes of (1) all individuals who purchased corporation's stock between June 17, 1972 when it was alleged that defendant's duty to disclose first existed, and July 12, 1972 and (2) all purchasers, with exception of defendants, of defendant corporation's stock between June 28, 1972, when first tip was alleged to have occurred, and July 12, 1972, where, among other things, representative plaintiff, as to both classes, would be typical only of those who made purchases before he did on July 12, 1972, and not of those who made purchases afterward. *Elkind v. Liggett & Myers, Inc. (S.D.N.Y. 1975), 66 FRD 36, 21 Fed R Serv 2d (Callaghan) 20, Fed Sec L Rep (CCH) P94984*.

In securities class action under § 10(b) of Securities Exchange Act of 1934 (*15 USCS § 78j(b)*) and SEC Rule 10b-5 against corporate officials for alleged nondisclosures which result in artificial inflation of stock, certifiable class will consist of all purchasers of corporation's stock during disputed period and who have sustained damages thereby, and disputed period commences from date that first misrepresentation is made to magazine interviewer, even though article based on interview is published 3 days later and period terminates at date on which corporation issues new release stating expected near-term decline in profits. *Piel v. National Semiconductor Corp. (E.D. Pa. 1980), 86 FRD 357, 29 Fed R Serv 2d (Callaghan) 1332*.

235. —Mergers

In action for alleged violation of § 10(b) of Securities Exchange Act of 1934 (*15 USCS § 78j(b)*) and SEC Rule 10b-5 brought by plaintiffs, attorney and his wife, who were former owners of 500 shares of stock in corporation which

had been acquired by defendant pursuant to short-form merger, on their own behalf and on behalf of 371 other stockholders similarly situated, contention that plaintiffs had failed to define adequately class which they purported to represent was rejected where plaintiffs' class could be defined in such manner as to include 373 minority stockholders who either had surrendered their shares or still retained their shares after receiving notice of merger. *Weisman v. M C A, Inc. (D. Del. 1968), 45 FRD 258, 12 Fed R Serv 2d (Callaghan) 397, Fed Sec L Rep (CCH) P92353*.

Overbreadth of class sought to be represented in action arising out of merger of corporations in which it was alleged that proxy statement and conduct of defendants involved violations of §§ 10(b) and 14(a) of Securities Exchange Act of 1934 (*15 USCS §§ 78j(b)*, *78n(a)*) would not require dismissal of class allegations with respect to such class where court would limit membership. *Cole v. Schenley Industries, Inc. (S.D.N.Y. 1973), 60 FRD 81, 17 Fed R Serv 2d (Callaghan) 495, Fed Sec L Rep (CCH) P94003*.

Certification under *Fed. R. Civ. P. 23(b)(3)* was not precluded by plaintiffs' claim for punitive damages, although certification of punitive damages claim prior to determining liability and actionable harm would be inappropriate; punitive damages claim would need to be certified, if at all, after liability under Rule 23(b)(2) was determined. *Scott v. Family Dollar Stores, Inc. (W.D.N.C. Jan. 7, 2010), 2010 US Dist LEXIS 1455*.

236. —Misrepresentations or inaccuracies in statements or reports

Consolidated actions purporting to state cause of action under § 10(b) of Securities Exchange Act (*15 USCS § 78j(b)*) and SEC Rule 10b-5 were maintainable as class actions under Rule 23(b)(3), and class would include persons who purchased stock of defendant corporation on open market during time when reports or financial statements, alleged to be materially misleading or inaccurate, were issued and who retained such stock to date when inaccuracies were revealed, but, in light of existence of purchaser-seller requirement for cause of action such as one alleged, class could not include shareholders of defendant corporation who purchased before any alleged misleading statements or reports and who allegedly retained or held shares of corporation on basis of reports. *Bleznak v. C.G.S. Scientific Corp. (E.D. Pa. 1973), 61 FRD 493, Fed Sec L Rep (CCH) P94804*.

In action brought by purchasers of securities alleging that corporation's financial statements, registration statement, and prospectus contained material misrepresentations and omissions in violation of securities laws, termination of class period is determined according to rule that liability under securities acts is terminated when curative information is publicly announced or otherwise effectively disseminated. *In re Data Access Systems Sec. Litigation (D.N.J. Sept. 20, 1984), 103 FRD 130, 40 Fed R Serv 2d (Callaghan) 54, Fed Sec L Rep (CCH) P91688*, rev'd, *(3d Cir. N.J. Apr. 8, 1988), 843 F2d 1537, Fed Sec L Rep (CCH) P93703*.

In investors' class suit alleging that three investment banks issued materially misleading analyst reports, which artificially inflated price of certain stock, investors were ascertainable class because class consisted of all purchasers of certain stock within defined time period, and class members could be determined by looking at company's records and records of relevant transfer agents. *Fogarazzo v. Lehman Bros. (S.D.N.Y. Aug. 4, 2009), 263 FRD 90*.

In securities fraud suit, where investors alleged that company and its officers made false and misleading statements regarding company's currency hedging practices using American Depository Receipts, class was ascertainable using objective criteria because putative class members could be readily identified from company's books and records as well as from records maintained by transfer agents. *In re Sadia (S.D.N.Y. July 20, 2010), 269 FRD 298, Fed Sec L Rep (CCH) P95806*.

In suit alleging false and misleading statements with respect to sale of securities as well as control person liability, in violation of federal securities law, *Fed. R. Civ. P. 23* class was readily ascertainable because it consisted of all purchasers of certain securities from particular stock exchange during class period and members of class could be determined from company's transfer records. *Menkes v. Stolt-Nielsen S.A. (D. Conn. Sept. 10, 2010), 270 FRD 80, Fed Sec L Rep (CCH) P95852*.

237. Miscellaneous

In action alleging violations of Securities Act of 1933 (15 USCS §§ 77a et seq.), Securities Exchange Act of 1934 (15 USCS §§ 78a et seq.) and SEC Rules with respect to defendant corporation's acquisition of insurance company, class was precise enough for class action purposes where complaint defined plaintiff class as all holders of insurance company common stock who exchanged shares for acquiring corporation's preferred and such clearly identified class members. *Herbst v. International Tel. & Tel. Corp. (2d Cir. Conn. Apr. 3, 1974), 495 F2d 1308, 18 Fed R Serv 2d (Callaghan) 768, Fed Sec L Rep (CCH) P94481*.

In action brought for alleged violation of federal securities law on behalf of class of thousands of plaintiffs, predominantly citizens and residents of Canada, Australia, England, France, Germany, Switzerland, and many other countries in Europe, Asia, Africa, and South America, Federal District Court would be directed to eliminate from class action all purchasers other than persons who were residents or citizens of United States, where (1) Court of Appeals had concluded that anti-fraud provisions of federal securities law applied to losses from sales of securities to Americans residing abroad only if acts of material importance in United States significantly contributed thereto, but did not apply to losses from sales of securities to foreigners outside United States unless acts within United States directly caused such losses, and (2) record contained uncontradicted affidavits that England, Germany, Switzerland, Italy, and France would not recognize United States judgment in favor of defendant as bar to action by their own citizens, even assuming that citizens had in fact received notice that they would be bound unless they affirmatively opted out of plaintiff class, and another affidavit reciting that several hundred claims against one of defendants were pending in Switzerland, and that at least 90 had been settled. *Bersch v. Drexel Firestone, Inc. (2d Cir. N.Y. Apr. 28, 1975), 519 F2d 974, 20 Fed R Serv 2d (Callaghan) 340, Fed Sec L Rep (CCH) P95080*, cert. denied, *(U.S. Dec. 8, 1975), 423 US 1018, 96 S Ct 453, 46 L Ed 2d 389*.

Although plaintiffs in action brought for alleged violation of federal securities laws did not define exact number of people in class they purported to represent, such would not preclude maintenance of class action where class had been defined with some precision as all individuals who bought particular securities during period when allegedly false and misleading statements were issued and circulated, and group represented could not be called amorphous. *Fischer v. Kletz (S.D.N.Y. 1966), 41 FRD 377, 10 Fed R Serv 2d (Callaghan) 639, Fed Sec L Rep (CCH) P91848*.

In action involving, among other things, alleged violation of federal securities laws with respect to defendant's dealings with Negro purchasers of used residential property, although plaintiffs were entitled to maintain class action on behalf of class consisting of themselves and other potential plaintiffs, action did not identify appropriate defendant class and defendants could not be sued as class, where it was not claimed that all sales of used residential property to Negroes during relevant time were within specific allegations of complaint, there was no definable limit for group of sellers other than group of named defendants, and defendants were all named. *Contract Buyers League v. F & F Inv. (N.D. Ill. 1969), 48 FRD 7, 13 Fed R Serv 2d (Callaghan) 590, 1969 Trade Cas (CCH) P72754*.

In action brought under federal securities laws with respect to public offering of defendant corporation's stock, which action was brought by partnership and three of its individual members on behalf of class of all persons, excluding defendants, who purchased shares of defendant corporation during approximate 7 month period, including those who purchased during underwriting of approximately 295,000 shares of defendant corporation's common stock at beginning of 7-month time frame, specification of time period and assertions to effect that there could not be more than few thousand in class satisfied requirements that there be adequately defined class, although plaintiffs had not demonstrated exact number of members. *B & B Inv. Club v. Kleinert's, Inc. (E.D. Pa. 1974), 62 FRD 140, 18 Fed R Serv 2d (Callaghan) 746, Fed Sec L Rep (CCH) P94451*.

Fact that plaintiffs in action brought for alleged violation of federal securities laws had defined class overbroadly would not necessitate dismissal of class allegations, where class might be appropriately limited. *In re Penn Cent. Sec. Litigation (E.D. Pa. Jan. 30, 1974), 62 FRD 181, 18 Fed R Serv 2d (Callaghan) 467*.

Upon court approval of settlement of action alleging various causes of action under federal securities laws, court would grant motion to redefine class so as to exclude from class one category of shareholders and to include two others where shareholders excluded from class were protected in that settlement stipulation provided they would not be bound by judgment and contained adequate provision whereby statute of limitations was tolled. *Blank v. Talley Industries, Inc. (D.N.Y. 1974), 64 FRD 125, Fed Sec L Rep (CCH) P94734*.

In class action brought for alleged violation of federal securities law where plaintiffs defined class as consisting of all past and present customers of financial corporation and coin exchange corporation who suffered damage, class would be more precisely defined as consisting of those persons who purchased coins from date of inception of coin exchange corporation to present time and suffered damage, since financial corporation owned assets of coin exchange corporation and did business under name of coin exchange corporation, and plaintiffs' claims were based upon business operation of coin exchange corporation. *Jenson v. Continental Financial Corp. (D. Minn. Nov. 19, 1975), 404 F Supp 806, 22 Fed R Serv 2d (Callaghan) 843, Fed Sec L Rep (CCH) P95436*.

In suit alleging violation of federal securities laws by issuance of allegedly materially false and misleading statements, which artificially inflated prices of company's stock, although institutional investors established requirements of *Fed. R. Civ. P. 23* for most of proposed class, class period was limited to time period when investors became aware of full extent of alleged fraud by announcement, which informed public of required additional components of this alleged fraud, and thereby gave investors sufficient notice, which, in exercise of reasonable diligence, would have led to actual knowledge of alleged fraud. *In re Alstom SA Sec. Litig. (S.D.N.Y. Aug. 26, 2008), 253 FRD 266, 71 Fed R Serv 3d (Callaghan) 570*.

In shareholders' suit alleging federal securities laws violations, subclass of shareholders subjected to particular tender offer was sufficiently ascertainable for purposes of *Fed. R. Civ. P. 23(a)* class certification because facts were clear as to which shareholders were subject to tender offer and as to which shareholders were harmed by tender offer. *In re Piedmont Office Trust Sec. Litig. (N.D. Ga. Mar. 10, 2010), 264 FRD 693*, vacated, *(11th Cir. Ga. Apr. 11, 2011), 422 Fed Appx 868*.

In class action on behalf of futures traders that purchased, sold, or held natural gas futures or options on futures contracts from particular exchange and during certain time period, alleging that company and certain of its officers used their market power to manipulate prices of natural gas futures contracts, class was sufficiently ascertainable because it was limited to injured traders during certain time period and it was not rendered unascertainable by limitation that class members held net long or short term positions on specific contracts at specific times. *In re Amaranth Natural Gas Commodities Litig. (S.D.N.Y. Sept. 30, 2010), 269 FRD 366*.

E. Class Membership of Representative

1. In General

238. Generally

Plaintiff cannot represent class of which he is not member. *Norman v Connecticut State Board of Parole (1972, CA2 Conn) 458 F2d 497*; *Long v District of Columbia (1972, App DC) 152 US App DC 187, 469 F2d 927*; *Clark v Chase Nat'l Bank (1942, DC NY) 45 F Supp 820*; *Ritacco v Norwin School Dist. (1973, WD Pa) 361 F Supp 930*; *Feliciano v Romney (1973, SD NY) 363 F Supp 656*; *Jenkins v Fidelity Bank (1973, ED Pa) 365 F Supp 1391, CCH Fed Secur L Rep P 94373*; *Hackett v Kincade (1964, ND Miss) 36 FRD 442, 9 FR Serv 2d 23A*.33, Case 3; *Feldman v. Hanley (S.D.N.Y. 1973), 59 FRD 299, Fed Sec L Rep (CCH) P93913*; *National Auto Brokers Corp. v. General Motors Corp. (S.D.N.Y. 1973), 60 FRD 476, 1973-2 Trade Cas (CCH) P74707*.

Words of Rule permit no relaxation of requirement that there be membership in class, and to be proper representative, plaintiff must establish his nexus with class and its interests and claims which is embraced in various requirements of Rule 23(a) and (b). *Long v. Sapp (5th Cir. Fla. Oct. 4, 1974), 502 F2d 34, 8 Empl Prac Dec (CCH) P9712, 19 Fed R Serv 2d (Callaghan) 254*, disapproved as stated in *Hartman v. Duffey (D.C. Cir. Apr. 5, 1994), 19 F3d 1459, 64 Empl Prac Dec (CCH) P43001*.

Class action may not be maintained unless plaintiff representative is member of class he purports to represent. *Haas v. Pittsburgh Nat'l Bank (3d Cir. Pa. Sept. 25, 1975), 526 F2d 1083, 20 Fed R Serv 2d (Callaghan) 957*.

Plaintiffs cannot properly represent "subclass" of which they are not members any more than they can represent overall class to which they do not belong. *Abercrombie v. Lum's, Inc. (S.D. Fla. June 14, 1972), 345 F Supp 387, 16 Fed R Serv 2d (Callaghan) 658, 1972 Trade Cas (CCH) P74118*.

Representative of class must himself be member of class he seeks to represent; in other words, representative must show that his individual claim rises to level of case or controversy. *Leonard v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (S.D.N.Y. 1974), 64 FRD 432, 19 Fed R Serv 2d (Callaghan) 248, Fed Sec L Rep (CCH) P94814*.

That named plaintiff must be member of class is inherent prerequisite arising by implication from real party in interest requirement of Rule 17(a). *Booth v. Prince George's County (D. Md. Jan. 23, 1975), 66 FRD 466, 9 Empl Prac Dec (CCH) P10075, 9 Empl Prac Dec (CCH) P9925, 19 Fed R Serv 2d (Callaghan) 1035*.

Before there can be class action or group can be proceeded against as class, group must in fact constitute class and those joined in action as representative defendants must be members of class. *United States v. Truckee-Carson Irrigation Dist. (D. Nev. 1975), 71 FRD 10*.

Since Rule 23 authorizes one or more members of class to sue as representative parties on behalf of others similarly situated, person seeking certification as named plaintiff must be member of class allegedly aggrieved; such threshold requirement insures vigorous prosecution of case necessary to protect interests of unnamed class members and is distinguishable from requirement that named plaintiff fairly and adequately represent interests of class, which focuses on absence of antagonistic or conflicting interests between named plaintiff and class. *Robinson v. Leahy (N.D. Ill. 1977), 73 FRD 109*.

For purposes of *FRCP 23*, named plaintiffs must be members of proposed class. *Peoples v. Wendover Funding (D. Md. May 8, 1998), 179 FRD 492, 41 Fed R Serv 3d (Callaghan) 907*.

In addition to specifications of *FRCP 23*, certain implied requirements exist; specifically, there must be identifiable class and plaintiff or plaintiffs must be members of such class. *Chisolm v. TranSouth Fin. Corp. (E.D. Va. May 12, 2000), 194 FRD 538*.

239. Standing as requirement, generally

To have standing to sue as class representative, it is essential that plaintiff must be part of that class, that is, plaintiff must possess same interest and suffer same injury shared by all members of class he represents. *Schlesinger v. Reservists Committee to Stop the War (U.S. June 25, 1974), 418 US 208, 94 S Ct 2925, 41 L Ed 2d 706*.

Class action may not be maintained unless plaintiff representative is member of class he purports to represent and where no nominal plaintiff has standing on any issue against one of multiple defendants, suit for damages may not be maintained as class action against that defendant. *Haas v. Pittsburgh Nat'l Bank (3d Cir. Pa. Sept. 25, 1975), 526 F2d 1083, 20 Fed R Serv 2d (Callaghan) 957*.

District court properly certified class action under *Fed. R. Civ. P. 23* in case alleging violation of *7 USCS § 13(a)* because, despite any questions regarding losses sustained by class members, standing requirement was satisfied so long as one member of class had plausible claim of injury. *Kohen v. Pac. Inv. Mgmt. Co. LLC & PIMCO Funds (7th Cir. Ill. July 7, 2009), 571 F3d 672*, cert. denied, *(U.S. Feb. 22, 2010), 559 US 962, 130 S Ct 1504, 176 L Ed 2d 151*.

Irreducible constitutional minimum of standing requires showing of injury in fact to plaintiff that is fairly traceable to challenged action of defendant, and likely to be redressed by favorable decision; constitutional requirement of standing is equally applicable to class actions; although federal courts do not require that each member of class

submit evidence of personal standing, class cannot be certified if it contains members who lack standing; class must therefore be defined in such way that anyone within it would have standing, or to put it another way, named plaintiff cannot represent class of persons who lack ability to bring suit themselves. *Avritt v. Reliastar Life Ins. Co. (8th Cir. Minn. Aug. 12, 2010), 615 F3d 1023*.

Employee three satisfied all aspects of standing requirements as parties' stipulated class description included female employees who had been denied promotion to Assistant General Manager (AGM) or General Manager (GM)—employee three was denied promotion to GM; crux of plaintiffs' lawsuit was that harm alleged was directly traceable to employer's promotion practices and general corporate culture, which plaintiffs alleged were discriminatory to women; employee three showed that there was significant likelihood that she will be wronged again in similar way; and if employer's allegedly discriminatory policies were enjoined, employee three's claimed threat of being passed over for promotion due to her gender was likely to be redressed; employee three's status as AGM did not preclude her from meeting standing requirements, given that purported class also included women denied promotion to GM. *Ellis v. Costco Wholesale Corp. (9th Cir. Cal. Sept. 16, 2011), 657 F3d 970, 94 Empl Prac Dec (CCH) P44282, 80 Fed R Serv 3d (Callaghan) 832*.

Party who lacks standing to sue on his own behalf may not assert claims on behalf of alleged class of which he is not member. *Di Julio v. Digicon, Inc. (D. Md. Mar. 27, 1972), 339 F Supp 1284, Fed Sec L Rep (CCH) P93438*; *Thomas v. Clarke (D. Minn. 1971), 54 FRD 245, 15 Fed R Serv 2d (Callaghan) 1579*; *Burwell v. Eastern Airlines, Inc. (E.D. Va. Oct. 9, 1975), 68 FRD 495, 20 Fed R Serv 2d (Callaghan) 1226*.

Standing to sue is essential threshold which must be crossed before any determination as to class representation under Rule 23 can be made, and without standing one cannot represent class, but standing to sue does not, of itself, support right to bring class action, since all of other prerequisite tests of Rule 23(a) and (b) (1) or (2), or (3) must be met. *Weiner v. Bank of King of Prussia (E.D. Pa. Apr. 30, 1973), 358 F Supp 684, 17 Fed R Serv 2d (Callaghan) 1536, 1973-2 Trade Cas (CCH) P74845*.

Only member of class can normally be named class representative, and representative must have standing. *Midwest Community Council, Inc. v. Chicago Park Dist. (N.D. Ill. 1980), 87 FRD 457, 30 Fed R Serv 2d (Callaghan) 1499*.

Membership in plaintiff class is insufficient to mitigate lack of individual standing. *Akerman v. Oryx Communications, Inc. (S.D.N.Y. Sept. 20, 1984), 609 F Supp 363, Fed Sec L Rep (CCH) P91680*, aff'd in part, *(2d Cir. N.Y. Jan. 26, 1987), 810 F2d 336, 6 Fed R Serv 3d (Callaghan) 1136, Fed Sec L Rep (CCH) P93101*.

Plaintiff moving for class certification must establish that he has standing to bring suit by showing that he is member of each class that he purports to represent. *Wilborn v. Dun & Bradstreet Corp. (N.D. Ill. Aug. 5, 1998), 180 FRD 347*.

Based on allegations in complaint, insured, on behalf of himself and as class representative, could not assert claims against those insurers that played no part in decision to deny him benefits for certain medical treatment; accordingly, his insurer was only insurer that insured had standing to sue, and his claims against other insurers had to be dismissed. *Cady v. Anthem Blue Cross Life & Health Ins. Co. (N.D. Cal. Oct. 2, 2008), 583 F Supp 2d 1102*.

240. Time of class membership

Litigant must be member of class which he or she seeks to represent at time class action is certified by District Court. *Sosna v. Iowa (U.S. Jan. 14, 1975), 419 US 393, 95 S Ct 553, 42 L Ed 2d 532*.

Litigant must be member of class which he seeks to represent at time class action is certified by District Court. *EEOC v. General Tel. Co. (9th Cir. Wash. June 27, 1979), 599 F2d 322, 20 Empl Prac Dec (CCH) P30036, 27 Fed R Serv 2d (Callaghan) 981*, aff'd, *(U.S. May 12, 1980), 446 US 318, 100 S Ct 1698, 64 L Ed 2d 319* (criticized in *Brown v Nucor Corp. (2009, CA4 SC) 576 F3d 149, 106 BNA FEP Cas 1718, 92 CCH EPD P 43642*).

241. Loss of class membership by representative and effect thereof

Where individual class member is no longer in need of relief, such class member retains real interest in case and class action should "relate back" to date of filing of complaint. *Williams v. Schweiker (E.D. Mo. June 30, 1982), 541 F Supp 1360, 35 Fed R Serv 2d (Callaghan) 1283*.

Certification of class action is improper where it takes place after proposed class representative is no longer member of proposed class. *Zuranski v. Anderson (N.D. Ind. Mar. 5, 1984), 582 F Supp 101*.

242. —Prisoners and detainees

In civil rights action brought on behalf of all persons appearing before state Board of Parole who wished to be represented by counsel to enjoin Board from proceeding with any parole revocation hearings until members of class were afforded right to counsel, sole named plaintiff was no longer member of class he sought to represent, where, during pendency of appeal, criminal charges against him were dropped so that there was no outstanding criminal charges against him and no parole revocation hearing pending against him, and action would be dismissed without prejudice unless within designated time another member of class was granted leave to intervene. *Norman v. Connecticut State Board of Parole (2d Cir. Conn. Apr. 6, 1972), 458 F2d 497*, disapproved, *Sosna v. Iowa (U.S. Jan. 14, 1975), 419 US 393, 95 S Ct 553, 42 L Ed 2d 532*.

Named plaintiffs, who sought to represent class consisting of all federal prisoners incarcerated at federal penitentiary in action arising out of disciplinary proceedings instituted against named plaintiffs with respect to their involvement in work stoppage, had standing to represent class consisting of all present prisoners at penitentiary, notwithstanding that 3 of named plaintiffs were on parole and fourth had been transferred to different federal institution. *Workman v. Mitchell (9th Cir. Wash. Aug. 21, 1974), 502 F2d 1201, 19 Fed R Serv 2d (Callaghan) 1299*, limited, *Smith v. Grimm (9th Cir. Cal. Apr. 13, 1976), 534 F2d 1346*.

If named plaintiff brings action under *42 USCS § 1983* while in custody of North Carolina alleging that federal detainer filed against him prevented him from becoming eligible for various privileges available to inmates without detainers because of unconstitutional state prison regulations, and such action is certified as class action after such plaintiff is released from custody of North Carolina to begin serving term in federal prison, such certification is improper, since litigant must be member of class which he seeks to represent at time class action is certified by District Court. *Holt v. Moore (4th Cir. N.C. Sept. 22, 1976), 541 F2d 460*.

Class action brought on behalf of all inmates at Rikers Island who are or will become eligible for conditional release by named plaintiffs, all of whom were given conditional release between time of evidentiary hearing and class certification, would be exception to requirement that plaintiffs be members of class they seek to represent, in view of fact that relatively short periods of incarceration and possibility of conditional release make it unlikely that alleged harm could be redressed during time in which any possible plaintiff remains inmate. *Zurak v. Regan (2d Cir. N.Y. Feb. 7, 1977), 550 F2d 86, 22 Fed R Serv 2d (Callaghan) 1344*, cert. denied, *(U.S. June 27, 1977), 433 US 914, 97 S Ct 2988, 53 L Ed 2d 1101*.

Prisoners who brought pro se action against sheriff alleging lack of adequate medical care at parish jail do not have standing to request class certification when amended complaint is filed where at that time they have been transferred to other facilities; relation-back doctrine does not extend to time before which class action was actually requested. *Walker v. Haynes (5th Cir. La. Oct. 14, 1981), 659 F2d 46, 32 Fed R Serv 2d (Callaghan) 872*.

Certification of *Fed. R. Civ. P. 23(b)(2)* class for injunctive relief regarding county jail's policy regarding possession and use of crutches by inmates was properly denied; inmate who sought certification could not satisfy adequacy of representation requirement of Rule 23(a)(4) because inmate did not have personal stake in prospective relief as inmate was no longer at jail and his return, with need for crutches, was highly speculative. *Arreola v. Godinez (7th Cir. Ill. Oct. 14, 2008), 546 F3d 788*.

In action brought by two pretrial detainees at correctional center, on behalf of themselves and others similarly situated, for alleged violations of rights under due process and equal protection clauses of Fourteenth Amendment and *42 USCS § 1983*, mere fortuity that named plaintiffs were released or transferred from correctional center before court had opportunity to make Rule 23(c)(1) determination would not bar certification of action as class action; court would permit action to proceed as class action for injunctive and declaratory relief on behalf of all present and future detainees at certain wing of correctional center, but action would be dismissed without prejudice in 30 days unless within such time other members of certified class sought to intervene in action. *La Reau v. Manson (D. Conn. Sept. 24, 1974), 383 F Supp 214, 19 Fed R Serv 2d (Callaghan) 1305*.

Class would not be certified where named plaintiff sought to represent all persons who were or would be confined at county jail either being detained while awaiting trial or following conviction of offenses against state, since plaintiff, having been transferred to another jail on day that suit was filed, was not presently member of class. *Fields v. Gander (E.D. Mo. Aug. 12, 1983), 572 F Supp 63*, rev'd, *(8th Cir. Mo. May 23, 1984), 734 F2d 1313*.

243. —Other particular cases

In action challenging state legislation requiring 2 year residency in state in order for divorce action to be commenced, death of spouse of party bringing action as class action involuntarily removed party from membership in class of persons who would seek to obtain divorce while not residing in state for 2 years, but such did not destroy right of other members of class to proceed with action. *Wymelenberg v. Syman (D. Wis. 1972), 54 FRD 198, 15 Fed R Serv 2d (Callaghan) 1577*.

Former female student bringing civil rights action against school board seeking money damages and injunctive relief for alleged sex-based denial of participation in interscholastic athletics would not be adequate representative of class consisting of former and present female students who have been or are being denied such participation, since name plaintiff has no continuing injury and therefore, unlike present student members of class, has no real interest in injunctive relief. *Lavin v. Chicago Board of Education (N.D. Ill. 1977), 73 FRD 438*.

Court declined to grant claimant's motion for enlargement of time to file motion for class certification, because while claimant's complaint at times made passing reference to class of employees he represented and mentioned that he brought suit on behalf of similarly situated class of employees, claimant ignored requirements of D.D.C. Civ. R. 23.1(a); claimant failed to comply with local rules for making class action allegations. *Shallal v. Gates (D.D.C. July 23, 2008), 252 FRD 2*.

244. Time-barred claims

Putative class could not be certified because claim of only named representative was time-barred and he therefore could not be class representative and class could not be certified without one. *Great Rivers Coop. v. Farmland Indus. (8th Cir. Iowa July 24, 1997), 120 F3d 893, Fed Sec L Rep (CCH) P99490*.

Although plaintiff alleges that defendants continue to discriminate against class of similarly situated persons that he seeks to represent, plaintiff is precluded from membership in, and representation of, class where his action is time-barred. *Mason v. Anheuser-Busch, Inc. (E.D. Mo. Jan. 31, 1984), 579 F Supp 871*, dismissed without op., *(8th Cir. Mo. Sept. 28, 1984), 745 F2d 64*.

If sole class representative is time-barred by statute of limitations, he cannot represent class. *Kelley v. Galveston Autoplex (S.D. Tex. Sept. 29, 2000), 196 FRD 471*.

Airline was entitled to dismissal of passenger's putative class action under *Fed. R. Civ. P. 23* alleging claims under *Convention for Unification of Certain Rules for International Carriage by Air* as result of delays because Convention's two-year statute of repose had expired and tolling of provision was not applicable; justice did not require court to allow amendment of complaint under *Fed. R. Civ. P. 15(a)(2)*. *Dickson v. Am. Airlines, Inc. (N.D. Tex. Jan. 28, 2010), 685 F Supp 2d 623*.

In plaintiff landowner's 16 USCS § 1247(d) "rails to trails" takings claim, 28 USCS § 2501's limitations period was tolled for class members that would opt-in, since all class actions in United States Court of Federal Claims were opt-in, not opt-out cases, and complaint had sought certification which was sufficient to toll limitations period during opt-in period; while United States Supreme Court in Wal-Mart required lower courts to engage in "rigorous analysis" to determine whether prerequisites for class action were met, differences between Fed. R. Civ. P. 23(b)(2), (3), and U.S. Ct. Fed. Cl. R. 23(b)(2), (3), resulted in circumscribed scope for "rigorous analysis" called for in Wal-Mart. Geneva Rock Prods. v. United States (Fed. Cl. Sept. 15, 2011).

245. Associations or organizations

Reasons for requiring individual plaintiff in class action to be member of class do not necessarily preclude association from representing class where its raison d'etre is to represent interests of that class. Norwalk CORE v. Norwalk Redevelopment Agency (2d Cir. Conn. June 7, 1968), 395 F2d 920, 12 Fed R Serv 2d (Callaghan) 368, disapproved, Washington v. Davis (U.S. June 7, 1976), 426 US 229, 96 S Ct 2040, 48 L Ed 2d 597.

Rule whereby one must be member of class in order to be class representative applies only to individuals as class representatives; organization's standing as class representative should depend not on its membership in class, but instead on whether its members, who give it standing to sue at all, are also members of plaintiff class. Thompson v. Board of Education (W.D. Mich. May 27, 1976), 71 FRD 398, 13 Empl Prac Dec (CCH) P11487, 1 Fed R Evid Serv (CBC) 557, disapproved, Shimkus v. Gersten Cos. (9th Cir. Cal. May 6, 1987), 816 F2d 1318, 7 Fed R Serv 3d (Callaghan) 767 (criticized in Thompson v Jiffy Lube Int'l, Inc. (2007, DC Kan) 505 F Supp 2d 907).

Association may be representative of defendant class where it has ability to carry expense and other practical burdens of class defense; unwillingness of association to be class representative should not deter court from naming it as representative where association has been litigant who most vigorously and persuasively opposes certification; association, although not class member, is proper representative where it exists for express purpose of representing its members and protecting or asserting their common interests. Thillens, Inc. v. Community Currency Exchange Asso. (N.D. Ill. Apr. 14, 1983), 97 FRD 668, 36 Fed R Serv 2d (Callaghan) 657, 1983-2 Trade Cas (CCH) P65579 (criticized in Popoola v MD-Individual Practice Ass'n (2005, DC Md) 230 FRD 424).

Court granted association's request to be appointed class representative because individual members of association had standing to bring suit on their own behalf, so association also had standing to litigate action, and defendants provided no support for their assertion that association was not going to be vigorous and zealous class representative. *Perdue v. Individual Members of the Ind. State Bd. of Law Examiners (S.D. Ind. Jan. 29, 2010), 266 FRD 215*.

246. —Unions

Union suing in behalf of employees of defendant due to damages sustained by employees, as result of bribe of labor union official, could not qualify as representative of class in class suit, since union was not member of class in whose interest suit was brought. Rock Drilling, etc., Local Union v. Mason & Hangar Co. (D.N.Y. May 16, 1950), 90 F Supp 539, 18 Lab Cas (CCH) P65795, aff'd, (2d Cir. N.Y. Dec. 6, 1954), 217 F2d 687, 27 Lab Cas (CCH) P68855.

Labor union representing employees of defendant telephone company is not member of class consisting of non-supervisory female employees of company and therefore, although it may represent its members in claim for injunctive relief from alleged discriminatory practices concerning payment under disability and sick leave plans and accrual of seniority during pregnancy-related absences, it may not maintain its claim as class action nor sue for back pay on behalf of individual members. Wilhite v. South Cent. Bell Tel. & Tel. Co. (E.D. La. Oct. 21, 1976), 426 F Supp 61, disapproved as stated in Rogers v. Caps Corp. (E.D. La. Sept. 25, 1992), 1992 US Dist LEXIS 14854.

Union is not entitled to class certification in order to vindicate economic interests of its members unless individual members have joined in class action since union itself is not "member" of class. Drywall Tapers & Pointers etc. v.

Operative Plasterers & Cement Masons International Asso. (E.D.N.Y. Aug. 19, 1981), 91 FRD 216, 32 Fed R Serv 2d (Callaghan) 874, 94 Lab Cas (CCH) P13625, aff'd, *(2d Cir. N.Y. Apr. 13, 1984), 742 F2d 1432*.

Union may not act as class representative of union members seeking, through lawsuit by union and individual plaintiff members of union against railroad carrier, injunctive and declaratory relief, backpay and punitive damages since class representative must be member of class and union is not member of class. *Brotherhood Ry. Carmen v. Delpro Co. (D. Del. Oct. 15, 1982), 549 F Supp 780, 97 Lab Cas (CCH) P10240*.

247. —Other particular cases

Association of present and former members of Armed Forces Reserves organized to oppose military involvement in Vietnam and individual members of association—alleging injury because members of Congress holding positions in Reserves were subject to possible undue influence by executive branch of government and might not faithfully discharge their duty as members of Congress—did not have standing as citizens or taxpayers to bring federal court class action against Secretary of Defense and 3 Service Secretaries (1) challenging Reserve membership of members of Congress as being in violation of incompatibility clause of Article I, § 6, clause 2 of Constitution and (2) seeking order directing defendants to strike from rolls of Reserves all present or future members of Congress and to reclaim from former and present members of Congress any Reserve pay received while serving in Congress, since, with respect to standing to sue as citizens, claimed nonobservance of incompatibility clause implicated only generalized interest of all citizens in constitutional governance and was merely abstract injury rather than concrete injury that is essential to satisfy Article III's "case or controversy" requirement, and since, with respect to standing to sue as taxpayers, there was failure to establish required logical nexus between taxpayer status asserted and claim sought to be adjudicated. *Schlesinger v. Reservists Committee to Stop the War (U.S. June 25, 1974), 418 US 208, 94 S Ct 2925, 41 L Ed 2d 706*.

Teachers' association had standing to bring class action on behalf of black teacher members against school district with respect to alleged discrimination against black teachers in payment of salaries, even though it was not individual member of class it represented. *Arkansas Education Asso. v. Board of Education (8th Cir. Ark. July 26, 1971), 446 F2d 763, 3 Empl Prac Dec (CCH) P8292, 15 Fed R Serv 2d (Callaghan) 367*.

In action brought by Congress of Racial Equality (CORE) as class action on behalf of Social Security Administration employees who had allegedly been subjected to racial discrimination in employment in violation of federal civil rights legislation and presidential executive order, CORE was not employee of Social Security Administration and could not be member of class which it purported to represent; any representative capacity which CORE might enjoy in administrative process did not relieve it from requirement of Rule 23 that representative of class in federal courts be member of that class. *King v. Ralston Purina Co. (W.D.N.C. Mar. 17, 1983), 97 FRD 477, 31 Empl Prac Dec (CCH) P33550, 38 Fed R Serv 2d (Callaghan) 1272*.

In civil rights action involving alleged race discrimination in housing, where one of named plaintiffs, Urban League of Philadelphia, sought to represent all residents, regardless of race, in Philadelphia metropolitan area who might apply for apartments in buildings owned, rented, managed, or controlled by defendants and who might wish to reside in integrated housing, League did not have standing in its own right to sue defendants where League did not aver that any of League's members had been directly affected in any way by alleged discrimination and further had not alleged that League itself had been subject of discrimination by defendants. *Harris v. Dumont Co. (D. Pa. 1973), 61 FRD 423*.

In action brought by individuals and two organizations—Fight Back and National Association for Advancement of Colored People—on behalf of minority persons seeking training and employment in construction industry, there was no support for propositions that organization plaintiffs were not members of class which plaintiff sought to represent and that class of persons and associations representing members of class could not both proceed as proper plaintiffs, where it was not alleged that claims of organizations conflicted with those of plaintiffs or class they sought to represent, and where determination of class would not alter finding that organizations had standing. *Percy v.*

Brennan (S.D.N.Y. Nov. 8, 1974), 384 F Supp 800, 8 Empl Prac Dec (CCH) P9799, 19 Fed R Serv 2d (Callaghan) 659.

In civil rights action brought with respect to alleged race discrimination, unincorporated association of black police officers could not sue as representative of proposed class, which class was comprised of all present and past black employees of Richmond Bureau of Police, past, present, and future potential black employees and applicants for employment with Bureau, and all black persons residing in city of Richmond entitled to police protection, in light of fact that association does not have standing to represent members of association in civil rights suit where there are alleged violations of members' rights, but not association's rights. *Richmond Black Police Officers Ass'n v. City of Richmond (E.D. Va. Nov. 18, 1974), 386 F Supp 151, 10 Empl Prac Dec (CCH) P10268, 19 Fed R Serv 2d (Callaghan) 1296*.

Retired police officers' association lacked associational standing to challenge settlement agreement in earlier litigation between city and pension funds concerning health care plan since action clearly required individualized proof and individual member participation to determine time, place, source, and content of communications regarding members' entitlement to health care that were core of litigation. *Retired Chicago Police Ass'n v. Chicago (N.D. Ill. Mar. 23, 1992), 141 FRD 477*.

248. Effect of criminal status

Counsel for plaintiff in class action suit was granted leave to amend complaint under *Fed. R. Civ. P. 15(a)*, based on requirement that such leave be freely given, to substitute new class representative under *Fed. R. Civ. P. 23* after it was determined that individual who was originally designated as class representative was not suitable based on his arrest and felony charge against him. *Hernandez v. Balakian (E.D. Cal. Mar. 18, 2008), 251 FRD 488*.

249. Governmental bodies or agencies

Commonwealth was precluded from prosecuting action as class action on behalf of all citizens and residents of Commonwealth who sustained uninsured flood damage in action brought for defendants' alleged failure to publicize availability of flood insurance prior to floods, since in order for Commonwealth, as plaintiff, to be proper class action representative under Rule 23, it had to have standing to maintain suit on its own behalf, and Commonwealth lacked standing because of its failure to submit valid administrative claim. *Pennsylvania by Sheppard v. Nat'l Ass'n of Flood Insurers (3d Cir. Pa. June 13, 1975), 520 F2d 11, 20 Fed R Serv 2d (Callaghan) 601*, overruled in part, *Pennsylvania v. Porter (3d Cir. Pa. July 30, 1981), 659 F2d 306, 9 Fed R Evid Serv (CBC) 1062*.

Although it is conceivable that governmental agency might, with reference to particular act or series of acts, stand in same position as individual resident within its jurisdiction, in context of acts alleged in multidistrict private civil treble damage antitrust litigation involving motor vehicle air pollution control equipment and any impact or damage resulting therefrom, governmental agency raised issues which were peculiar only to its status as governmental agency and could not be member of class of citizens or residents and could not maintain class action on behalf of individual plaintiffs, where litigation involved complaints by several states which alleged representation by governmental entity of individual residents within its jurisdiction. *In re Motor Vehicle Air Pollution Control Equipment (C.D. Cal. Sept. 4, 1970), 52 FRD 398, 1970 Trade Cas (CCH) P73317, 1970 Trade Cas (CCH) P73318*.

In litigation involving water rights brought by United States where defendant class was composed of water rights certificate holders who were members of named defendant irrigation district, irrigation district was appropriate representative although not technically member of class. *United States v. Truckee-Carson Irrigation Dist. (D. Nev. 1975), 71 FRD 10*.

Because plain language of § 2104(a)(5) of Worker Adjustment and Restraining Notification Act, *29 USCS § 2104(a)(5)* contemplated that only "persons," "representatives of employees," and "units of local government" had standing to enforce WARN Act, court found that state Department of Labor and its commissioner did not have standing to file action under WARN Act and, therefore, could not serve as class representative of certified class of

aggrieved employees, pursuant to *Fed. R. Civ. P. 23*. *Cashman v. Dolce International/Hartford (D. Conn. Dec. 7, 2004), 225 FRD 73, 151 Lab Cas (CCH) P10474*.

250. Miscellaneous

Since Rule 23(a) provides that one or more members of class may sue or be sued as representative parties on behalf of class, it is fundamental that under Rule 23, in order to sue on behalf of class, plaintiff representative must be member of class. *Illinois ex rel. Bowman v. Home Federal Sav. & Loan Asso. (7th Cir. Ill. Aug. 19, 1975), 521 F2d 704, 20 Fed R Serv 2d (Callaghan) 946*; *Dorfman v. First Boston Corp. (E.D. Pa. Apr. 17, 1974), 62 FRD 466, 17 Fed R Serv 2d (Callaghan) 991, Fed Sec L Rep (CCH) P94531*.

Whether or not *Fed. R. Civ. P. 23* would permit plaintiff to represent class against non-injurious defendants cannot affect plaintiff's U.S. Const. art. III standing to sue non-injurious defendants. *Mahon v. Ticor Title Ins. Co. (2d Cir. Conn. June 25, 2012), 683 F3d 59*.

Named plaintiff is not required by Rule 23 to represent group of claimants of which he is not member merely because that group may have suffered injury at hands of defendant, and it is fundamental that named plaintiff bring suit only on behalf of those who are similarly situated to himself. *Weit v. Continental Illinois Nat'l Bank & Trust Co. (N.D. Ill. 1973), 60 FRD 5, 17 Fed R Serv 2d (Callaghan) 999, 1973-2 Trade Cas (CCH) P74673*.

Where named plaintiff is dismissed from class action because there is no case or controversy between him and defendant and where class itself has been previously certified pursuant to Rule 23(c), then, in certain circumstances, class action will be permitted to continue if live case or controversy exists between certified class and defendants, but where named plaintiff is dismissed from class action because there is no case or controversy between him and defendant and where class itself has not been properly certified in accordance with Rule 23(c), complaint of class must be simultaneously dismissed for failure to set forth case or controversy as required by Article III of Constitution. *Booth v. Prince George's County (D. Md. Jan. 23, 1975), 66 FRD 466, 9 Empl Prac Dec (CCH) P10075, 9 Empl Prac Dec (CCH) P9925, 19 Fed R Serv 2d (Callaghan) 1035*.

Scrutiny of facts of case and named representative's grievance to ascertain his membership in putative class is especially important where certification is sought under Rule 23(b)(2), because vital core of such action is its cohesiveness. *Mays v. Scranton City Police Dep't (M.D. Pa. 1979), 87 FRD 310, 30 Fed R Serv 2d (Callaghan) 477*.

Member of class sought to be represented in class action must not only meet definitional requirements of class, but must also assert claim of class. *Fox v. United States Dep't of Housing & Urban Development (E.D. Pa. Jan. 10, 1979), 468 F Supp 907*.

Party who maintains position adverse to class in pretrial proceeding is not entitled to be included as class member. *Sterman v. Louisiana-Pacific Corp. (E.D. Pa. Jan. 10, 1983), 96 FRD 574, Fed Sec L Rep (CCH) P99252*.

Federal Rules of Civil Procedure did not prohibit detainees from being certified as class representatives because they previously opted out of class action. *Berry v. Baca (C.D. Cal. Feb. 16, 2005), 226 FRD 398*.

Subdivision (a) of Rule 23 of Arizona Rules of Civil Procedure (rule identical to *Rule 23 of Federal Rules of Civil Procedure*) requires by implication that representative be member of class. *Lennon v. First Nat'l Bank (Ariz. Ct. App. 1974), 518 P2d 1230*.

2. Particular Cases

a. In General

251. Antitrust

Two companies, who were assignees of companies that had antitrust claims against several initial public offering underwriters, were members of class of companies allegedly injured by underwriters such that they had standing to bring class suit against underwriters; fact that their interests were derived by assignment did not exclude them from being members of class or from meeting *Fed. R. Civ. P. 23(a)(4)* class representation requirement. *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc. (2d Cir. N.Y. Sept. 11, 2007), 502 F3d 91, 2007-2 Trade Cas (CCH) P75861*.

Plaintiff suing as president of American Association of Securities Representatives could not maintain class action on behalf of securities representatives against their employers' alleged conspiracy to reduce representatives' commissions in violation of Sherman Act where plaintiff, who was not employed as securities representative, who was not injured by conspiracy, and who lacked standing to sue individually, was not member of class. *Cordova v. Bache & Co. (S.D.N.Y. Dec. 10, 1970), 321 F Supp 600, 64 Lab Cas (CCH) P11384, 1971 Trade Cas (CCH) P73406*.

In antitrust action brought against defendant processor and distributor of food items through approximately 350 stores bearing defendant's name, which action was brought by former manager of one of such stores as class representative of class of existing store managers, former store managers who had been promoted to higher positions, and former store managers who were no longer employed by defendant, plaintiff had to establish that he was member of class he sought to represent, but where plaintiff was not in position to adequately represent existing and promoted store managers, action could proceed as class action only on behalf of former store managers and not on behalf of existing and promoted managers. *Matarazzo v. Friendly Ice Cream Corp. (E.D.N.Y. 1974), 62 FRD 65, 18 Fed R Serv 2d (Callaghan) 471, 1974-1 Trade Cas (CCH) P74923*.

In antitrust action brought against defendant oil company with respect to its gasoline station dealership arrangements, which action was sought to be maintained as class action on behalf of class of dealers, issues satisfying Rule 23 requisites of commonality, typicality, and predominance could not be raised as to persons who were then contract lessees of defendant, since no person named as plaintiff was presently contract dealer of defendant. *Herrmann v. Atlantic Richfield Co. (W.D. Pa. 1974), 65 FRD 585, 20 Fed R Serv 2d (Callaghan) 137, 1975-1 Trade Cas (CCH) P60115*.

In antitrust action brought against parent telephone company and its subsidiaries as class action on behalf of all users of private communication service to recover for alleged excessive federal communications excise taxes that plaintiffs paid, representative plaintiffs had standing to sue on behalf of users of communication service who dealt with operating companies other than those which serviced representative plaintiffs, where acts in conduct attributed to defendants had same impact upon users of communications service, all allegedly being injured thereby except for differences in amounts of overpayment of taxes. *Du Pont Glore Forgan, Inc. v. American Tel. & Tel. Co. (S.D.N.Y. 1975), 69 FRD 481, 20 Fed R Serv 2d (Callaghan) 1190, 1975-2 Trade Cas (CCH) P60520*.

In action brought against professional basketball leagues for alleged violations of federal antitrust laws, named plaintiffs, 11 individuals who were active players in one of leagues and 3 who no longer played in league, were members of proposed class where class was comprised of all active players in one of leagues from date of commencement of action through present, and all future players in league prior to date of final judgment. *Robertson v. NBA (S.D.N.Y. Feb. 14, 1975), 389 F Supp 867, 19 Fed R Serv 2d (Callaghan) 982, 76 Lab Cas (CCH) P10729, 1975-1 Trade Cas (CCH) P60168*.

252. —Franchises

Motion of plaintiff, former franchisee of defendant franchisor, for class action determination as to action brought by franchisee for alleged violation of federal antitrust laws with respect to franchise agreement, would not be granted where plaintiff, as former franchisee, was not member of class of present franchisees. *Free World Foreign Cars, Inc. v. Alfa Romeo, S.p.A. (S.D.N.Y. 1972), 55 FRD 26, 16 Fed R Serv 2d (Callaghan) 75, 1972 Trade Cas (CCH) P73925*.

Complaint of plaintiffs (individual franchisees) in action sought to be maintained as class action with respect to defendant franchisor's alleged violation of Sherman Act, satisfied prerequisites of class action, notwithstanding contention that as franchisees who had repudiated their franchise agreement plaintiffs were not members of class they purported to represent, where fact that plaintiffs terminated their agreement with defendant did not in any way affect their claim for damages or time during which they operated under terms of alleged illegal agreement, and where plaintiff sought relief for same alleged violations as did franchisees who were continuing to operate under agreement. *Seligson v. Plum Tree, Inc. (E.D. Pa. 1972), 55 FRD 259, 16 Fed R Serv 2d (Callaghan) 236, 1972 Trade Cas (CCH) P74098*.

In action under Clayton and Sherman Acts in which individual plaintiffs and their franchisee corporations sought to sue their franchisor and its subsidiaries on behalf of 400 past and present franchisees of defendant franchisor in class action, plaintiffs were not members of class they sought to represent where, among other things, none of agreements executed by plaintiffs contained provisions containing agreement to purchase requirements for certain items while number of franchisees sought to be represented did so agree, and where, among other things, plaintiffs claimed that all franchisees were subject to illegal tie-ins concerning signs, yet plaintiffs bought 8 or 9 signs from private sources. *Abercrombie v. Lum's, Inc. (S.D. Fla. June 14, 1972), 345 F Supp 387, 16 Fed R Serv 2d (Callaghan) 658, 1972 Trade Cas (CCH) P74118*.

253. Banks and banking

On removal from state court to federal court of class action brought by state's attorney on behalf of state citizens who sought home mortgage loans, for one of defendant's alleged violation of *12 USCS § 1464(a)*, state's attorney was not member of class he purported to represent so that District Court properly dismissed complaint, where state's attorney did not allege in complaint that either he or state sought home mortgage loan. *Illinois ex rel. Bowman v. Home Federal Sav. & Loan Asso. (7th Cir. Ill. Aug. 19, 1975), 521 F2d 704, 20 Fed R Serv 2d (Callaghan) 946*.

District court did not abuse its discretion in refusing to certify class in borrower's claim that bank which loaned her money to purchase vehicle charged cost of unauthorized, excessive and concealed insurance to her account, since plaintiff admitted that she never paid any of premiums or finance charges and thus did not allege damages in support of her claim, her claims were thus atypical of those of rest of class, and her failure to protest amount of collateral insurance premiums disclosed to her or fact that coverage was for full balance of loan rather than fair market value of vehicle was evidence that she would not fairly and adequately protect interests of class. *McClain v. South Carolina Nat'l Bank (4th Cir. S.C. Jan. 22, 1997), 105 F3d 898, 36 Fed R Serv 3d (Callaghan) 1474, 1997-1 Trade Cas (CCH) P71687*.

In class action representative plaintiff who fulfills Article III case or controversy requirement is not limited by standing doctrine to litigating claims of class members which are identical to his own; thus, in class action brought by bank credit card holders involved exclusively in consumer transactions, on behalf of all bank credit card holders alleging: (1) that banks' charging more than one per cent per month interest violated National Bank Act [*12 USCS § 85*], (2) that previous balance method of accounting was illegal, (3) that compounding of interest on delinquent accounts was unlawful, consumer card holders could continue as representative plaintiffs on all three claims on behalf of commercial card holders despite fact that court had ruled against first claim with regard to consumer transactions, since consumer card holders still shared other two intimately related claims with plaintiff class. *Haas v. Pittsburgh Nat'l Bank (W.D. Pa. 1976), 72 FRD 174*.

In replevin action brought by bank against former holder of account and "Guardian Check Cashing Service Courtesy Card" to obtain possession of property covered by security agreement which bank and account holder had entered into when holder had become indebted to bank, wherein holder counterclaimed (1) alleging that service charges on her account had been unlawful, that bank had erred in computing balance in her account, and that she had signed promissory note and security agreement as result of fraud and duress, and (2) asserting that she was member of class of people who had been assessed illegal service charges, class would be limited to persons who were holding or had held Guardian Check Cashing Cards and who had been assessed allegedly illegal service

charges, and named plaintiff was member of class, notwithstanding that she did not maintain checking loan account with bank at time she filed counterclaim, where woman was assessed allegedly illegal service charges along with rest of class and her alleged harm was identical to absent class members. *Lennon v. First Nat'l Bank (Ariz. Ct. App. 1974), 518 P2d 1230*.

254. Consumers and their protection

Objectors failed to demonstrate inadequate representation based on *Cal. Civ. Code 896(a)(15)* where all class members shared common objective of recovering costs associated with replacing defective brass plumbing fittings in their homes. *Ortega v. Uponor, Inc. (In re Uponor, Inc.) (8th Cir. Minn. June 7, 2013), 716 F3d 1057*.

In putative class action alleging that imposition of 10 percent surcharge for damage waiver on tool rentals violated state statutes and constituted common law unjust enrichment and money had and received, certification was properly denied for certain subclasses because named representative was not member of those subclasses. *Berger v. Home Depot USA, Inc. (9th Cir. Cal. Feb. 3, 2014), 741 F3d 1061*, overruled in part, *Microsoft Corp. v. Baker (U.S. June 12, 2017), — US —, 137 S Ct 1702, 198 L Ed 2d 132*.

University lacked standing to represent class of colleges and universities in action for breach of fiduciary duty against asbestos settlement trust and its trustees because class was only conditionally certified for purposes of discovery on eight specific issues involving merits of universities' underlying asbestos claims, and that conditional class certification did not extend to breach of fiduciary duty claims; further, record did not show that university was ever authorized to serve as representative for conditionally certified class in that action. *S. Wesleyan Univ. v. Andrews (In re Celotex Corp.) (Bankr. M.D. Fla. Apr. 6, 2010), 427 BR 909*, aff'd, *(11th Cir. Fla. Nov. 6, 2012), 496 Fed Appx 3*.

255. —Telephone Consumer Protection Act

In this Telephone Consumer Protection Act (TCPA) action, plaintiff had standing to pursue its claims; fact that plaintiff did not personally recall receiving "junk fax" was inconsequential because personal knowledge of receipt was not necessary under TCPA. *Reliable Money Order, Inc. v. McKnight Sales Co., Inc. (E.D. Wis. Mar. 30, 2012), 281 FRD 327*, aff'd, *(7th Cir. Wis. Jan. 9, 2013), 704 F3d 489, 84 Fed R Serv 3d (Callaghan) 637*.

Evidence that fax advertisements were successfully sent was sufficient to show standing for named plaintiff in putative class action alleging violation of Telephone Consumer Protection Act, *47 USCS 227*. *City Select Auto Sales, Inc. v. David Randall Assocs. (D.N.J. Dec. 20, 2013), 296 FRD 299*.

Person or entity that owns fax machine that receives unsolicited fax advertisement is person or entity with standing to assert Telephone Consumer Protection Act (TCPA), *47 USCS § 227*, claim; accordingly, class certification was not warranted in suit alleging TCPA violations because class included persons lacking statutory standing. *APB Assocs. v. Bronco's Saloon, Inc. (E.D. Mich. Apr. 26, 2013), 297 FRD 302*.

256. Insurance, generally

Plaintiff, who was allegedly injured by defendant title insurance company, did not have standing to sue two other companies as class representative, even if they engaged in similar conduct that injured other parties; plaintiff's proposed interpretation of U.S. Const. art. III (that it permitted suits against non-injurious defendants as long as one of defendants in suit injured plaintiff) was unprecedented, and court declined to adopt it. *Mahon v. Ticor Title Ins. Co. (2d Cir. Conn. June 25, 2012), 683 F3d 59*.

Putative class action against catastrophic illness insurer must be dismissed, where only named plaintiff's claims have been extinguished and merged under doctrine of res judicata, because class certification issues cannot be reached since only class plaintiff lacks individual standing. *Gladney v. American Heritage Life Ins. Co. (W.D. La. Apr. 5, 1999), 80 F Supp 2d 594*.

257. Labor and employment

In civil rights action brought to obtain declaratory judgment declaring provisions of state's law unconstitutional, insofar as they authorized suspension or termination of unemployment compensation benefits without prior hearing, plaintiff, who sought to represent all persons for whom state department of labor had made or would make determination pursuant to state law that they were eligible for unemployment insurance benefits, was representative party within meaning of Rule 23 despite fact that he received post-termination hearing, and hearing which plaintiff received was not pre-termination hearing, kind of hearing which was pertinent to class. *Torres v. New York State Dep't of Labor (S.D.N.Y. Sept. 14, 1970), 318 F Supp 1313, 14 Fed R Serv 2d (Callaghan) 1079*.

In action brought by member of defendant union as class action under Title I of Labor Management Reporting and Disclosure Act (*29 USCS §§ 401* et seq.) for alleged violation of balloting procedures for dues increases under Act, plaintiff had standing to sue both for himself and class he sought to represent, where rights which plaintiff possessed and injury asserted were coterminous with those of all union members. *Connor v. Highway Truck Drivers & Helpers (E.D. Pa. July 25, 1974), 378 F Supp 1069, 19 Fed R Serv 2d (Callaghan) 95, 75 Lab Cas (CCH) P10350*.

Class of prospective or potential employees may not be represented by named plaintiff who was actually hired by defendant. *Meyers v. Ace Hardware, Inc. (N.D. Ohio Aug. 10, 1982), 95 FRD 145, 35 Fed R Serv 2d (Callaghan) 68*.

In multicount complaint seeking damages and rescission of Eastern Airlines--Texas Air Merger brought by employee-stockholders, those counts seeking rescission of merger would not be certified for class action since outcome of litigation would also affect non-employee stockholders who were not members of proposed class, since without presence of non-employee stockholders court could not assure that they would receive minimal due process; however, class would be certified as to damages counts since rights of both employee common and preferred stockholders may have given rise to duty to disclose certain information in proxy statement owed only to employee stockholders. *Hastings-Murtagh v. Texas Air Corp. (S.D. Fla. Feb. 29, 1988), 119 FRD 450*.

Nurse was not entitled to *Fed. R. Civ. P. 23* New York class certification against employer for alleged violations of New York wage and hour laws on basis that employer improperly treated certain nurses as exempt salary employees because nurse was not part of New York class; class was defined as all persons who worked for employer as utilization review nurse, case management nurse, or medical management nurse, and nurse was not person who worked for employer in one of these roles. *Ruggles v. Wellpoint, Inc. (N.D.N.Y. Feb. 22, 2011), 272 FRD 320*.

Unpublished decision: Named plaintiff's failure to provide specific information about his job position or duties relative to employee class meant that class certification requirements of commonality, typicality, adequacy, predominance, and superiority were not met in wage and hour action. *Lusby v. Gamestop Inc. (N.D. Cal. Mar. 25, 2013), 297 FRD 400*.

258. —Pensions and retirement

In plaintiff union pension and welfare funds putative class action against defendants, investment trusts, "depositor" that organized them and 5 of its officers, and trusts' underwriters, under *15 USCS §§ 77k(a)*, *77l(a)(2)*, because none of named funds bought certificates in 6 of trusts, there was no standing on those claims, and *Fed. R. Civ. P. 23* criteria could be used as required tool for shaping scope of class action without abandoning notion that U.S. Const. art. III created outer limit based on incentives of named plaintiffs to adequately litigate issues of importance to them. *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp. (1st Cir. Mass. Jan. 20, 2011), 632 F3d 762, Fed Sec L Rep (CCH) P96021*.

In action challenging constitutionality of state statutory provision barring refund of pension moneys, where plaintiff sought to act on behalf of, among others, widows and heirs or legal representatives of all deceased former members of city's police and fire departments who were separated from police or fire department prior to becoming

eligible for retirement and who, while living, were also denied refund of contributed pension moneys, requirements of Rule 23 that "one or more members of a class may sue" was not met since there were no representatives of such class among named plaintiffs. *Muzquiz v. San Antonio (W.D. Tex. July 1, 1974), 378 F Supp 949*, aff'd, *(5th Cir. Tex. Oct. 8, 1975), 520 F2d 993*.

In interpleader action brought by administrators of retirement program for university against city officials who made contributions toward annuity contracts allegedly in violation of statutes and members of class, which class was composed of former employees of university who were appointed on or after fall 1967 semester, who elected to participate in optional retirement program by purchasing annuity contracts, who did not already own any similar annuity contracts issued by plaintiffs, who did not complete one year in service to university and continue in service thereafter, and to whose annuity contracts contributions were made by city, individual who was first appointed on annual salary basis for 1968–1969 academic year and had not remained in service with university for more than year thereafter as required in order for her rights in optional retirement program to vest was member of class affected by settlement of action. *Teachers Ins. & Annuity Asso. v. Beame (S.D.N.Y. 1975), 67 FRD 30*.

In case pursuant to Employee Retirement Income Security Act of 1974 (ERISA), *29 USCS §§ 1001* et seq., plaintiffs' relative lack of interest and independence in this case were no obstacle to finding that they were nonetheless adequate representatives of class in light of their counsel's qualifications; to extent class representative's adequacy came down to question of "vigorous representation" (as opposed to question of possible conflict of interests), it was perfectly acceptable to decide that matter in light of counsel's competence and ability to meet his fiduciary duties to class. *Ruppert v. Alliant Energy Cash Balance Pension Plan (W.D. Wis. Feb. 12, 2009), 255 FRD 628*.

Participants in their employer's retirement plan filed suit alleging that plan underpaid their retirement benefits, and court ruled that participants were entitled to class certification because they proved that their cause of action satisfied *Fed. R. Civ. P. 23*; however, court declined to appoint designated appointee as class representative because she failed to prove that her claims were typical of those of class; although she claimed that plan failed to provide sufficient discovery that would support her bid to serve as class representative, she had not moved to compel that discovery. *Clemons v. Norton Health Care, Inc. (W.D. Ky. Feb. 22, 2011), 271 FRD 562*.

259. Prisons and jails

In action for equitable relief relating to quality of medical care at county jail, which action was brought by persons who had been incarcerated in jail on behalf of class of other persons who at time, or in past, were incarcerated, or would be incarcerated in jail, District Court correctly proceeded to dismissal of action without making class action determinations under Rule 23(c)(1), where named plaintiffs failed to state claim in themselves for relief they sought. *Boyle v. Madigan (9th Cir. Cal. Feb. 6, 1974), 492 F2d 1180, 18 Fed R Serv 2d (Callaghan) 1207*.

In action by prisoners attacking conditions in county prison court will not allow certification of class to include pretrial detainees in county prison since named plaintiffs are not members of this class. *Mawson v. Wideman (M.D. Pa. 1979), 84 FRD 116*.

Certification of class comprising all juveniles who are now or may in future be placed in certain state home for boys is appropriate even though named plaintiff has already been discharged from home since length of stay of given juvenile in institution is so indefinite that it is by no means certain that any individual named as plaintiff in case would be committed to institution long enough for court to certify class. *Cruz v. Collazo (D.P.R. 1979), 84 FRD 307*.

260. Securities, stocks and bonds

President of brokerage firm who was allegedly elected to board of directors of issuing corporation and who advanced funds to corporation to pay auditing expenses to be repaid out of expected future investment, was not so remote from core of class action complaint alleging securities violations as to violate class action requirements of *Eisen v. Carlisle & Jacquelin (U.S. May 28, 1974), 417 US 156, 94 S Ct 2140, 40 L Ed 2d 732* (criticized in *Howard v Securitas Sec. Servs., USA (2009, ND Ill) 2009 US Dist LEXIS 3913*) and (criticized in *Drennan v PNC Bank, NA*

(In re Comty. Bank of N. Va. & Guaranty Nat'l Bank of Tallahassee Second Mortg. Loan Litig.) (2010, CA3 Pa) 622 F3d 275) and (criticized in *Hecht v United Collection Bureau (2011, DC Conn) 2011 US Dist LEXIS 39507*) and (criticized in *Wal-Mart Stores, Inc. v Dukes (2011, US) 131 S Ct 2541, 180 L Ed 2d 374, 112 BNA FEP Cas 769, 94 CCH EPD P 44193, 161 CCH LC P 35919, 79 FR Serv 3d 1460, 22 FLW Fed S 1167*) and (criticized in *In re Ford Motor Co. E-350 Van Prods. Liab. Litig. (2012, DC NJ) 2012 US Dist LEXIS 13887*) *Herm v. Stafford (W.D. Ky. Dec. 6, 1978), 461 F Supp 508, Fed Sec L Rep (CCH) P96735*.

In Securities Act suit, plaintiffs who were unable to secure standing for themselves were not members of class, and could not pursue action as class representatives. *Mintz v. Mathers Fund, Inc. (7th Cir. Ill. June 15, 1972), 463 F2d 495, 16 Fed R Serv 2d (Callaghan) 415, Fed Sec L Rep (CCH) P93524*.

Group of investors could not be effective representative of class of investors who held short positions on October 31, 2001, if they had already filed and lost their own suit; they would then not even be members of certified class, let alone its appropriate champions. *Premium Plus Partners, L.P. v. Goldman, Sachs & Co. (7th Cir. Ill. Aug. 5, 2011), 648 F3d 533, 80 Fed R Serv 3d (Callaghan) 259*.

In action claiming breaches of trust with respect to certain bonds, bondholders protective committee, which had no title, legal or equitable, to bonds, was not one of class of bondholders entitled to bring class action against defendant on behalf of bondholders in light of Rule 23 requirement that person instituting class action by one of class he purports to represent. *Clark v. Chase Nat'l Bank (D.N.Y. Apr. 30, 1942), 45 F Supp 820*.

In action brought by plaintiff individually and as representative of all other similarly situated stockholders and former stockholders of corporate defendant to recover damages for alleged violations of § 10(b) of Securities Exchange Act of 1934 (*15 USCS § 78j(b)*) and SEC Rule 10b-5, since plaintiff acquired stock prior to acts complained of and had never parted with it, and since maintenance of action for damages under § 10(b) and Rule 10b-5 that plaintiff be seller of stock, plaintiff could not maintain action on his individual behalf, and, having no standing to sue on his own account, he could not maintain class action on behalf of those stockholders who did sell their stock. *Greenstein v. Paul (S.D.N.Y. Oct. 27, 1967), 275 F Supp 604, 12 Fed R Serv 2d (Callaghan) 380, Fed Sec L Rep (CCH) P92011*, aff'd, *(2d Cir. N.Y. Aug. 30, 1968), 400 F2d 580, Fed Sec L Rep (CCH) P92262*, limited, *Entin v. Barg (E.D. Pa. 1973), 60 FRD 108, 17 Fed R Serv 2d (Callaghan) 689, Fed Sec L Rep (CCH) P94100*.

Since plaintiffs were nonselling shareholders, they could not represent selling shareholders where plaintiffs sought to maintain action on behalf of corporation's shareholders, and where only relief sought by plaintiffs which could properly be requested on behalf of class was injunction against manipulative activities to depress price of corporation's stock in violation of SEC Rule 10b-5. .

In action brought by individual and corporation, as purchasers of debentures, to recover damages they allegedly sustained as result of false and misleading offering circular issued by defendants in connection with sale of debentures, where action involved claims under § 10(b) of Securities Exchange Act (*15 USCS § 78j(b)*) and §§ 17(a)(1) and (a)(3) of Securities Act (*15 USCS § 77q(a)(1)* and (3)) and where plaintiff sought to represent all persons who purchased convertible subordinate debentures of company in reliance on offering circular, plaintiffs were members of class sought to be represented whether or not they relied on alleged misstatements and omissions and notwithstanding defendants' contention that absence of actual damages precluded both plaintiffs from membership in class. *Dorfman v. First Boston Corp. (E.D. Pa. Apr. 17, 1974), 62 FRD 466, 17 Fed R Serv 2d (Callaghan) 991, Fed Sec L Rep (CCH) P94531*.

Named plaintiffs in actions predicated on alleged violations of § 5 of Securities Act (*15 USCS § 77e*) with respect to defendants' alleged offer and sale of unregistered securities (call options) did not have standing, where none of named plaintiffs had any dealings whatsoever with respect to call options with any of moving defendants, and where representative status under Rule 23 did not cure defects in standing in light of fact that representative of class must himself be member of class he seeks to represent and thus show that his individual claim rises to level of case or controversy. *Leonard v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (S.D.N.Y. 1974), 64 FRD 432, 19 Fed R Serv 2d (Callaghan) 248, Fed Sec L Rep (CCH) P94814*.

In light of fact that class representative must himself possess cause of action, counts of complaint charging defendants with alleged violations of federal securities laws and SEC Rule could not be maintained as class action, where court had determined that counts of complaint would be dismissed for failure to state claim upon which relief could be granted. *Harris v. American Inv. Co. (E.D. Mo. June 24, 1974), 378 F Supp 894*, rev'd, *(8th Cir. Mo. June 18, 1975), 523 F2d 220, Fed Sec L Rep (CCH) P95208*.

Membership in plaintiff class is insufficient to mitigate lack of individual standing; thus, fact that plaintiffs seek certification as representatives of class of securities purchasers, at least one of whose members most probably will have purchased from each of proposed defendant underwriters, in no way alters fundamental requirement that each plaintiff have standing to sue each defendant in action brought under § 12(2) of Securities Act of 1933 (*15 USCS § 77l*(2)). *Akerman v. Oryx Communications, Inc. (S.D.N.Y. Sept. 20, 1984), 609 F Supp 363, Fed Sec L Rep (CCH) P91680*, aff'd in part, *(2d Cir. N.Y. Jan. 26, 1987), 810 F2d 336, 6 Fed R Serv 3d (Callaghan) 1136, Fed Sec L Rep (CCH) P93101*.

261. —Fraud

Plaintiffs in action brought for alleged securities fraud violative of Securities Exchange Act could not represent purchasers of stock in corporations whose stock plaintiffs did not purchase, since they themselves were not members of classes they sought to represent, although class action could still be maintained on behalf of separate classes consisting of open-market purchasers of stock of parent corporation and certain subsidiaries and affiliates. *Price v. Skolnik (S.D.N.Y. 1971), 54 FRD 261, 15 Fed R Serv 2d (Callaghan) 409, Fed Sec L Rep (CCH) P93149*.

Shareholder cannot represent class of which he or she is not member; in securities fraud action, plaintiffs may not be class representatives to challenge false and misleading statements made in proxy statement which had proposed merger of two companies, where class is defined as those shareholders of merged company who after exchanging shares sold preferred stock they had received, because plaintiffs themselves are non-selling shareholders and, therefore, they do not appear to be members of class which they purport to represent, and indeed may well have different if not adverse interests. *20 Fed R Serv 2d (Callaghan) 1225*.

Plaintiff lacked standing to bring securities class action with respect to particular transaction as to which defendant allegedly made material misstatements, since plaintiff did not purchase stock after that period and his assertion that fraudulent accounting treatment was similar to transactions as to which he had standing was insufficient, without more, to establish common course of conduct for purposes of standing requirement. *Abato v. Marcam Corp. (D. Mass. June 20, 1995), 162 FRD 8, Fed Sec L Rep (CCH) P98816*.

Where claims of lead plaintiffs in putative class action related to company's stock were based on different legal theories and necessarily required proof of different facts than their claims related to company's bonds, lead plaintiffs did not have standing to pursue claims involving bonds, particularly since, in addition to different elements of proof under federal securities laws, lead plaintiffs had not purchased bonds. *In re Am. Int'l Group, Inc. Sec. Litig. (S.D.N.Y. Feb. 22, 2010), 265 FRD 157, Fed Sec L Rep (CCH) P95612*, vacated, in part, *(2d Cir. Aug. 13, 2012), 689 F3d 229, Fed Sec L Rep (CCH) P96971*.

Using longest noticed class period, court determined that group of plaintiffs consisting of New York and Ohio plaintiffs should be lead plaintiffs under *Fed. R. Civ. P. 23* and *15 USCS § 78u-4(a)(3)(B)* because: (1) allegations in complaints gave rise to claims of securities fraud for that period of time that were not obviously frivolous; and (2) using that time period, it was undisputed that New York and Ohio had largest financial interest; however, because New York and Ohio plaintiffs' claims differed from those of second class of plaintiffs, as New York and Ohio plaintiffs' alleged that oil company made fraudulent statements between 2005 and 2010 about its safety precautions and second class of plaintiffs' claims centered on oil company's statements about safety of its drilling operations in Gulf of Mexico in 13 months leading up to particular explosion and oil spill, court created subclass consisting of purchasers of oil company's stock between March 4, 2009 and April 20, 2010. *In re BP, PLC Sec. Litig. (S.D. Tex. Dec. 28, 2010), 758 F Supp 2d 428*.

262. —Mergers

Since none of plaintiffs had relied on any statements contained in merger proxy statement, they could not represent class of persons who had allegedly relied upon such statements in voting for merger in action for alleged violation of Securities Exchange Act and SEC Rule 10b-5 by defendants' merger proxy statement. *Knauff v. Utah Constr. & Mining Co. (D. Wyo. Oct. 2, 1967), 277 F Supp 564, Fed Sec L Rep (CCH) P92163*, aff'd, *(10th Cir. Wyo. Mar. 25, 1969), 408 F2d 958, Fed Sec L Rep (CCH) P92374*.

In Securities Act suit alleging that defendant's merger proxy statement was false and misleading, plaintiffs who could not show that they were harmed financially by premerger manipulative practices, in that they did not sell their shares, could not recover as member of class of persons who purchased or sold corporation's shares from time when other merging corporation first began to purchase stock until merger was consummated, could not represent such class, and in any event were adequately protected in seeking damages for alleged proxy fraud. *Basch v. Talley Industries, Inc. (S.D.N.Y. 1971), 53 FRD 14, 15 Fed R Serv 2d (Callaghan) 582, Fed Sec L Rep (CCH) P93230*.

In securities violation lawsuit arising out of merger of insurance company as wholly-owned subsidiary with its holding company, where intervening plaintiff sought to represent class composed of all persons, other than defendant, who purchased or sold shares of common stock in insurance company during particular time and subclass consisting of all owners, excluding defendants, of life insurance company stock which was converted into holding company stock upon merger, argument that intervening plaintiff was not member of class because he did not buy any insurance company stock during time in question could not succeed, and since there was no longer any question that exchange of stock pursuant to merger qualified as purchase for purposes of 10(b) action under Securities Exchange Act, it was inconsistent to permit individual action to proceed but disallow class action on identical complaint. *Richardson v. Hamilton Int'l Corp. (E.D. Pa. 1974), 62 FRD 413, 18 Fed R Serv 2d (Callaghan) 756*.

In multicount complaint seeking damages and rescission of Eastern Airlines--Texas Air Merger brought by employee-stockholders, those counts seeking rescission of merger would not be certified for class action since outcome of litigation would also affect non-employee stockholders who were not members of proposed class, since without presence of non-employee stockholders court could not assure that they would receive minimal due process; however, class would be certified as to damages counts since rights of both employee common and preferred stockholders may have given rise to duty to disclose certain information in proxy statement owed only to employee stockholders. *Hastings-Murtagh v. Texas Air Corp. (S.D. Fla. Feb. 29, 1988), 119 FRD 450*.

263. Social Security

In action involving question of whether Social Security Administration could constitutionally make downward adjustment in amount being paid under existing award of survivors' benefits without affording adversely affected recipient opportunity to contest reduction at pre-reduction evidentiary hearing, there was no validity to argument that because plaintiffs had received post-reduction hearing they were no longer members or proper representatives of class of all persons who then or in future might be entitled to receive survivors' benefits and whose benefits had been or might be reduced without prior hearing. *Frost v. Weinberger (E.D.N.Y. May 3, 1974), 375 F Supp 1312*, rev'd, *(2d Cir. N.Y. Apr. 17, 1975), 515 F2d 57, 20 Fed R Serv 2d (Callaghan) 117*.

Even though named plaintiff in class action involving social security benefits has received her benefits through proceedings before Secretary of Health and Human Services on remand from District Court, she may continue to serve as class representative, where it has not been demonstrated that she and her counsel can no longer properly represent class, and where she has indicated her continuing interest in case and her willingness to represent class. *Jackson v. Heckler (N.D. Ind. Jan. 6, 1984), 581 F Supp 871*.

264. Welfare and public assistance

In action challenging effectiveness of state's food stamp program, requirements of Rule 23 were met as to series of classes composed of all those who were aggrieved by various policies of defendant which were under attack, except alleged failure of defendants to implement 60-day continuing certification plan for those participating

households who moved within state, since, in view of lack of standing of named plaintiffs to raise such issue, there was no class representative. *Tyson v. Norton (D. Conn. Feb. 24, 1975), 390 F Supp 545*, aff'd in part, vacated in part, *(2d Cir. Conn. Sept. 29, 1975), 523 F2d 972*.

Plaintiffs have standing to represent class of recipients of and applicants for home health care in New York State who have been or will in future be deprived of their federal constitutional rights through operation of 1991 and 1992 amendments to laws and regulations governing Medicaid-funded home health care in state, where plaintiffs challenged validity of state statutes relating to home health care services, because: (1) plaintiffs alleged they are being provided with less home health care services than ordered by their treating physicians and that this reduction was done without adequate notice and opportunity for hearing; (2) plaintiffs have personal stake in outcome of litigation and have been injured by conduct charged against defendants; (3) plaintiffs allege that if procedures outlined in 1991 and 1992 amendments were applied to them their home health care would be reduced without adequate notice and hearing, and (4) favorable decision would benefit plaintiffs. *Catanzano by Catanzano v. Dowling (W.D.N.Y. Mar. 31, 1994), 847 F Supp 1070*, aff'd, *(2d Cir. N.Y. July 13, 1995), 60 F3d 113*.

265. Miscellaneous

Action brought against several pawnbrokers for alleged violations of Truth in Lending Act (*15 USCS §§ 1601* et seq.) with respect to nondisclosures to borrowers was not appropriate for class action where named plaintiff, borrower from only one of defendant pawnbrokers, had suffered no injury at hands of other pawnbrokers and could not fairly and adequately protect interests of those who did have causes of actions against other pawnbrokers. *La Mar v. H & B Novelty & Loan Co. (9th Cir. Or. Dec. 7, 1973), 489 F2d 461, 17 Fed R Serv 2d (Callaghan) 1468*.

Court lacked appellate jurisdiction over denial of class certification of individual medical monitoring claims asserted by plaintiff citizens because after plaintiffs voluntarily dismissed claims so that they could seek appeal of dismissal of their tort claims, there was no longer self-interested party advocating for class treatment as necessary to satisfy Article III standing requirements. *Rhodes v. E.I. du Pont de Nemours & Co. (4th Cir. W. Va. Apr. 8, 2011), 636 F3d 88*, cert. denied, *(U.S. Oct. 31, 2011), 565 US 977, 132 S Ct 499, 181 L Ed 2d 347*.

In action brought by two of four residuary legatees on behalf of all 4 with respect to alleged mishandling of residuary funds by defendant executor and trustee with consent of other 2 legatees, potentially conflicting interests which legatees bringing action had with other 2, over issue of part played by them in defendant bank's disbursement of funds of residuary estate, prevented 4 legatees from falling in same class. *Hyde v. First & Merchants Nat'l Bank (W.D. Va. 1967), 41 FRD 527, 11 Fed R Serv 2d (Callaghan) 448*.

In action brought for alleged unauthorized representations as patent practitioner and for false representation of services under Lanham Act, plaintiff failed to define ascertainable class and to show he was member of such class, where complaint alleged class to be clients with whom defendants dealt and for whom defendants prepared patent applications, but very viable issue was whether defendants ever prepared patent application for plaintiff or anyone else, plaintiff presenting no evidence to contradict position that patent application was prepared by registered patent attorney, not part of defendant's organization. *Arnesen v. Raymond Lee Organization, Inc. (C.D. Cal. 1973), 59 FRD 145*.

In products liability suit regarding allegedly addictive drug that caused users various kinds of harm, including addiction, there was not enough evidence that named plaintiffs would fall within proposed class, as they did not appear to suffer addiction to drug or other alleged harm. *Gevedon v. Purdue Pharma (E.D. Ky. Oct. 17, 2002), 212 FRD 333*.

Courts considered named individual to be member of proposed class of individuals who had received communications from bad check diversion program that allegedly violated Fair Debt Collection Practices Act, *15 USCS §§ 1692* et seq., where reasonable fact finder could have concluded that her testimony as to what she expected to receive from case was not disclaimer of any right to collect damages, but was indication that financial remuneration was not motivating factor in her decision to pursue litigation. *Liles v. Am. Corrective Counseling Servs. (S.D. Iowa Sept. 29, 2005), 231 FRD 565*.

Certification of sub-classes of members of Puerto Rico integrated bar that unconstitutionally compelled members to purchase life insurance partially funded by annual dues was improper, as certified damages class was adequately represented, and most members of proposed sub-classes had opted out and thus lacked standing to seek sub-classes. *Brown v. Colegio De Abogados De P.R. (D.P.R. Mar. 2, 2011), 274 FRD 354*.

b. Constitutional Protections

266. Arrest, search and seizure

In civil rights action involving alleged police misconduct, named plaintiffs had standing to maintain action on behalf of class of all citizens of Philadelphia and included class of all black residents of city, where one of named plaintiffs alleged in complaint and established at trial incident where he was victim of illegal arrest and beating by Philadelphia police and another named plaintiff alleged illegal beating by police which presented arguably constitutional violation. *Goode v. Rizzo (3d Cir. Pa. Nov. 1, 1974), 506 F2d 542*, rev'd, *(U.S. Jan. 21, 1976), 423 US 362, 96 S Ct 598, 46 L Ed 2d 561*.

In action brought to enjoin police from stopping and frisking individuals in any manner not in accord with their constitutional rights, plaintiff could not represent class composed of those subjected to police action under statutes relating to interrogation of arrestees and admissibility of prearraignment statements where plaintiff was not member of class of people who had been subject to action based upon statutes. *Long v. District of Columbia (D.C. Cir. Sept. 6, 1972), 469 F2d 927*.

In light of rule that in order to be member of class it is necessary that each individual have standing to bring suit in his own right, group of persons in county whose property was at time under threat of seizure pursuant to state claim and delivery statute were not proper plaintiffs in action brought to have claim and delivery statute declared unconstitutional, where no one in group had yet been affected by action of statute and none had valid claim of his own, but group consisting of those whose property had been seized since action was instituted would be proper plaintiffs, since anyone whose property had actually been seized had right to bring similar action on his own. *Thomas v. Clarke (D. Minn. 1971), 54 FRD 245, 15 Fed R Serv 2d (Callaghan) 1579*.

267. Privacy

In proposed class action brought for equitable relief, in which it was claimed that policy of hospital in refusing to permit elective abortions and to refuse to permit medical personnel to perform elective abortions in hospital was violative of federal constitution right to privacy under amendments 9 and 14, representative plaintiff whose pregnancy had been terminated still had standing to sue as representative of class of all women residents of county who were less than 3 months' pregnant, who desired, or would desire in future, to have abortions performed at hospital, who had received doctor's advice to have abortion performed, and who were unable to receive abortions at hospital because of express policies of hospital concerning elective abortions. *Doe v. Mundy (E.D. Wis. July 24, 1974), 378 F Supp 731*, aff'd, *(7th Cir. Wis. Jan. 30, 1975), 514 F2d 1179*.

In action challenging constitutionality of Wisconsin statute placing limitations on sale and exhibition of devices designed to procure miscarriages or prevent pregnancy as being violative of fundamental right of privacy for sexual activities, lecturer on birth control and abortion lacked standing to assert claim seeking to enjoin defendants from enforcing provision prohibiting sale or disposal of contraceptive and abortion devices to unmarried persons, and lecturer could not, for such claim, act as representative of class of all unmarried persons who wished to obtain contraceptive devices. *Baird v. Lynch (W.D. Wis. Nov. 26, 1974), 390 F Supp 740*.

268. Self-help provisions of statutes

In action challenging constitutionality of provisions of state's Uniform Commercial Code enactments, plaintiffs, two individuals who entered into conditional sales contract with defendant company, who experienced repossession of their purchased goods, and who asserted standing as representatives of class of persons offended by self-help provisions of challenged statutes, were not member of class, if one could be described, claiming deprivation of

constitutional rights under statutes, nor could defendant company be said to be representative of class of probable defendants in such actions since it did not act against named plaintiffs by self-help. *Thompson v. Keesee (E.D. Ky. May 7, 1974), 375 F Supp 195*.

In action challenging constitutionality of self-help repossession and disposition provisions of Uniform Commercial Code provisions enacted in Michigan, where named plaintiffs, owners of automobiles which were repossessed without previous notice and opportunity for judicial hearing as authorized by challenged provisions, sought to represent class composed of themselves and all others whose automobiles were subject to repossession by one of named defendants without prior notice and opportunity for judicial hearing, 2 of named plaintiffs, individuals who had no unpaid loan or outstanding security agreement with one of defendants and whose automobile was not subject to seizure and sale by defendant, could not represent requested class in light of fact that plaintiff must be part of class to have standing to sue as class representative. *Watson v. Branch County Bank (W.D. Mich. Aug. 12, 1974), 380 F Supp 945*, rev'd, *(6th Cir. Mich. 1975), 516 F2d 902*.

269. Miscellaneous

Although juvenile court proceedings had been completed against 2 named juvenile plaintiffs in class action under federal civil rights legislation which challenged on federal constitutional grounds "intake" procedures of state juvenile court, such completion of proceedings did not remove 2 named juveniles from membership in class defined in order which included juveniles who might in future be subjected to challenged "intake" procedures, and 2 named juvenile plaintiffs would remain adequate representatives of entire class. *Conover v. Montemuro (3d Cir. Pa. Dec. 20, 1972), 477 F2d 1073*.

Court would not accept amended complaint purporting to assert class action on behalf of all indigent persons who had been convicted of criminal misdemeanors in absence of paid, competent, and effective appointed council, all defense lawyers who should have been appointed, and all indigents and attorneys who would suffer from said actions in future, in action brought under Civil Rights Act by two individuals alleging abridgment of constitutional right to counsel, since individuals one of whom had received appointed counsel, and one of whom was not indigent, were not similarly situated and therefore not representatives of class they purported to represent. *Geehring v. Municipal Court of Girard (N.D. Ohio Mar. 27, 1973), 357 F Supp 79*.

In civil rights action brought by husband and wife on behalf of themselves and all other former mental patients who had similarly requested and been denied access to their hospital medical files, where it was contended that defendants' refusal to grant plaintiffs access to requested medical records constituted deprivation of federal constitutional rights, it could not be asserted that husband was member of class he purported to represent, since nowhere in complaint, or in papers, or in memoranda had it been alleged that he was ever mental patient at any of defendant hospitals, and since it had not been alleged that husband had ever requested or been refused access to either his or his wife's medical records. *Gotkin v. Miller (E.D.N.Y. July 24, 1974), 379 F Supp 859*, aff'd, *(2d Cir. N.Y. Apr. 17, 1975), 514 F2d 125*.

In action brought for alleged violation of *18 USCS § 1702* and Constitution with regard to investigation by FBI of female high school student, plaintiffs—student and student's teacher—could not be deemed to be part of class they sought to represent—all persons who had been or would become engaged in correspondence with dissident political groups or organizations and whose correspondence was surveilled by defendants, their agents, employees or informants without authority pursuant to valid search warrant and who thereby became subjects of files or other records maintained by defendants—where interests of plaintiffs were not being adversely affected as litigation moved forward, whereas at least some members of purported class were continuing to see themselves harmed. *Paton v. La Prade (D.N.J. Aug. 29, 1974), 382 F Supp 1118*, vacated, *(3d Cir. N.J. Oct. 14, 1975), 524 F2d 862, 21 Fed R Serv 2d (Callaghan) 359*.

Unpublished decision: Inmates' appeal with respect to denial of their motion for class certification was meritless because class action would not stand where proposed representative parties were dismissed. *Cook v. City of Phila. (3d Cir. Pa. May 16, 2006), 179 Fed Appx 855*.

c. Discrimination

(1) In General

270. Race discrimination

In action brought by black and female citizens of county as class action on behalf of themselves and all blacks and females who were qualified for services on grand and traverse juries, alleging that various organs of local government in their county, especially grand and traverse juries, were so constituted as to discriminate against blacks and females, District Court erred in dismissing lawsuit on theory that since all of named plaintiffs were actually on traverse jury list, they could not complain of injury and were not members of proposed class, where thrust of plaintiffs' complaint was not that they had been injured because they had been excluded as individuals from jury lists because of race or sex discrimination, but rather that blacks as class and females as class had been systematically excluded from participation in government of county and that such class exclusions had skewed public actions in county in manner unfavorable to blacks and females; plaintiffs were members of class they purported to represent, and record indicated that they were proper representatives of class, possessing nexus with class and its interests and claims. *Foster v. Sparks (5th Cir. Ga. Jan. 20, 1975), 506 F2d 805, 19 Fed R Serv 2d (Callaghan) 815*.

While suits involving racial discrimination lend themselves generally to class treatment, plaintiff does not satisfy burden that is his in order to qualify as proper representative to maintain such action merely because of his race or because he designates his action as class action. *Doctor v. Seaboard C. L. R. Co. (4th Cir. N.C. June 30, 1976), 540 F2d 699, 12 Empl Prac Dec (CCH) P11037, 21 Fed R Serv 2d (Callaghan) 1313*.

271. —Housing

In action brought with respect to effect upon blacks of defendant city's urban renewal activities, which action was brought by unincorporated association and four individuals who were displaced by urban renewal project to obtain redress for denial of rights guaranteed by Constitution and various civil rights laws and statutes pertaining to housing, where District Court did not enter separate order certifying class action, but did state in order that two distinct classes were represented and described them as being residents displaced by urban renewal project and unincorporated association whose members were residents of areas in defendant city scheduled for renewal in near future, Court of Appeals would reverse final order of District Court insofar as it required, among other things, affirmative action by city to provide replacement housing for persons displaced by enforcement of defendant city's building code, where none of plaintiffs asserted that he had been displaced by code enforcement so as to be member of class affected by code enforcement. *Garrett v. Hamtramck (6th Cir. Mich. Sept. 26, 1974), 503 F2d 1236, 19 Fed R Serv 2d (Callaghan) 514*.

Nonminority person was not member of subclass of plaintiffs in class action challenging racially discriminatory effect of public housing projects where such person did not believe additional low income housing should be permitted in project area or that it was proper to seek integration through law suit, since members of such class must assert Fair Housing Act claim of class that defendants' activities have caused segregation and that law suit is proper tool to remedy that unlawful activity. *Fox v. United States Dep't of Housing & Urban Development (E.D. Pa. Jan. 10, 1979), 468 F Supp 907*.

In action alleging racial steering in sale and rental of real estate, plaintiffs, as "testers," do not have standing to represent potential home buyers who have been injured by defendant real estate companies' conduct, but plaintiffs do have standing to represent persons who have been denied right to live in integrated community. *Sherman Park Community Asso. v. Wauwatosa Realty Co. (E.D. Wis. Mar. 31, 1980), 486 F Supp 838*.

272. —Schools and education

White student who was denied admission to university had standing to challenge its admissions policies as discriminating against whites since he suffered injury in fact since his application was treated less favorably than

that of non-whites, solely because of his race, and district court's denial of class certification simply because of its holding that student lacked standing was accordingly subject to reversal as well. *Wooden v. Bd. of Regents of the Univ. Sys. (11th Cir. Ga. Apr. 19, 2001), 247 F3d 1262, 49 Fed R Serv 3d (Callaghan) 567* (criticized in *Cotter v City of Boston (2002, DC Mass) 193 F Supp 2d 323*) and (criticized in *Donahue v City of Boston (2002, CA1 Mass) 304 F3d 110, 89 BNA FEP Cas 1495, 83 CCH EPD P 41165*).

Black students at University of Mississippi who sought to represent, in second and third counts of class action charging racial segregation in higher education, all students and potential students at predominantly black colleges and universities operated by state were not satisfactory parties to represent purported class since they were not members of class they purported to represent and had not demonstrated any substantial relationship to that class. *Donald v. University of Mississippi (N.D. Miss. Jan. 30, 1973), 354 F Supp 266*.

Class certification was granted in Title IX of Education Amendments of 1972, *20 USCS §§ 1681* et seq., action because members of women's equestrian team shared common interest with other female students in compelling university's compliance with its Title IX obligations; and in claiming that university failed to comply with these obligations members of equestrian team were asserting discrimination claims that were typical of those that could be asserted by other members of class. *Foltz v. Del. State Univ. (D. Del. July 12, 2010), 269 FRD 419*.

273. —Use of facilities

Although Negro minor who had been declared insane by court and denied admission to state hospital might maintain suit in his own right and as class action as member of class of Negro incompetent citizens who allegedly were adjudged to be entitled to admission to hospital as persons suffering from psychosis and were denied right of admission, issue of alleged unconstitutional racial segregation of patients receiving treatment in hospital could not be maintained as class action, since as class suit such issue could only be brought by one who was in position to show he is member of class who have been denied some right by reason of segregation, and plaintiff possessed no such right individually as he was not and never had been patient in hospital. *Johnson v. Crawfis (D. Ark. Jan. 28, 1955), 128 F Supp 230*.

In action under Civil Rights legislation for alleged racial discrimination in use of various facilities in city, which action was brought by four black citizens of city on behalf of all other Negro citizens of city, plaintiffs could not represent class they were not part of, where it was not shown that representative plaintiffs had been denied rights and suffered injuries referred to in complaint. *Anderson v. Kelly (M.D. Ga. 1963), 32 FRD 355, 7 Fed R Serv 2d (Callaghan) 435*.

In action by two blacks on behalf of all Negroes in Mississippi, wherein it was claimed that defendants discriminated against plaintiffs and their class by preventing them from using recreational facilities in city, county courthouse, and county hospital, named plaintiffs were not members of class with respect to alleged discrimination in use of recreational facilities, where neither plaintiff had sought or been denied admission to such recreational facilities, and class action would be dismissed to extent that plaintiffs had no standing to act on behalf of class relating to such facilities, although action might proceed with respect to issues involving discrimination in courthouse and hospital where there where genuine issues as to material fact of plaintiffs' membership in classes relating to such facilities. *Hackett v Kincade (1964, ND Miss) 36 FRD 442, 9 FR Serv 2d 23A*.33, Case 3.

274. Sex discrimination

In action brought by black and female citizens of county as class action on behalf of themselves and all blacks and females who were qualified for service on grand and traverse juries, in which action it was alleged that various organs of local government in their county, especially grand and traverse juries, were so constituted as to discriminate against blacks and females, District Court erred in dismissing lawsuit on theory that since all of named plaintiffs were actually on traverse jury list, they could not complain of injury and were not members of proposed class, where thrust of plaintiffs' complaint was not that they had been injured because they had been excluded as individuals from jury lists because of race or sex discrimination, but rather that blacks as class and females as class had been systematically excluded from participation in government of county and that such class exclusions had

twisted public actions in county in manner unfavorable to blacks and females. *Foster v. Sparks (5th Cir. Ga. Jan. 20, 1975), 506 F2d 805, 19 Fed R Serv 2d (Callaghan) 815*.

In suit by mother and daughter for alleged deprivation of constitutional rights in violation of Civil Rights statutes as result of school athletic association's requirement of separate girls' and boys' teams for interscholastic sports, where daughter sought to represent class of all female students of school district, proper class action did not exist since daughter, having graduated from high school, was no longer member of class she sought to represent. *Ritacco v. Norwin School Dist. (W.D. Pa. Aug. 3, 1973), 361 F Supp 930*.

Plaintiffs had standing to sue defendant bank for alleged sex discrimination on behalf of class, where all defendants were totally owned by bank holding company which exercised influence and control incident to ownership; existence of separate corporate entities was not impenetrable barrier where plaintiffs alleged common ownership and policy of discrimination. *Doe v. First City Bancorporation, Inc. (S.D. Tex. Oct. 24, 1978), 81 FRD 562, 18 Empl Prac Dec (CCH) P8754*.

In action by female high school students for alleged discriminatory treatment against female athletes and athletic programs at school, certification was warranted of class of all present and future female students at high school and potential students who participated, sought to participate, and/or were deterred from athletics at school because defendants conceded that female students met *Fed. R. Civ. P. 23(a)*'s requirements of numerosity, commonality, typicality, and adequacy and acknowledged that female students met requirements of Rule 23(b)(2); there is no requirement in Ninth Circuit that "need" for injunction be considered in certifying class. *Ollier v. Sweetwater Union High Sch. Dist. (S.D. Cal. Aug. 25, 2008), 251 FRD 564*.

275. Miscellaneous

Plaintiffs, 28-year-old woman and 2-year-old boy, each of whom claimed to represent class composed of persons in particular age group, and each of whom further claimed to represent 2 distinct classes within each age group, one of which was those who in past purchased tickets from defendant airlines, could not represent, in action alleging that student and youth fares of defendant airlines constituted discrimination in contravention of Federal Aviation Act (49 USCS § 1374(b)) and Civil Rights Act (*42 USCS § 1985(3)*), class of those who in fact purchased tickets from defendants, where there was no allegation in complaint that either plaintiff had ever purchased airline ticket from defendants. *Eisman v. Pan American World Airlines (E.D. Pa. Dec. 22, 1971), 336 F Supp 543, 15 Fed R Serv 2d (Callaghan) 1060*.

Companions of disabled persons could not be included in class charging that defendant's movie theaters did not afford disabled persons full and equal access to their accommodations in violation of California law since plain meaning of California law allegedly violated confers cause of action only on disabled persons injured by disability access violations. *Arnold v. United Artists Theatre Circuit (N.D. Cal. Apr. 26, 1994), 158 FRD 439*, amended, modified, *(N.D. Cal. Sept. 15, 1994), 158 FRD 439*.

(2) Employment

276. Generally

Prospective class representative in Civil Rights Act, Title VII action must be actual member of sex, ethnic or racial group which he or she seeks to represent. *Rodrigues v. Pacific Tel. & Tel. Co. (N.D. Cal. Feb. 11, 1976), 70 FRD 414, 13 Empl Prac Dec (CCH) P11338, 23 Fed R Serv 2d (Callaghan) 281*.

Employment discrimination class actions cannot go forward unless class representatives have suffered same injuries as class members they propose to represent. *Penk v. Oregon State Bd. of Higher Education (D. Or. Dec. 10, 1982), 99 FRD 508, 35 Fed R Serv 2d (Callaghan) 1305*.

Only those persons who could have filed timely Equal Employment Opportunity Commission charges at time class representative filed his or her charge may become members of class in employment discrimination action. *Lilly v*

Harris-Teeter Supermarket (1982, WD NC) 545 F Supp 686, 33 BNA FEP Cas 98, affd in part and revd in part on other grounds, vacated on other grounds, in part *(CA4 NC 1983), 720 F2d 326, 37 Fed R Serv 2d (Callaghan) 1206*.

277. Multiple-based discrimination

In proposed class action alleging discrimination by defendant against Spanish-surnamed employees, Portuguese American with Portuguese surname was not member of class he sought to represent nor adequate representative of proposed class within meaning of Rule 23(a)(4). *Rodrigues v. Pacific Tel. & Tel. Co. (N.D. Cal. Feb. 11, 1976), 70 FRD 414, 13 Empl Prac Dec (CCH) P11338, 23 Fed R Serv 2d (Callaghan) 281*.

White female who alleged harassment and unlawful discharge from her job as Criminal Justice Planner with West Piedmont Planning District Commission in Martinsville, Virginia, could not represent Negro race in race discrimination class action suit. *Beck v. Mather (W.D. Va. June 10, 1976), 417 F Supp 648, 13 Empl Prac Dec (CCH) P11462*, disapproved as stated in *Kremer v. Chemical Constr. Corp. (2d Cir. N.Y. June 2, 1980), 623 F2d 786, 23 Empl Prac Dec (CCH) P30989*.

278. Representative not victim of discrimination, generally

To challenge system of craft seniority that denies right to transfer seniority from craft to craft as violation of Title VII of 1964 Civil Rights Act in class action, there must be representative party who has been personally aggrieved by such system; one who never transferred from one craft to another cannot be such representative; one who has been certified as proper class representative in connection with other charges may have such certification enlarged by District Court to include representation of those aggrieved by Title VII violations if evidence justifying such enlargement develops in course of hearings. *Doctor v. Seaboard C. L. R. Co. (4th Cir. N.C. June 30, 1976), 540 F2d 699, 12 Empl Prac Dec (CCH) P11037, 21 Fed R Serv 2d (Callaghan) 1313*.

Plaintiff cannot maintain employment discrimination suit as class action where plaintiff is not member of class of employees claiming discrimination. *Harris v. Farmbest Foods (M.D. Ala. 1977), 24 Fed R Serv 2d (Callaghan) 615, 1977 US Dist LEXIS 13426*.

279. EEOC suits

Equal Employment Opportunity Commission has standing to bring class action suit in own name charging violations of Civil Rights Act. *19 Fed R Serv 2d (Callaghan) 1304*.

Equal Employment Opportunity Commission is required to comply with Rule 23 in suits under § 706 of Title VII of Civil Rights Act of 1964 (*42 USCS §§ 2000e* et seq.); for purposes of satisfying requirements of Rule 23, public and private concerns of EEOC, in bringing § 706 suit, are not in conflict and EEOC may be member of class it seeks to represent, as contemplated by Rule 23. *EEOC v. Page Engineering Co. (N.D. Ill. 1978), 26 Fed R Serv 2d (Callaghan) 937, 1978 US Dist LEXIS 16035*.

280. Disability discrimination

None of class plaintiffs stated claim for relief under Americans with Disabilities Act since they admitted in their complaints that they were unable to perform essential functions of their jobs, hence could not be "qualified individuals" under ADA. *Cramer v. Florida (11th Cir. Fla. July 24, 1997), 117 F3d 1258, 4 Accom Disabilities Dec (CCH) P4-099*.

Employee was unable to assert claim under Americans with Disabilities Act of 1990, *42 USCS §§ 12101* et seq., on his own behalf, which precluded him from satisfying requirements for class certification under *Fed. R. Civ. P. 23*; therefore, corporation's motion to strike class allegations was granted. *Cohen v. Ameritech Corp. (N.D. Ill. Dec. 23, 2003), 2003 US Dist LEXIS 23166*.

281. Race discrimination

Class certification is properly denied plaintiff alleging racial discrimination in university employment where plaintiff does not know of any other member of his race who has not been granted tenure, who has been discriminated against in hiring, who has been discriminated against in non-retention, or who has in any way been discriminated against while on university faculty and from time suit was filed, plaintiff was not resident of state and was not in contact with any alleged class members. *Jamerson v. Board of Trustees (5th Cir. Ala. Nov. 23, 1981), 662 F2d 320, 27 Empl Prac Dec (CCH) P32248, 33 Fed R Serv 2d (Callaghan) 926*.

Because no representative adequately represents class with respect to claim of racial discrimination in initial assignment of newly-hired employees, District Court's findings applicable to such claim must be vacated, but intervention may yet be appropriate upon remand, and assuming that proper class representative is appointed, District Court may then determine propriety of reinstating findings from original trial. *Goodman v. Lukens Steel Co. (3d Cir. Pa. Nov. 13, 1985), 777 F2d 113, 38 Empl Prac Dec (CCH) P35719, 4 Fed R Serv 3d (Callaghan) 490*, aff'd, *(U.S. June 19, 1987), 482 US 656, 107 S Ct 2617, 96 L Ed 2d 572*, cert. dismissed, *(U.S. June 23, 1988), 487 US 1211, 108 S Ct 2860, 101 L Ed 2d 896* (superseded by statute on other grounds as stated in *Banks-Holliday v. Am. Axle & Mfg. (W.D.N.Y. Jan. 24, 2005), 2005 US Dist LEXIS 2453*.

Plaintiff who only had standing based on his EEOC charge to pursue race discrimination claims regarding promotions, transfers, and demotions relating to store manager positions in his geographical area could not represent claims of others against same employer concerning jobs above store manager or outside this plaintiff's geographical area. *Jones v Firestone Tire & Rubber Co. (1992, CA11 Ala) 977 F2d 527, 60 BNA FEP Cas 456, 60 CCH EPD P 41845, 24 FR Serv 3d 335, 6 FLW Fed C 1339*, reh, en banc, den *(1992, CA11 Ala) 983 F2d 239* and cert den *(1993) 508 US 961, 113 S Ct 2932, 124 L Ed 2d 682, 61 BNA FEP Cas 1576, 61 CCH EPD P 42288* and (criticized in *Lovermi v Bellsouth Mobility (1997, SD Fla) 962 F Supp 136, 10 FLW Fed D 709*).

Class action against union locals and others for alleged violation of rights under Railway Labor Act because of race and color was not maintainable as class action by 2 individual plaintiffs where neither was injured in any way by actions of defendants and accordingly had no standing to represent class. *Conley v. Gibson (S.D. Tex. 1961), 29 FRD 519, 1 Empl Prac Dec (CCH) P9675, 44 Lab Cas (CCH) P17479*.

Prospective class representative in Civil Rights Act, Title VII action must be actual member of sex, ethnic or racial group which he or she seeks to represent. *Rodrigues v. Pacific Tel. & Tel. Co. (N.D. Cal. Feb. 11, 1976), 70 FRD 414, 13 Empl Prac Dec (CCH) P11338, 23 Fed R Serv 2d (Callaghan) 281*.

Prerequisites for Rule 23 standing are satisfied in employment race discrimination class action where named plaintiffs are members of class they seek to represent and have alleged same basic personal injury is that which they allege was suffered by class. *Pennsylvania v. International Union of Operating Engineers (E.D. Pa. Nov. 30, 1978), 469 F Supp 329, 19 Empl Prac Dec (CCH) P9028, 26 Fed R Serv 2d (Callaghan) 1174*.

282. —Representative not victim of discrimination

Individual plaintiff who was not victim of racial discrimination in employment lacked necessary nexus to represent class of all former and present black employees and applicants for employment at hospital. *Armour v. Anniston (5th Cir. Ala. June 13, 1979), 597 F2d 46, 20 Empl Prac Dec (CCH) P30022, 27 Fed R Serv 2d (Callaghan) 734*, vacated, *(U.S. Mar. 24, 1980), 445 US 940, 100 S Ct 1334, 63 L Ed 2d 774*.

Plaintiff in class action alleging racial discrimination by defendant may not serve as representative plaintiff of class where it does not appear that he is member of class he purports to represent; plaintiff's discharge was not wrongful, he was not member of class of past, present and prospective employees and union members who had been subjected to racial discrimination, and, therefore, he has no standing to represent class. *Taylor v. Springmeier Shipping Co. (W.D. Tenn. 1971), 15 Fed R Serv 2d (Callaghan) 1233*.

Plaintiffs could not sue on behalf of class of which they were not members, where plaintiffs who sued union and employer on ground of racial discrimination had not been discharged or treated in racially discriminatory manner with regard to discharge or hiring and promotions. *Davis v. Ameripol, Inc. (E.D. Tex. Jan. 17, 1972), 55 FRD 284, 5 Empl Prac Dec (CCH) P8041*.

In action brought by black applicant for position as police officer with defendant county's police department, to recover for alleged discriminatory employment practices engaged in by police department, which action plaintiff sought to maintain as class action on behalf of all past, present, and future black applicants for employment with police department and all blacks who would have applied but for department's alleged discriminatory practices, since named plaintiff had suffered no injury, he could not be real party in interest having standing to sue on behalf of class of persons who allegedly had been injured, particularly since it was injury itself which defined class, and although court had earlier dismissed plaintiff without prejudice as party to action and permitted class action to remain on docket for 30 days to allow class to come forward with new named plaintiff before action would be dismissed, court should have dismissed named plaintiff and class action simultaneously. *Booth v. Prince George's County (D. Md. Jan. 23, 1975), 66 FRD 466, 9 Empl Prac Dec (CCH) P10075, 9 Empl Prac Dec (CCH) P9925, 19 Fed R Serv 2d (Callaghan) 1035*.

Plaintiff cannot maintain employment discrimination suit as class action where plaintiff is not member of class of employees claiming discrimination because he was not employee at time suit was brought, he is not member of class of persons discharged for racial reasons because he was discharged for excessive absences, and plaintiff is not member of class claiming discrimination in hiring because he was hired on 2 separate occasions. *Harris v. Farmbest Foods (M.D. Ala. 1977), 24 Fed R Serv 2d (Callaghan) 615, 1977 US Dist LEXIS 13426*.

Plaintiffs are not entitled to certification as representatives of class of black employees, employed by United States in naval yard, for purposes of employment discrimination class action, where (1) individual claims of plaintiffs were tried and judgment entered for defendants, (2) decision in individual claims was appealed and affirmed, (3) plaintiffs have not moved to have their individual claims reconsidered on remand, and (4) plaintiffs are not proper class representatives where plaintiffs claim class was discriminated against while accepting court finding that plaintiffs individually did not suffer discrimination. *Simmons v. Brown (E.D. Va. 1978), 26 Fed R Serv 2d (Callaghan) 1170, 1978 US Dist LEXIS 17549*, aff'd in part, vacated in part, *(4th Cir. Va. Dec. 28, 1979), 611 F2d 65, 21 Empl Prac Dec (CCH) P30532, 28 Fed R Serv 2d (Callaghan) 1113*.

Plaintiffs representing class of employees who have been subjected to defendant employer's racially discriminatory policies with respect to conditions of employment are not members of class of individuals who have been subjected to employer's racially discriminatory hiring practices, and plaintiff cannot act as representatives for such class; nor can employees' union represent class of individuals who have been racially discriminated against with respect to hiring practices, where such individuals are not members of union. Retail Wholesale & Dept. *Retail Wholesale & Dep't Store Union v. Standard Brands, Inc. (N.D. Ill. Dec. 6, 1979), 85 FRD 599, 29 Fed R Serv 2d (Callaghan) 69*.

283. —Different job positions

In action to recover for alleged race discrimination in employment, which action was brought by black foreman for stevedoring company, on behalf of himself and class of black longshoremen who were or might be employed by defendant employer, and who were or might be members of defendant unions, District Court did not err in declining to allow cause to proceed as class action, where there was no nexus between plaintiff foreman and class of longshoremen. *Wells v. Ramsay, Scarlett & Co. (5th Cir. La. Jan. 9, 1975), 506 F2d 436, 9 Empl Prac Dec (CCH) P9869, 19 Fed R Serv 2d (Callaghan) 1044, 20 Fed R Serv 2d (Callaghan) 1044*.

Negro principal of public high school might maintain action claiming discrimination against black teachers with respect to salaries as class action on behalf of others similarly situated, notwithstanding contention that plaintiff principal, as such, could not represent class which included black high and elementary school teachers, since principal and teachers in high schools and teachers in elementary schools were all members of same profession

and were required to be possessed of certain qualifications prescribed by defendant Board of Education. *McDaniel v. Board of Public Instruction (D. Fla. July 3, 1941), 39 F Supp 638*.

284. —Dismissal, resignation or retirement of representative

In action brought on behalf of all of defendant's Negro employees, including discharged employees, with respect to alleged companywide policy of racial discrimination in hiring, firing, promotion, and maintenance of facilities, plaintiff, Negro who had been discharged from defendant's employ, was member of class which he sought to represent, and lower court improperly concluded that plaintiff could not maintain suit as class action until he proved that he had been discharged because of race. *Johnson v. Georgia Highway Express, Inc. (5th Cir. Ga. Oct. 30, 1969), 417 F2d 1122, 2 Empl Prac Dec (CCH) P10119, 13 Fed R Serv 2d (Callaghan) 511, 61 Lab Cas (CCH) P9355*, disapproved as stated in *Wheeler v. Columbus (5th Cir. Miss. Apr. 25, 1983), 703 F2d 853, 31 Empl Prac Dec (CCH) P33560, 36 Fed R Serv 2d (Callaghan) 405*, disapproved as stated in *Griffin v. Dugger (11th Cir. Fla. Aug. 7, 1987), 823 F2d 1476, 44 Empl Prac Dec (CCH) P37334, 8 Fed R Serv 3d (Callaghan) 782* (criticized in *Gen. Tel. Co. of the Southwest v Falcon (1982) 457 US 147, 102 S Ct 2364, 72 L Ed 2d 740, 28 BNA FEP Cas 1745, 29 CCH EPD P 32781, 34 FR Serv 2d 371*).

Dismissal of action brought against employer and union to redress employment discrimination under Civil Rights Act on ground that Negro laborer purporting to represent potential and actual Negro employees was not, when he filed suit, member of class he purported to represent, would be reversed where, notwithstanding that Negro had accepted pension benefits, he was still aggrieved because of discriminatory discharge and had standing to sue in his own right and as class representative. *Hackett v. McGuire Bros., Inc. (3d Cir. Pa. July 8, 1971), 445 F2d 442, 3 Empl Prac Dec (CCH) P8276*.

In civil rights action brought by dismissed certification clerk of County Commodity Distribution Program against county commissioners and director of program for alleged employment discrimination against herself and blacks as class, plaintiff was member of class she wished to represent, where plaintiff directed her claims at racially discriminatory policies she alleged pervaded all aspects of employment practices of county and occupied position of one suffering from alleged discrimination, thereby demonstrating necessary nexus with proposed class for membership therein. *Long v. Sapp (5th Cir. Fla. Oct. 4, 1974), 502 F2d 34, 8 Empl Prac Dec (CCH) P9712, 19 Fed R Serv 2d (Callaghan) 254*, disapproved as stated in *Hartman v. Duffey (D.C. Cir. Apr. 5, 1994), 19 F3d 1459, 64 Empl Prac Dec (CCH) P43001*.

In action brought by female former employee of defendant employer for alleged racial and sex discrimination in violation of civil rights legislation, plaintiff would have to be member of class she sought to represent, with sufficient interest in outcome to assure that she would adequately and fairly represent class, and representative plaintiff does not meet such standards if she in fact voluntarily resigned employment for reasons unrelated to employee evaluation and promotion practices of which she complained. *Jenkins v. Blue Cross Mut. Hospital Ins., Inc. (7th Cir. Ind. Sept. 8, 1975), 522 F2d 1235, 10 Empl Prac Dec (CCH) P10382, 20 Fed R Serv 2d (Callaghan) 1039*.

Although black employees claim that they are proper class representatives for all those who have been discriminatorily discharged by railroad, whether as sanction for violation of rules, for failure to follow procedures to protect seniority in event of furlough, or for failing to pass mandatory examination for promotion from fireman to engineer, plaintiff employees can properly represent only those persons discharged for latter 2 reasons, for which plaintiff employees were themselves discharged, since discharge for rules violation follows investigation into whether violation has occurred and into mitigating circumstances and is fundamentally different from types of discharges plaintiff employees suffered. *Roby v. St. Louis S. R. Co. (8th Cir. Ark. Oct. 17, 1985), 775 F2d 959, 38 Empl Prac Dec (CCH) P35681, 3 Fed R Serv 3d (Callaghan) 269* (criticized in *Bonanno v Quizno's Franchise Co., LLC (2009, DC Colo) 2009 US Dist LEXIS 37702*).

In civil rights action against employer by former black employee for alleged acts of racial discrimination in employment, plaintiff, who was affected only in terms of promotional opportunities and working conditions, was in

no way member of class of individuals who might have been discriminatorily denied employment by defendant. *Blankenship v. Wometco Blue Circle, Inc. (E.D. Tenn. Nov. 20, 1972), 59 FRD 308, 6 Empl Prac Dec (CCH) P8922*.

285. —Hiring

Plaintiffs could not sue on behalf of class of which they were not members, where no plaintiff had been refused employment discriminatorily on basis of race or sex. *Barrett v. United States Civil Service (D.D.C. Dec. 10, 1975), 69 FRD 544, 10 Empl Prac Dec (CCH) P10586, 21 Fed R Serv 2d (Callaghan) 521*.

In civil rights action brought on behalf of class to recover for alleged racially discriminatory hiring practices used by defendants' state agencies, satisfaction of two-part test for standing whereby plaintiffs must allege that they have suffered or will suffer injury in fact and that they are at least arguably within zone of interest protected by relevant statute would be necessary for maintenance of class action, because individual purporting to represent class must himself have standing before he can seek relief on behalf of class he claims to represent. *Jackson v. Sargent (D. Mass. Feb. 4, 1975), 394 F Supp 162, 9 Empl Prac Dec (CCH) P10083*, aff'd, *(1st Cir. Mass. Dec. 1, 1975), 526 F2d 64, 10 Empl Prac Dec (CCH) P10526*.

In civil rights action brought by employee of defendant authority for alleged race discrimination in employment, class action was maintainable as to plaintiff class of all blacks then employed by authority, or formerly employed and at time laid off, who allegedly had been discriminated against on basis of race, but plaintiff could not represent class of black persons who had allegedly been denied employment on basis of race by authority since plaintiff was not member of such class. *Williams v. Tennessee Valley Authority (M.D. Tenn. Feb. 13, 1976), 415 F Supp 454, 11 Empl Prac Dec (CCH) P10715, 22 Fed R Serv 2d (Callaghan) 1313*, aff'd in part, vacated in part, *(6th Cir. Tenn. Mar. 28, 1977), 552 F2d 691, 13 Empl Prac Dec (CCH) P11597* (superseded by statute on other grounds as stated in *McKenzie v Principi (2001, ED La) 86 BNA FEP Cas 1310*).

286. —Promotions

Where plaintiff did not charge that age limitation on entry to machinist apprentice program was included in defendants' collective bargaining agreement for purposes of racial discrimination nor identified any other blacks who were denied admission to such program because their age exceeded such limit, and reached machinist classification after passage of Age Discrimination Act but complained that he should have been given chance for promotion to machinist earlier, trial court did not abuse discretion in denying him status as class representative in suit charging racial discrimination in grant and conditions of and progression in employment. *Doctor v. Seaboard C. L. R. Co. (4th Cir. N.C. June 30, 1976), 540 F2d 699, 12 Empl Prac Dec (CCH) P11037, 21 Fed R Serv 2d (Callaghan) 1313*.

In action brought under Equal Opportunity Employment Act of 1972 (*42 USCS §§ 2000e* et seq.) with respect to alleged discrimination in promotional policies against members of black race at naval shipyard, which action was brought as class action on behalf of class of all black civilians who were then employed, in past had been employed, or who might thereafter seek employment at shipyard, named plaintiffs were members of proposed class where they were all employees of naval shipyard who claimed to have been discriminated against because of their race in obtaining promotions. *Richerson v. Fargo (E.D. Pa. Feb. 5, 1974), 61 FRD 641, 7 Empl Prac Dec (CCH) P9310, 18 Fed R Serv 2d (Callaghan) 1169*, vacated, *(D. Pa. Oct. 3, 1974), 64 FRD 393, 8 Empl Prac Dec (CCH) P9751*.

In Title VII race discrimination action, Mexican-American employee of defendant is not proper representative of class of Mexican Americans who applied for employment during period in question but were not hired, since (1) class claims of hiring discrimination are not fairly encompassed by plaintiff's claim of promotion discrimination, (2) plaintiff does not possess same interests and did not suffer same injuries as class, (3) plaintiff attempts to prove his individual claim of promotion discrimination by means of disparate treatment evidence, but he attempts to establish class claims of hiring discrimination solely through statistical evidence of disparate impact, (4) plaintiff has no standing to assert class claims of hiring discrimination, and (5) plaintiff does not complain of particular practice, such as biased testing procedure, which affects more than one employment decision, nor is there any significant

proof of general policy of discrimination. *Falcon v. General Tel. Co. of Southwest (N.D. Tex. June 17, 1985), 611 F Supp 707*, aff'd, *(5th Cir. Tex. Apr. 23, 1987), 815 F2d 317*.

287. Sex discrimination

In action brought by female former employee of defendant employer for alleged racial and sex discrimination in violation of civil rights legislation, plaintiff would have to be member of class she sought to represent, with sufficient interest in outcome to assure that she would adequately and fairly represent class, and representative plaintiff could not meet such standards if she in fact voluntarily resigned employment for reasons unrelated to employee evaluation and promotion practices of which she complained. *Jenkins v. Blue Cross Mut. Hospital Ins., Inc. (7th Cir. Ind. Sept. 8, 1975), 522 F2d 1235, 10 Empl Prac Dec (CCH) P10382, 20 Fed R Serv 2d (Callaghan) 1039*.

In action seeking preliminary injunction against use of mandatory maternity leave policy requiring pregnant teacher to discontinue employment after 7th month of pregnancy, plaintiff did not have standing to represent other members of proposed class who were affected by defendants' arbitrary maternity leave cut-off date because her claim was rendered moot by defendants' change in policy. *Scott v. Opelika City Schools (M.D. Ala. May 6, 1974), 63 FRD 144, 7 Empl Prac Dec (CCH) P9375, 18 Fed R Serv 2d (Callaghan) 998*.

Prospective class representative in Civil Rights Act, Title VII action must be actual member of sex, ethnic or racial group which he or she seeks to represent. *Rodrigues v. Pacific Tel. & Tel. Co. (N.D. Cal. Feb. 11, 1976), 70 FRD 414, 13 Empl Prac Dec (CCH) P11338, 23 Fed R Serv 2d (Callaghan) 281*.

Named plaintiff in suit charging sex discrimination may raise not only his or her own claims, but also those growing out of allegations during pendency of case before EEOC. *Kyriazi v. Western Electric Co. (D.N.J. Oct. 30, 1978), 461 F Supp 894, 18 Empl Prac Dec (CCH) P8700*, vacated, in part, *(D.N.J. July 17, 1979), 473 F Supp 786, 21 Empl Prac Dec (CCH) P30300*.

Plaintiffs who represent class of employees who have suffered from defendant employer's sexually discriminatory policies with respect to conditions of employment are not members of class of individuals who have suffered from employer's sexually discriminatory policies with respect to hiring practices, and cannot act as representatives for such class; nor can employees' union represent class of individuals who have suffered from employer's sexually discriminatory policies with respect to hiring practices, where such individuals are not members of union. Retail Wholesale & Dept. *Retail Wholesale & Dep't Store Union v. Standard Brands, Inc. (N.D. Ill. Dec. 6, 1979), 85 FRD 599, 29 Fed R Serv 2d (Callaghan) 69*.

288. —Hiring

Having found in Title VII sex discrimination case that named plaintiffs were not qualified for jobs they sought and thus suffered no injury as result of alleged discriminatory practices, District Court properly concludes that they cannot represent class including female employees and applicants because their individual claims are nonexistent, and that they lack sufficient nexus with class to be class members, since they were applicants for supervisory positions and do not sufficiently identify with applicants for lower level labor jobs or employees complaining of disparate job assignments or pay. *Walker v. Jim Dandy Co. (11th Cir. Ala. Dec. 4, 1984), 747 F2d 1360, 35 Empl Prac Dec (CCH) P34912, 40 Fed R Serv 2d (Callaghan) 988*.

Plaintiffs could not sue on behalf of class of which they were not members, where no plaintiff had been refused employment discriminatorily on basis of race or sex. *Barrett v. United States Civil Service (D.D.C. Dec. 10, 1975), 69 FRD 544, 10 Empl Prac Dec (CCH) P10586, 21 Fed R Serv 2d (Callaghan) 521*.

Plaintiffs who represent class of employees who have suffered from defendant employer's sexually discriminatory policies with respect to conditions of employment are not members of class of individuals who have suffered from employer's sexually discriminatory policies with respect to hiring practices, and cannot act as representatives for such class; nor can employees' union represent class of individuals who have suffered from employer's sexually discriminatory policies with respect to hiring practices, where such individuals are not members of union. Retail

Wholesale & Dept. *Retail Wholesale & Dep't Store Union v. Standard Brands, Inc. (N.D. Ill. Dec. 6, 1979), 85 FRD 599, 29 Fed R Serv 2d (Callaghan) 69*.

Plaintiff alleging sex discrimination in employment for refusal to hire was not member of class she sought to represent where she had no claim under Title VII. *Consor v. Occidental Life Ins. Co. (N.D. Tex. Mar. 19, 1979), 469 F Supp 1110, 19 Empl Prac Dec (CCH) P9162, 27 Fed R Serv 2d (Callaghan) 1016, 27 Fed R Serv 2d (Callaghan) 1016, 28 Fed R Serv 2d (Callaghan) 204, 28 Fed R Serv 2d (Callaghan) 204*.

289. Miscellaneous

Although named plaintiff whose personal claim was limited to alleged discrimination in his termination was not appropriate representative for class of persons discriminated against with respect to promotions, since charges relative to promotions raised significant issues of proof separate from those implicated by terminations claim, certification of class of persons discriminated against with respect to promotions in violation of *42 USCS §§ 1981* and *2000e* et seq. was nevertheless proper on basis of intervention of individuals who were proper representatives for promotions class; exhaustion of EEOC remedies was excused for such intervenors and their intervention was therefore proper, since exhaustion would have been futile in this case. *Lilly v. Harris-Teeter Supermarket (4th Cir. N.C. Oct. 14, 1983), 720 F2d 326, 32 Empl Prac Dec (CCH) P33856, 37 Fed R Serv 2d (Callaghan) 1206*, cert. denied, *(U.S. Apr. 23, 1984), 466 US 951, 104 S Ct 2154, 80 L Ed 2d 539*.

Individual who was hired as assistant manager and participant in selective management training program cannot represent class of nonmanagement retail employees who were not hired to be in specialized training program in employment discrimination suit. *Gray v. Walgreen Co. (Dec. 5, 1983)*.

Current and former employees of defendant, who brought action alleging employment discrimination based on national origin, do not have standing to maintain class action on behalf of individuals who were initially denied employment with defendant or who might be denied employment in future. *Reyes v. Walt Disney World Co. (M.D. Fla. Feb. 3, 1998), 176 FRD 654, 74 Empl Prac Dec (CCH) P45533, 40 Fed R Serv 3d (Callaghan) 430*.

F. Mootness of Representative's Claim

1. In General

290. Generally

District court is not deprived of power to certify class action because controversy is mooted as to original named plaintiffs and intervenors when live controversy exists between unnamed class members and defendants. *Swisher v. Brady (U.S. June 28, 1978), 438 US 204, 98 S Ct 2699, 57 L Ed 2d 705*.

Termination of controversy of named class representative will not operate as dismissal, or render action of class moot, or prevent named plaintiff from litigating issues on behalf of class, despite lack of remaining stake, so long as named plaintiff initially had standing to bring action. *Cleaver v. Wilcox (9th Cir. Cal. June 7, 1974), 499 F2d 940*.

Purported class action becomes moot when personal claims of all named plaintiffs are satisfied and no class has properly been certified since in such case there is no plaintiff who can assert justiciable claim against any defendant within meaning of Article III of United States Constitution; however, general rule must yield when District Court is unable reasonably to rule on motion for class certification before individual claims of named plaintiffs become moot due to transitory nature of action. *Zeidman v. J. Ray McDermott & Co. (5th Cir. La. July 27, 1981), 651 F2d 1030, 32 Fed R Serv 2d (Callaghan) 128, Fed Sec L Rep (CCH) P98265*.

Upon certification, class attains legal status distinct from named plaintiff's asserted interest in suit, and action may consequently present live controversy as to unnamed class members, notwithstanding that case becomes moot as to named plaintiff. *Georgia Ass'n of Retarded Citizens v. McDaniel (11th Cir. Ga. Oct. 17, 1983), 716 F2d 1565, 37 Fed R Serv 2d (Callaghan) 1038*, vacated, *(U.S. July 5, 1984), 468 US 1213, 104 S Ct 3582, 82 L Ed 2d 880*.

Named plaintiff in proposed class action for monetary relief may proceed to seek timely class certification where unaccepted offer of judgment is tendered in satisfaction of plaintiff's individual claim before court can reasonably be expected to rule on class certification motion. *Lucero v. Bureau of Collection Recovery, Inc. (10th Cir. N.M. Mar. 31, 2011), 639 F3d 1239, 79 Fed R Serv 3d (Callaghan) 25*.

Fact that class representative personally has been afforded relief neither moots claims of class nor disqualifies representative from asserting them. *In re Seagate Tech. II Sec. Litig. (N.D. Cal. Feb. 11, 1994), 843 F Supp 1341*, amended, *(D. Mar. 2, 1994), Fed Sec L Rep (CCH) P98312*.

Class certification will be denied upon mooting of representative's claim if no controversy exists between named defendant and member of proposed class. *Pernas v. Parkview Towers Management Corp. (D.N.J. Nov. 10, 1980), 502 F Supp 1099*.

In general, class action will not be rendered moot simply because claims of class representative have become moot; further, fact that class has not been certified before proposed class representative's claims become moot is of no consequence. *Putnam v. Davies (S.D. Ohio Sept. 26, 1996), 169 FRD 89*.

Where individual representative's claims are mooted after motion for class certification is filed, but before class certification question is resolved, class action will survive. *Cavallo v. Utica-Watertown Health Ins. Co. (N.D.N.Y. Mar. 8, 2000), 191 FRD 342*.

291. Relation back of class certification

Relation-back doctrine applied to claims of plaintiff prison inmates who had been released and preserved their claims for adjudication for purposes of class action. *Amador v Andrews (2011, CA2 NY) 655 F3d 89* criticized in *Smith v City of New York (2013, SD NY) 2013 US Dist LEXIS 144122* and criticized in *Lovick v Schriro (2014, SD NY) 2014 US Dist LEXIS 106261*) and motion gr, in part, motion den, in part, dismd, in part, motion den, as moot *(SD NY 2014), 2014 US Dist LEXIS 173482*.

Mootness of representative's claim will not defeat class certification, if certification can "relate back" to time of representative's original motion for certification, by demonstrating that (1) claim is so inherently transitory that trial court will not have time to rule on motion for certification before proposed representative's individual interest expires and (2) constant existence of class of persons suffering deprivation is certain. *Christy v. Hammel (M.D. Pa. June 13, 1980), 87 FRD 381, 31 Fed R Serv 2d (Callaghan) 1077*.

Where named plaintiff's claim has become moot, class certification may be deemed to relate back to filing of complaint in order to avoid mooting entire controversy; relation back doctrine may be applied to permit class representation by individuals whose claims have become moot after filing of motion for class certification but before resolution of that motion, and is appropriate where claims of named plaintiff have become moot before motion for class certification is filed so long as justiciable controversy existed some time prior to class certification. *Crisci v. Shalala (S.D.N.Y. Dec. 18, 1996), 169 FRD 563*.

292. Dismissal due to mootness

It is inappropriate to decide case on its merits before determining whether it can be certified as class action, and since dismissal on ground of mootness is in essence decision on merits, it is inappropriate for court to consider alleged mootness of claims of putative class members in determining whether to grant certification. *Cruz v. Hauck (5th Cir. Tex. Oct. 8, 1980), 627 F2d 710, 30 Fed R Serv 2d (Callaghan) 494*.

Mootness of claim of named plaintiff does not necessarily bar class action and court must take action to find appropriate class representative if named plaintiff is inadequate; however, decision to or not to certify class is discretionary and court's decision will not be disturbed absent abuse of discretion; thus, court is warranted in dismissing case in which plaintiff's claim is mooted and allowing claims, in almost identical case in which another

plaintiff's case is still alive, to proceed. *Newby v. Johnston (5th Cir. Tex. Aug. 5, 1982), 681 F2d 1012, 34 Fed R Serv 2d (Callaghan) 659*.

Mootness of named plaintiff's claim does not inexorably require dismissal of action and fact that class has been certified by District Court is not necessarily sufficient to require court to reach merits of class claims where claims of named representative have become moot. *Bishop v. Committee on Professional Ethics & Conduct of Iowa State Bar Ass'n (8th Cir. Iowa Aug. 17, 1982), 686 F2d 1278, 34 Fed R Serv 2d (Callaghan) 1261*.

Normal rule is that when claims of named plaintiffs are moot before class certification dismissal of action is required. *Hechenberger v. Western Electric Co. (8th Cir. Mo. Aug. 28, 1984), 742 F2d 453*, cert. denied, *(U.S. Feb. 19, 1985), 469 US 1212, 105 S Ct 1182, 84 L Ed 2d 330*.

It was within bankruptcy court's discretion to consider merits of claims before their amenability to class certification; if complaint could not survive motion to dismiss, class action was moot, and as result, dismissal was considered before addressing issue of class certification. *Smith v. Fairbanks Capital Corp. (In re Smith) (Bankr. S.D. Ga. Aug. 15, 2003), 299 BR 687*.

293. Offers of judgment

Fed. R. Civ. P. 68 offer of judgment for full amount of plaintiff's individual claim did not moot class action filed by plaintiff, and district court was required to consider plaintiff's subsequent timely motion for class certification; offer of judgment did not extinguish jurisdiction because any interest class may have had was present from inception of case. *Lucero v. Bureau of Collection Recovery, Inc. (10th Cir. N.M. Mar. 31, 2011), 639 F3d 1239, 79 Fed R Serv 3d (Callaghan) 25*.

After affirmative decision on class certification is reached, and same is denied, court may enter judgment pursuant to *FRCP 68* offer of judgment over objections of individual plaintiff, when relief tendered moots controversy by offering full measure of relief sought, and thereby dismiss pending matter. *Schaake v. Risk Mgmt. Alternatives, Inc. (S.D.N.Y. Sept. 14, 2001), 203 FRD 108*.

294. Appeal and review

Class action in which issue sought to be litigated escapes full appellate review at behest of any single challenger does not inexorably become moot by intervening resolution of controversy as to named plaintiffs. *Sosna v. Iowa (U.S. Jan. 14, 1975), 419 US 393, 95 S Ct 553, 42 L Ed 2d 532*.

Trial court's denial of motion for certification of class sought to be represented by named plaintiff may be reviewed on appeal after named plaintiff's personal claim has become moot; action brought on behalf of class does not become moot upon expiration of named plaintiff's substantive claim, even though class certification has been denied, since proposed representative retains personal stake in obtaining class certification sufficient to assure that values under Article III (USCS Constitution Article III) are not undermined; if appeal results in reversal of class certification denial, and class is subsequently certified, merits of class claim can then be adjudicated pursuant to rule that mootness of named plaintiff's individual claim after class has been certified does not render action moot. *United States Parole Comm'n v. Geraghty (U.S. Mar. 19, 1980), 445 US 388, 100 S Ct 1202, 63 L Ed 2d 479*.

If action presents dispute which is capable of judicial resolution, plaintiff may appeal denial of class certification, even if plaintiff's personal stake in claim is moot or without substantive merit. *Alexander v Gino's, Inc. (1980, CA3 Pa) 621 F2d 71, 22 BNA FEP Cas 1253, 23 CCH EPD P 30892, 29 FR Serv 2d 782*, cert den *(1980) 449 US 953, 101 S Ct 358, 66 L Ed 2d 217, 24 BNA FEP Cas 254, 24 CCH EPD P 31301* and (criticized in *Aegis Sec. Ins. Co. v Fleming (2008) 32 CIT 410, 556 F Supp 2d 1359, 30 BNA Intl Trade Rep 1621*).

Certification in suits for injunctive or declaratory relief under Rule 23(b)(2) serves important purpose that is not obviated by rulings against named plaintiffs on substantive claims, in that risk of mootness often is present in these

cases, and certification insures that claims of unnamed plaintiffs will receive full appellate review. *Finberg v. Sullivan (3d Cir. Pa. Oct. 27, 1980), 634 F2d 50, 30 Fed R Serv 2d (Callaghan) 691*.

Although settlement reached subsequent to District Court's denial of class certification resolved plaintiff's individual claim, plaintiff's appeal from denial of class certification is not moot. *Love v. Turlington (11th Cir. Fla. June 11, 1984), 733 F2d 1562, 39 Fed R Serv 2d (Callaghan) 358*.

In suit asserting class claims under California Labor Code and *Cal. Bus. & Prof. Code § 17200*, settlement of employee's personal claims did not render moot his appeal from denial of his *Fed. R. Civ. P. 23* class certification motion because he did not release class action claims, and he retained financial stake in class action. *Narouz v. Charter Communs., LLC (9th Cir. Cal. Jan. 15, 2010), 591 F3d 1261, 159 Lab Cas (CCH) P60928*.

295. Miscellaneous

Individual action cannot properly be permitted by federal court to continue as class action, by amendment of complaint, after individual's claim has become moot. *Cicchetti v. Lucey (1st Cir. Mass. Apr. 16, 1975), 514 F2d 362, 20 Fed R Serv 2d (Callaghan) 845*.

Mootness, artificially created by defendant by making named plaintiff whole, will not defeat class action after motion for class certification has been made and pursued with reasonable diligence and is pending before District Court. *Susman v. Lincoln American Corp. (7th Cir. Ill. Oct. 23, 1978), 587 F2d 866, 26 Fed R Serv 2d (Callaghan) 1225*, cert. denied, *(U.S. 1980), 445 US 942, 100 S Ct 1336, 63 L Ed 2d 775*, cert. denied, *(U.S. 1980), 445 US 942, 100 S Ct 1337, 63 L Ed 2d 775*.

Issues related to class certification are moot in light of resolution against plaintiff of motion to dismiss or for summary judgment. *Greenlee County v. United States (Fed. Cir. May 14, 2007), 487 F3d 871*, cert. denied, *(U.S. Jan. 14, 2008), 552 US 1142, 128 S Ct 1082, 169 L Ed 2d 810*.

2. Particular Cases

296. Arrest, search and seizure

Plaintiff's motion for certification of class of persons subject to jurisdiction of sheriff who have been, are now being, or hereafter may be arrested for non-felony offenses and subjected to strip search by sheriff where there exists no reasonable grounds to suspect arrestee of possessing weapons or contraband would be dismissed as moot since sheriff had adopted new policy authorizing strip search only when officer has reasonable belief that arrestee is concealing weapons or contraband. *Jones v. Bowman (N.D. Ind. Apr. 8, 1988), 120 FRD 88*.

When city tendered return of arrestees' seized cash before arrestees filed class action law suit against city and police officers, arrestees' restitution-based claims of unjust enrichment, constructive trust, declaratory judgment, and breach of fiduciary duty were moot and therefore dismissed from arrestees' class action under *Fed. R. Civ. P. 23*. *Gates v. Towery (N.D. Ill. Oct. 16, 2006), 456 F Supp 2d 953*.

297. Bankruptcy

In action brought by woman under federal civil rights legislation on behalf of herself and all other female employees of defendants who were forced to discontinue their employment because of pregnancy, plaintiff fails to satisfy Rule 23 requirement that class be so numerous that joinder of all members is impracticable, where parties agree that only four women have been affected by defendant's mandatory maternity leave policy after established cut-off date for litigation. *Scott v. Opelika City Schools (M.D. Ala. May 6, 1974), 63 FRD 144, 7 Empl Prac Dec (CCH) P9375, 18 Fed R Serv 2d (Callaghan) 998*.

Although broker's claim against brokerage firm for lost commissions became moot after he filed for Chapter 7 bankruptcy protection, and although Chapter 7 trustee could not be substituted as class representative due to

conflicts of interest with potential class members, court retained jurisdiction of putative class suit in order to permit absentee class members to file motion for intervention as class representative. *Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (In re Merrill Lynch & Co. Research Reports Sec. Litig.) (S.D.N.Y. Sept. 18, 2007), 375 BR 719*.

In class action, while two Chapter 13 debtors' claims became moot after case was filed, and after certification, due to fact that one debtor's car was involuntarily repossessed, and one debtor had already paid creditor's attorney's fee to receive discharge, for which that debtor would be due refund if class prevailed, case was not moot; and since trial had been held on debtors' challenges to creditor's attorneys' fees, issue of whether to decertify *Fed. R. Civ. P. 23(b)(2)* class was moot. *Powe v. Chrysler Fin. Corp., L.L.C. (In re Powe) (Bankr. S.D. Ala. May 10, 2002), 278 BR 539*.

It was within bankruptcy court's discretion to consider merits of claims before their amenability to class certification; if complaint could not survive motion to dismiss, class action was moot, and as result, dismissal was considered before addressing issue of class certification. *Smith v. Fairbanks Capital Corp. (In re Smith) (Bankr. S.D. Ga. Aug. 15, 2003), 299 BR 687*.

298. Bar admission

Although non-Wisconsin law school graduate's individual constitutional claims become moot once he passed Wisconsin bar exam and became eligible for admission to Wisconsin bar, his appeal challenging district court's denial of his motion for class certification was not moot; district court erred when it denied class certification motion on mootness grounds after granting defendants' dismissal motion; it should have decided class certification motion first, applying *Fed. R. Civ. P. 23* criteria, before addressing substantive merits of graduate's individual claims. *Wiesmueller v. Kosobucki (7th Cir. Wis. Jan. 29, 2008), 513 F3d 784*.

Action challenging Mississippi bar admissions plan is not moot notwithstanding that some of representative plaintiffs successfully passed bar examination, where three of named plaintiffs had not achieved relief they sought and where claims fell within "capable of repetition" exception to mootness doctrine. *Shenfield v. Prather (N.D. Miss. Dec. 20, 1974), 387 F Supp 676*.

299. Children or juveniles and custody thereof

In action brought by nine minors under *42 USCS § 1983* seeking declaratory judgment and injunctive relief to prevent State from filing exceptions with Juvenile Court to proposed findings and recommendations made by masters, when filing exceptions required hearing de novo by Juvenile Court judge, as violative of Double Jeopardy Clause, district court had power to certify proposed class under Rule 23(b) to consist of all juveniles involved in proceedings where state had filed exceptions to master's proposed findings of nondelinquency even though State withdrew its exceptions against original named plaintiffs and intervenors or completed adjudicatory process by securing ruling from Juvenile Court. *Swisher v. Brady (U.S. June 28, 1978), 438 US 204, 98 S Ct 2699, 57 L Ed 2d 705*.

Class action challenging constitutionality of state statute relating to detention of minors taken into custody by state official was not moot, even though plaintiff was released from custody within 48 hours of her incarceration. *Rivera v. Freeman (9th Cir. Cal. Nov. 17, 1972), 469 F2d 1159*.

Where plaintiffs brought class action challenging intake procedures of state juvenile court for juveniles charged with delinquency, and where, subsequent to certification of action as proper class action, juvenile proceedings against named plaintiffs were completed, action was not moot, as there were numerous class members whose claims remained alive. *Conover v. Montemuro (3d Cir. Pa. Dec. 20, 1972), 477 F2d 1073*.

In action brought on behalf of all wards of state court's juvenile division who had been adjudicated neglected under state's juvenile law and subsequently charged in petitions for adjudication of wardship as delinquent minors under state law, which action alleged right of individualized treatment and care for members of class, claim of

representative plaintiff was rendered moot since he had been discharged from custody of state's Department of Corrections two months prior to date of filing motion for class certification, and plaintiff's motion to certify action as class action would be denied where there was no support for determination that plaintiff's claim would necessarily terminate prior to class certification and it had not been shown that claim evaded review. *Robinson v. Leahy (N.D. Ill. 1977), 73 FRD 109*.

Mootness of one representative's individual claim would not render claims of proposed class moot in civil rights suit alleging unconstitutionally substandard conditions at juvenile diagnostic centers for adolescent girls with serious behavioral and emotional problems since motion for certification was filed prior to representative's claim becoming moot by reason of her departure from facility, and length of stay at facilities was inherently transitory. *Jane B. v. New York City Dep't of Social Services (S.D.N.Y. Oct. 2, 1987), 117 FRD 64, 9 Fed R Serv 3d (Callaghan) 676*.

300. Committed or hospitalized persons

Class action brought by plaintiff husband and wife, who alleged that defendant hospital had infringed certain rights guaranteed to plaintiffs by Federal Constitution in refusing to permit plaintiff wife to undergo at time of her Caesarian delivery tubal ligation, was not moot, even though plaintiff wife had already had tubal ligation performed. *Taylor v. St. Vincent's Hospital (9th Cir. Mont. Aug. 26, 1975), 523 F2d 75*, cert. denied, *(U.S. Mar. 1, 1976), 424 US 948, 96 S Ct 1420, 47 L Ed 2d 355*.

Class action seeking injunctive and declaratory relief against state statute authorizing defendant superintendent to return nonresident patients in state hospital to state of their residence did not become moot upon discharge of plaintiff from state hospital subsequent to filing of present action. *Vaughan v. Bower (D. Ariz. May 14, 1970), 313 F Supp 37*, aff'd, *(U.S. Sept. 1, 1970), 400 US 884, 91 S Ct 139, 27 L Ed 2d 129*.

District Court certified Rule 23(b)(2) class in discrimination suit among those similarly situated voluntarily and involuntarily committed mentally ill, consisting of all persons between 21 and 65 who are or who will be involuntarily committed to New York State mental institutions, to insure representative is member of class at time action brought as well as time disposition on merits is reached. *Woe v. Mathews (E.D.N.Y. Jan. 16, 1976), 408 F Supp 419*, aff'd, *(2d Cir. N.Y. 1977), 562 F2d 40*.

Action brought as class action on behalf of persons 18 years or older who might be committed involuntarily to mental institution through proceedings governed by state statute and procedural rules governing civil commitments of mentally ill is not moot, notwithstanding that representative plaintiff, who had been involuntarily committed to hospital and who was patient at time suit was filed, was not presently in institution, where record established likelihood that plaintiff representative would be recommitted perhaps number of times in future, where allegedly unconstitutional commitment procedures could affect him, and where defendants, having control of representative's discharge, could render controversy moot by representative's release, thus making issue one capable of repetition yet evading review. *Coll v. Hyland (D.N.J. Apr. 15, 1976), 411 F Supp 905*.

Civil rights class action by inmates of diagnostic center alleging improper commingling with inmates of state penitentiary is not rendered moot by fact that plaintiff intervenor escaped from custody prior to certification, original plaintiff having been proper representative at time of certification, nor by fact that no individual plaintiff was in diagnostic center at time of certification, diagnostic center being central diagnostic and classification center in which inmates do not typically remain for extended periods of time. *Doe v. Lally (D. Md. Mar. 5, 1979), 467 F Supp 1339*.

Mootness of one representative's individual claim would not render claims of proposed class moot in civil rights suit alleging unconstitutionally substandard conditions at juvenile diagnostic centers for adolescent girls with serious behavioral and emotional problems since motion for certification was filed prior to representative's claim becoming moot by reason of her departure from facility, and length of stay at facilities was inherently transitory. *Jane B. v. New York City Dep't of Social Services (S.D.N.Y. Oct. 2, 1987), 117 FRD 64, 9 Fed R Serv 3d (Callaghan) 676*.

301. Domestic relations

Although by time it reached United States Supreme Court, plaintiff had satisfied state's 1-year residency requirement for instituting divorce action and had also obtained divorce in another state, action challenging constitutionality of state residency requirement, which action was brought as class action under Rule 23 on behalf of class of all residents of state who resided therein for period of less than 1 year and who desired to institute actions for dissolution of marriage or legal separation and who were barred from doing so by 1-year durational residency requirement, was not moot. *Sosna v. Iowa (U.S. Jan. 14, 1975), 419 US 393, 95 S Ct 553, 42 L Ed 2d 532*.

On direct appeal from decision of Federal District Court holding unconstitutional state's law providing that members of certain class of state's residents may not marry, within state or elsewhere, without first obtaining court order granting permission to marry—which decision District Court had rendered in action brought by state resident, who had been denied marriage license for not obtaining court's permission to marry, as representative of class of all state residents who had been refused marriage licenses under law—issues before United States Supreme Court are not mooted by named plaintiff's marriage outside state sometime after argument on merits in District Court but prior to judgment, or because after argument in Supreme Court somewhat narrower version of challenged law had been signed into law. *Zablocki v. Redhail (U.S. Jan. 18, 1978), 434 US 374, 98 S Ct 673, 54 L Ed 2d 618*.

Class action challenging constitutionality of state statute requiring that party seeking divorce must reside 6 months in state before filing petition was not moot, even though, subsequent to filing of action, named plaintiffs could satisfy residency requirements of statute they attacked. *Shiffman v. Askew (M.D. Fla. June 1, 1973), 359 F Supp 1225*, aff'd, *(5th Cir. Fla. Sept. 18, 1974), 500 F2d 577*.

302. Fair Debt Collection Practices Act

Where putative class action complaint was filed which alleged violations of Fair Debt Collection Practices Act (*15 USCS §§ 1692* et seq.), defendant made *FRCP 68* offer of judgment to plaintiff which covered full amount of relief prayed for by plaintiff in his complaint, and plaintiff filed motion for class action certification pursuant to *FRCP 23* less than ten days after defendant's offer, plaintiff's action was not moot; *FRCP 23(e)* precludes mootness in such case because defendant's *FRCP 68* offer to plaintiff individually could not have been accepted by him at any time during ten-day period under *FRCP 68* without approval of district court. *Parker v. Risk Mgmt. Alternatives, Inc. (N.D. Ill. Nov. 2, 2001), 204 FRD 113*.

In putative class action filed for alleged violations of Fair Debt Collection Practices Act, *15 USCS §§ 1692* et seq., where debtor had not filed for class certification pursuant to *Fed. R. Civ. P. 23*, court granted law firm's *Fed. R. Civ. P. 12(b)(1)* motion after law firm made offer of judgment pursuant to *Fed. R. Civ. P. 68* for full amount that debtor was entitled to because there was no case or controversy. *Greif v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP (E.D.N.Y. Apr. 22, 2003), 258 F Supp 2d 157*.

303. Housing

District Court correctly dismissed, for mootness, class action brought by four public housing applicants charging that defendant housing authority followed tenant's selection policies which gave preference to higher income applicants when housing authority gave apartments to named plaintiffs, notwithstanding that District Court failed to take action on plaintiffs' motions for class action certification and that defendants deliberately mooted issue as to named plaintiffs so as to avoid judicial review, where it served interests of all concerned that remaining class begin anew. *Bradley v. Housing Authority of Kansas City (8th Cir. Mo. Mar. 19, 1975), 512 F2d 626, 20 Fed R Serv 2d (Callaghan) 157*.

Class action seeking to enjoin defendants' practice of housing welfare recipients in welfare hotels at great expense and defendants' refusal to pay lesser amounts to house these recipients in apartments was not rendered moot by placement of plaintiff in apartment, as defendant had failed to show that there was no reasonable expectation that wrong would be repeated. *Washington v. Wyman (D.N.Y. 1971), 54 FRD 266, 15 Fed R Serv 2d (Callaghan) 1591*.

Where plaintiff, who was resident of multifamily apartment complex which was financed and constructed pursuant to federal statute, brought class action for declaratory and injunctive relief, claiming that her due process rights were denied because her lease was terminated by defendant operator of apartment without notice and hearing, and where defendant, in its answer, averred that it had rescinded its notice of termination and that it would no longer seek lease termination except in accordance with procedures prayed for by plaintiff in her complaint, action was moot. *McCleary v. Realty Industries, Inc. (E.D. Va. Sept. 18, 1975), 405 F Supp 128*.

In class action against city housing authority by low-income housing applicants challenging authority's policy which gives priority for housing to persons who have maintained city residence for one year or more, class representative's receipt of low-income housing subsequent to motion to maintain action under Rule 23(b)(2) will not prevent action from proceeding as class action, since application of Rule 23 may relate back to time of motion and thereby eliminate mootness problem, where (1) continual turnover of class members renders allegedly wrongful acts capable of repetition yet evading review, and (2) there is probability that there will be constant existence of class suffering alleged deprivations. *Yearsley v. Scranton Housing Authority (M.D. Pa. Nov. 8, 1979), 487 F Supp 784, 29 Fed R Serv 2d (Callaghan) 1397*.

304. Judicial or administrative procedures

Class action challenging constitutionality of state statute, which required prior payment of filing for appeal before docket of appeal, was not moot, even though plaintiff representative was granted leave to file her appeal without payment of fee. *Gatling v. Butler (D. Conn. 1971), 52 FRD 389, 15 Fed R Serv 2d (Callaghan) 403*.

Mooting of named representative's claim does not render whole suit moot, and in action seeking declaration of unconstitutionality as to state claim and delivery statute, mooting of case as to representative plaintiff did not affect his ability to continue as representative where representative was clearly proper representative when action was commenced, since he was member of class at such time. *Thomas v. Clarke (D. Minn. 1971), 54 FRD 245, 15 Fed R Serv 2d (Callaghan) 1579*.

Where plaintiff, judgment debtor whose wages had been garnished by defendant judgment creditor, brought class action challenging constitutionality of state statute authorizing postjudgment garnishment of individual without first providing notice of garnishment and opportunity for hearing to contest propriety of garnishment, action was not moot even though named plaintiff's claim had been completely resolved. *Brown v. Liberty Loan Corp. (M.D. Fla. Nov. 25, 1974), 392 F Supp 1023*, rev'd, *(5th Cir. Fla. Oct. 6, 1976), 539 F2d 1355*.

305. Labor and employment

Class action challenging constitutionality of state statute authorizing suspension or termination of unemployment compensation benefits without prior hearing, is not rendered moot by fact that subsequent to filing of present action plaintiff was granted hearing. *Torres v. New York State Dep't of Labor (S.D.N.Y. Sept. 14, 1970), 318 F Supp 1313, 14 Fed R Serv 2d (Callaghan) 1079*; *Steinberg v. Fusari (D. Conn. Sept. 17, 1973), 364 F Supp 922*, vacated, *(U.S. Jan. 14, 1975), 419 US 379, 95 S Ct 533, 42 L Ed 2d 521*.

Class certification motions related back to date of filing, even though named plaintiff's action was moot when considered by court, since claims of other class members were sufficient to meet actual controversy requirement and since court did not have reasonable opportunity to review certification motion before named plaintiff's claim alleging unconstitutionality of wage attachment became moot. *Cristiano v. Courts of Justices of the Peace (D. Del. Mar. 30, 1987), 115 FRD 240*.

306. —Discrimination in employment

Federal Court class action against employer and unions, in which action discriminatory hiring practices in violation of federal civil rights law were established, was not rendered moot at time of United States Supreme Court's review of whether hiring relief to be granted should include retroactive seniority status, merely because sole named representative of class was later hired by employer and properly discharged for cause, since even though named

representative no longer had any personal stake in outcome, unnamed members of class had personal stake sufficient to present live controversy. *Franks v. Bowman Transp. Co. (U.S. Mar. 24, 1976), 424 US 747, 96 S Ct 1251, 47 L Ed 2d 444*.

In action brought by woman against county board of public instruction for alleged discrimination on basis of race and sex with respect to her employment as teacher, class action controversy is moot where representative plaintiff moved to another location where she was satisfactorily employed so that reinstatement of her to her prior position would serve no purpose, where declaration of representative's rights would merely be hypothetical ruling, where challenged maternity leave policy which allegedly violated rights of class no longer existed, and where nature of case was that of single individual alleging infringement on her rights. *Locke v. Board of Public Instruction (5th Cir. Fla. Aug. 19, 1974), 499 F2d 359, 8 Empl Prac Dec (CCH) P9635*.

Motion for class certification in age discrimination suit was rendered moot since punitive class representatives had previously settled their individuals claims. *Lusardi v. Xerox Corp. (3d Cir. N.J. Sept. 16, 1992), 975 F2d 964, 59 Empl Prac Dec (CCH) P41753, 23 Fed R Serv 3d (Callaghan) 905* (criticized in *Mental Disability Law Clinic v Hogan (2008, ED NY) 21 AD Cas 459*).

Employment discrimination plaintiff's class allegations were properly dismissed since summary judgment for employer on plaintiff's individual claims was proper, rendering plaintiff without standing to represent class. *Sample v Aldi Inc. (1995, CA7 Ill) 61 F3d 544, 68 BNA FEP Cas 759, 66 CCH EPD P 43678*, reh den *(1995, CA7 Ill) 1995 US App LEXIS 23886* and (criticized in *Chiaramonte v Fashion Bed Group (1996, ND Ill) 932 F Supp 1080, 76 BNA FEP Cas 242*) and (criticized in *Martinez v Harrah's Ill. Corp. (1998, ND Ill) 1998 US Dist LEXIS 15332*) and (criticized in *Sweeney v Northeast Ill. Regional Commuter R.R. Corp. (1998, ND Ill) 1998 US Dist LEXIS 18508*).

307. —Pensions and retirement

Class action challenging notice and hearing procedures followed by Veterans' Administration in connection with suspending veterans' pension benefits was not moot, even though plaintiff had received posttermination hearing and unfavorable ruling on her claim for benefits. *Plato v. Roudebush (D. Md. May 6, 1975), 397 F Supp 1295*.

Where pension fund participant was granted summary judgment on his claim that pension fund violated terms of pension plan and his remaining claims were dismissed as moot, his motion for certification of class of all participants in plan was not proper because such broad class encompassed claims that had been dismissed; class was instead limited to those participants who were affected by practice that violated terms of plan. *Novella v. Westchester County, N.Y. Carpenters' Pension Fund (S.D.N.Y. Dec. 29, 2004), 2004 US Dist LEXIS 26149*, aff'd, *(2d Cir. N.Y. Nov. 3, 2011), 661 F3d 128*.

Former employee of hotel who sued his former employer for improperly calculated retirement benefits was entitled to class certification under *Fed. R. Civ. P. 23(a)* and *23(b)(2)* on renewed motion because new evidence showed that former employee was proper representative of class with respect to claim that employer improperly failed to count all union service for vesting purposes; this claim was not moot, as originally held, because employee showed that, while his employer granted him some credit, employee was not credited for all of his union service. *Kifafi v. Hilton Hotel Ret. Plan (D.D.C. Mar. 30, 2005), 228 FRD 382*.

308. Licenses and permits

Where plaintiff motorist brought class action alleging that defendant official's refusal to issue restricted driving permits to persons otherwise qualified except for financial responsibility requirements was unconstitutional, and where, subsequent to filing of action, plaintiff's financial responsibility suspension expired and his driver's license was restored, action is moot. *Valentino v. Howlett (7th Cir. Ill. Jan. 6, 1976), 528 F2d 975*.

Where, subsequent to filing of class action brought by plaintiff who was denied license to teach defendant reversed its initial determination and granted plaintiff teaching license, action is moot. *Heumann v. Board of Education (S.D.N.Y. Dec. 7, 1970), 320 F Supp 623*.

Although plaintiffs' complaint in civil rights action challenging constitutionality of state statutory provisions governing motor vehicles contained allegations that plaintiffs, individuals whose motor vehicle privileges had been revoked or suspended, desired to proceed as class action, plaintiffs cannot proceed in class action class action since causes of action of plaintiffs became moot when their motor vehicle privileges because their claims were permanently restored, *Leonhart v. McCormick (W.D. Pa. June 27, 1975), 395 F Supp 1073*.

309. Military and veterans

Challenge by two Marines to Defense Department's program to collect and store blood and tissue samples from all members of armed forces for future DNA analysis was rendered moot by Marines' honorable discharge since they were no longer subject to DNA collection program and faced only remote possibility that they might ever be subject to policy. *Mayfield v. Dalton (9th Cir. Haw. Mar. 27, 1997), 109 F3d 1423, 37 Fed R Serv 3d (Callaghan) 458*.

Class action challenging notice and hearing procedures followed by Veterans' Administration in connection with suspending veterans' pension benefits was not moot, even though plaintiff had received posttermination hearing and unfavorable ruling on her claim for benefits. *Plato v. Roudebush (D. Md. May 6, 1975), 397 F Supp 1295*.

310. Prisons and jails

Although by time class action by prisoners—individuals who had been arrested without warrants and were being held for state court trials under informations and who asserted that their federal constitutional rights were violated by state's failure to provide judicial hearing on issue of probable cause for pretrial restraint of their liberty—reached United States Supreme Court for review, named plaintiffs' pretrial detention had ended and they had been convicted, claims of unnamed members of class were not mooted by termination of class representatives' claims. *Gerstein v. Pugh (U.S. Feb. 18, 1975), 420 US 103, 95 S Ct 854, 43 L Ed 2d 54*.

Class action brought by three inmates of state prison challenging constitutionality of disciplinary procedures in state prison was not rendered moot by release of named plaintiffs from prison. *Sands v. Wainwright (5th Cir. Fla. Dec. 26, 1973), 491 F2d 417*.

Dismissal, on ground of mootness, of entire action brought by female prisoner to challenge constitutionality of state statute authorizing state to find children of incarcerated parent to be dependent on state and to obtain custody of her children was proper under circumstances where action had been filed on November 13, 1973, and plaintiff filed motion for class action certification on February 7, 1974, but Federal District Court never ruled upon motion, and where plaintiff's individual case became moot on April 3, 1974, when she was paroled from prison, since it could not be found that court failed to rule on plaintiff's motion as soon as practicable and issues involved were not capable of repetition, yet evading review. *Allen v. Likins (8th Cir. Minn. June 9, 1975), 517 F2d 532, 20 Fed R Serv 2d (Callaghan) 430*.

There is no mootness of representative's claim where constitutional violations are likely to recur and named plaintiff had suffered from his lengthy, warrantless, prehearing incarceration and this claim was not extinguished by his release. *McGill v. Parsons (5th Cir. Ala. June 1, 1976), 532 F2d 484, 21 Fed R Serv 2d (Callaghan) 1100*.

Release of plaintiff in Rule 23 class action suit claiming incarceration pursuant to warrantless arrest for unreasonable length of time without bail or hearing did not moot his claim and did not moot class suit since appropriateness of class action should be judged at time suit is instituted. *McGill v. Parsons (5th Cir. Ala. June 1, 1976), 532 F2d 484, 21 Fed R Serv 2d (Callaghan) 1100*.

Class action brought on behalf of all inmates at Rikers Island who are or will become eligible for conditional release by named plaintiffs, all of whom were given conditional release between time of evidentiary hearing and class certification, would be exception to requirement that plaintiffs be members of class they seek to represent, in view of fact that relatively short periods of incarceration and possibility of conditional release make it unlikely that alleged harm could be redressed during time in which any possible plaintiff remains inmate. *Zurak v. Regan (2d Cir. N.Y.*

Feb. 7, 1977), 550 F2d 86, 22 Fed R Serv 2d (Callaghan) 1344, cert. denied, *(U.S. June 27, 1977), 433 US 914, 97 S Ct 2988, 53 L Ed 2d 1101*.

Although prisoner's individual claim challenging sheriff's policy of using stun belt on prisoners appearing in county courts may have become moot, existence of class preserved live case or controversy demanded by Article III; analysis of standing focuses on prisoner's standing at time class was certified, and there was likelihood of recurrence, use of stun belt stemmed from official written policy, and prisoner sought relief on behalf of class. *Hawkins v. Comparet-Cassani (9th Cir. Cal. May 30, 2001), 251 F3d 1230, 50 Fed R Serv 3d (Callaghan) 1525*.

Where petitioner, who has proceeded as individual in habeas corpus action, is no longer inmate at federal correctional institution in question and no longer subject to alleged unconstitutional confinement, no class action has been certified and petitioner is therefore not member of putative class of inmates at institution, doctrine of mootness applies to petitioner's individual claim despite fact that there may exist potential controversy between other inmates and institution. *Crider v. Keohane (W.D. Okla. May 27, 1981), 526 F Supp 727*.

Class action challenging county policy of keeping persons in custody after court has discharged them and asking for injunction barring county from continuing alleged practice is not moot, notwithstanding that class representative is no longer unlawfully in custody since constant existence of class suffering wrong guarantees that live issue exists throughout lawsuit. *Lewis v. Tully (N.D. Ill. Oct. 31, 1983), 99 FRD 632*.

311. —Conditions of confinement

Notwithstanding Federal District Court's denial of class action treatment to civil rights action brought by black prisoner in attempt to reform conditions of county jail, in part, for possible mootness, where representative plaintiff at time of appeal was no longer in county jail, mootness was illusory problem since case fell within narrow class cases in which termination of class representative's claim does not moot claims of unnamed members of class. *Jones v. Diamond (5th Cir. Miss. Sept. 26, 1975), 519 F2d 1090, 21 Fed R Serv 2d (Callaghan) 185*, disapproved, *Gardner v. Westinghouse Broadcasting Co. (U.S. June 21, 1978), 437 US 478, 98 S Ct 2451, 57 L Ed 2d 364*.

Action by pretrial detainees challenging denial of contact visitation in county jails was not rendered moot by fact that neither of original plaintiffs was inmate of county jail at time of appeal, where proper plaintiff class existed; constitutional case or controversy requirement imposes on court heightened duty to ensure that case will be prosecuted vigorously where action becomes moot as to named plaintiffs; however, that requirement is met where class attorneys representing pretrial detainees challenging denial of contact visitation are experienced and able public interest lawyers with continuing and abiding interest in success of litigation. *Marcera v. Chinlund (2d Cir. N.Y. Feb. 27, 1979), 595 F2d 1231, 26 Fed R Serv 2d (Callaghan) 1144*, vacated, *(U.S. June 4, 1979), 442 US 915, 99 S Ct 2833, 61 L Ed 2d 281*, disapproved as stated in *West v. Infante (2d Cir. N.Y. May 9, 1983), 707 F2d 58*, disapproved, *Block v. Rutherford (U.S. July 3, 1984), 468 US 576, 104 S Ct 3227, 82 L Ed 2d 438*.

In class action by prisoners seeking injunctive relief to prohibit enforcement of jail regulations restricting inmates' use and possession of legal materials, fact that prisoners named as class representatives are no longer incarcerated does not moot propriety of class certification, where (1) claims are capable of repetition, yet evading review, in that confinement in jail is by its nature temporary and threat of injury to named plaintiffs was real and immediate, rather than conjectural, (2) all parties had treated litigation as class action since its inception 10 years earlier, and (3) plaintiffs moved for certification of class immediately after repleading their complaint and, but for unreasonable delay in holding certification hearing, one of named plaintiffs would have been in jail and there would have been no question about propriety of certifying class. *Cruz v. Hauck (5th Cir. Tex. Oct. 8, 1980), 627 F2d 710, 30 Fed R Serv 2d (Callaghan) 494*.

Civil Rights class action brought challenging conditions of confinement of sentenced offenders and pretrial detainees at county jail does not satisfy Article III case or controversy requirement where representative pretrial detainee and representative sentenced inmate are released from incarceration and detention facility prior to District Court's ruling on class certification because case is moot, and District Court lacks jurisdiction over action. *Inmates*

of Lincoln Intake & Detention Facility v. Boosalis (8th Cir. Neb. May 3, 1983), 705 F2d 1021, 36 Fed R Serv 2d (Callaghan) 888.

District court should decide class certification motion before proceeding further in action challenging working conditions of "chain gang" labor at county jail, and if it finds that claims are inherently transitory because inmates are short term, then action qualifies for exception to mootness even if there is no indication that class representative or other current class members may again be subject to acts that gave rise to claims. *Wade v. Kirkland (9th Cir. Nev. July 2, 1997), 118 F3d 667, 37 Fed R Serv 3d (Callaghan) 1389*.

In action on behalf of present and future inmates challenging denial of special education services, mootness of plaintiff inmate's claims is not absolute bar to class certification, where, because of revolving nature of inmate population and length of time between filing of complaint and ruling on motion for class certification, claims asserted may be capable of repetition yet evasive of review, and where attorneys representing plaintiffs are federally-funded legal services lawyers with sufficient interest in protecting rights of inmates being denied services to assure continuing live interest in case. *Green v. Johnson (D. Mass. May 8, 1981), 513 F Supp 965*.

Mootness of inmate's claim for declaratory and injunctive relief relative to his challenge of conditions of confinement in hospital isolation cell in county house of correction precludes him from having action certified as class action on behalf of all persons similarly situated. *Strachan v. Ashe (D. Mass. Oct. 13, 1982), 548 F Supp 1193*.

Class of pretrial detainees and convicted prisoners at correctional facility was certified under *Fed. R. Civ. P. 23(a)* and *(b)(2)* in suit alleging that overcrowding at facility violated Eighth and Fourteenth Amendments; fact that inmates who brought suit were no longer incarcerated at facility at time they moved for certification did not moot action, as claims were inherently transitory; requirements of *Fed. R. Civ. P. 23(b)(2)* were met because inmates alleged that defendants had failed to act on class-wide basis to alleviate overcrowding and because inmates sought only injunctive and declaratory relief. *Dittimus-Bey v. Taylor (D.N.J. July 31, 2007), 244 FRD 284, 68 Fed R Serv 3d (Callaghan) 1308*.

In suit by current and future residents of residential medical treatment center that served as halfway house for pre-released or paroled former inmates of certain correctional facility alleging that systematic defects at medical facility precluded adequate and timely physical and mental healthcare, claims of residents who were not present at center at time class certification motion was filed were moot and these claims did not fit within recognized exceptions to mootness doctrine based on transitory nature of claim or claims capable of repetition but escaping review. *Clarke v. Lane (E.D. Pa. Mar. 31, 2010), 267 FRD 180*, dismissed without prejudice, *(E.D. Pa. Feb. 24, 2012), 2012 US Dist LEXIS 23737*.

312. Public utilities

Where plaintiff, whose water service had been terminated by defendants without hearing, brought class action challenging constitutionality of defendants' rules and procedures for terminating water service of consumers, action was not moot, even though named plaintiff had moved from premises which were subject to action. *Lamb v. Hamblin (D. Minn. 1972), 57 FRD 58*, disapproved, *Sterling v. Maywood (7th Cir. Ill. July 7, 1978), 579 F2d 1350*.

Class action challenging procedures by which defendant terminated service to delinquency accounts was not rendered moot by the fact that defendant had, since filing of action, dropped its claim against plaintiffs. *Cottrell v. Virginia Electric & Power Co. (E.D. Va. Aug. 3, 1973), 363 F Supp 692*.

313. Schools and education

Action brought by six named plaintiffs—school students involved in publication and distribution of student newspaper who alleged that certain actions of defendant Board of School Commissioners or its subordinates, as well as certain of its rules and regulations, violated First and Fourteenth Amendment rights—as class action under Rule 23, on behalf of all high school students attending schools managed by defendant Board, became moot pending review by United States Supreme Court of judgment for plaintiffs, where (1) case or controversy with

respect to validity of rules at issue ceased to exist between named plaintiffs and defendants upon graduation of all of named plaintiffs from school system, and (2) District Court did not adequately comply with requirements of Rule 23(c)(1) and Rule 23(c)(3). *Board of School Comm'rs v. Jacobs (U.S. Feb. 18, 1975), 420 US 128, 95 S Ct 848, 43 L Ed 2d 74*.

Lawsuit alleging racially discriminatory policies in admission to public law school was rendered moot by state's passage of initiative measure prohibiting state's discrimination in employment, education, or contracting on basis of, inter alia, race, and district court properly decertified class accordingly. *Smith v. Univ. of Wash. Law School (9th Cir. Wash. Dec. 4, 2000), 233 F3d 1188*, cert. denied, *(U.S. May 29, 2001), 532 US 1051, 121 S Ct 2192, 149 L Ed 2d 1024*.

Action seeking to desegregate county school system is not moot notwithstanding that original plaintiffs, Black school children and their parents, have lost any stake in litigation because they have left school system in ensuing 22 years since action was filed, given (1) long procedural history of case, (2) fact that it has always been treated as class action by parties and court, (3) fact that it proceeded for approximately 3 years under prior version of Rule 23 which did not require certification, and (4) fact that all interested parties in community have had opportunity to intervene and to participate in trial. *Whittenberg v. School Dist. (D.S.C. Mar. 11, 1985), 607 F Supp 289*.

In action by female high school students for alleged discriminatory treatment against female athletes and athletic programs at school, even when necessity was considered, certification was warranted under *Fed. R. Civ. P. 23* of class of all present and future female students at high school and potential students who participated, sought to participate, and/or were deterred from athletics at school; for example, mootness was important concern because case concerned students who might move, transfer, or graduate; class members would obtain additional protection in form of notice to class; and defendants made no showing that class treatment would needlessly complicate and hinder judicial efficiency in instant case. *Ollier v. Sweetwater Union High Sch. Dist. (S.D. Cal. Aug. 25, 2008), 251 FRD 564*.

314. Social Security

Social Security disability claimant's class action application was not rendered moot by resolution of his individual claim since his motion for attorney's fees was still pending and other disability claimants had moved to intervene, thus showing live controversy concerning class claims. *Adamson v. Bowen (10th Cir. Colo. Aug. 15, 1988), 855 F2d 668, Unemployment Ins Rep (CCH) P14107A, 11 Fed R Serv 3d (Callaghan) 606*.

In suit alleging that state's manner of allocating certain services violated *42 USCS § 1396a(a)(8)*, district court's failure to rule on class certification was improper in light of *Fed. R. Civ. P. 23(c)(1)*, which required decision on certification to be made early in litigation; however, failure to certify was not challenged on appeal, and fact that no class was ever certified meant that claim of one class representative, applicant whose request for services had been granted upon reconsideration, had to be dismissed as moot. *Bertrand v. Maram (7th Cir. Ill. July 24, 2007), 495 F3d 452*.

In action challenging amount of time taken by Department of Health and Human Services to make reconsideration determinations on applications for disability insurance benefits and supplemental security income benefits, where controversy involving named-plaintiff became moot before court could reasonably have been expected to have ruled on class certification request, subsequent certification may "relate back" to filing of complaint where issues involved could easily be capable of repetition, but evading review. *Maloney v. Califano (D.N.M. 1980), 88 FRD 293*.

315. —Supplemental Security Income

Mootness of case of class representative seeking review of termination of supplemental security income benefits does not destroy class certification where class members present sufficient case or controversy and where named plaintiff, on appeal, adequately represents interest of class pursuant to Rule 23. *Jackson v. Schweiker (7th Cir. Ind. July 20, 1982), 683 F2d 1076*.

Action brought on behalf of supplemental security income benefit recipients in state, seeking to compel defendants to promptly replace benefit checks which had been lost or stolen or mistakenly not issued was not moot, even though plaintiff had already received relief he originally sought in court. *Moore v. Matthews (D. Mass. 1975), 69 FRD 406, 23 Fed R Serv 2d (Callaghan) 88*.

Mootness would not bar class action from being maintained in action brought on behalf of Supplemental Security Income benefit recipients in state, which action was brought to compel defendants to promptly replace benefit checks which had been lost or stolen or not been issued by mistake, notwithstanding that plaintiff had received relief he originally sought in court, where case was one where named plaintiff's dispute would generally be resolved administratively long before court would have opportunity to carefully consider class action question. *Moore v. Matthews (D. Mass. 1975), 69 FRD 406, 23 Fed R Serv 2d (Callaghan) 88*.

In action challenging amount of time taken by Department of Health and Human Services to make reconsideration determinations on applications for disability insurance benefits and supplemental security income benefits, where controversy involving named-plaintiff became moot before court could reasonably have been expected to have ruled on class certification request, subsequent certification may "relate back" to filing of complaint where issues involved could easily be capable of repetition, but evading review. *Maloney v. Califano (D.N.M. 1980), 88 FRD 293*.

316. Welfare and public assistance

State public assistance applicant's claims were not rendered moot by their receipt of delayed benefits since claims of unlawful delay were inherently transitory because state will almost always be able to process delayed application before plaintiff can obtain relief through litigation, and two named plaintiffs alleged that they expected to apply again. *Robidoux v. Celani (2d Cir. Vt. Mar. 10, 1993), 987 F2d 931, 25 Fed R Serv 3d (Callaghan) 86*.

Class action challenging directive pursuant to which county board of assistance disbursed emergency welfare checks by centralized mailing procedure rather than by making them available on demand to those deemed eligible, is not rendered moot by fact that named plaintiff was given emergency check pursuant to present court's temporary restraining order. *Adens v. Sailer (E.D. Pa. May 1, 1970), 312 F Supp 923*.

Class action challenging validity of federal food stamp regulation was not moot, even though named plaintiff's claim became moot after court had certified action as class action under Rule 23. *Knowles v. Butz (N.D. Cal. Feb. 23, 1973), 358 F Supp 228*.

In class action against agencies administering state medical assistance program and against various private nursing homes, alleging that persons in state eligible for medical assistance and determined to be in need of skilled nursing facility care are being systematically excluded from skilled nursing facilities because of low level of reimbursement for such care by state in violation of federal statutory and constitutional law, lapse of class representative's eligibility for such medical assistance subsequent to class action certification does not moot representative's own stake in litigation or make representative inappropriate standard bearer for certified class, even if representative's asserted injury is not perceived as one capable of repetition, yet evading review, since representative's damage claim for past wrongs makes him appropriate named plaintiff on behalf of class which has interests inclusive of, but broader than his own. *Degregorio v. O'Bannon (E.D. Pa. 1980), 86 FRD 109*.

317. —Eligibility

In class action by certain recipients of benefits under Aid to Families with Dependent Children program, challenging 2 state incapacity eligibility standards for receiving such benefits, where claim against first standard is mooted by state administrative revision of such standard, court may not exercise jurisdiction over second standard unless it is determined that named plaintiff is present who has been directly injured by such standard, and if named plaintiff is not present court will allow intervention of party who has standing to challenge such standard. *Silva v. Vowell (5th Cir. Tex. June 26, 1980), 621 F2d 640, 30 Fed R Serv 2d (Callaghan) 104*, cert. denied, *(U.S. Jan. 26, 1981), 449 US 1125, 101 S Ct 941, 67 L Ed 2d 111*, disapproved, *Green v. Mansour (U.S. Dec. 3, 1985), 474 US 64, 106 S Ct 423, 88 L Ed 2d 371*.

Class action challenging constitutionality of state statute which requires social service officials to deny public assistance to any person who applied for such assistance within one year of arrival in state is not moot, even though plaintiff received assistance in spite of state statute. *Gaddis v. Wyman (S.D.N.Y. Aug. 5, 1969), 304 F Supp 713, 13 Fed R Serv 2d (Callaghan) 683*.

In consolidated actions challenging constitutionality of Massachusetts welfare statute and companion regulations which limited eligibility for benefits under Massachusetts General Relief program where one action was maintainable as class action on behalf of all persons residing in Massachusetts who were 65 years of age or older, who had or would experience, delay from date of application to Social Security Administration until date of determination of eligibility and who would be eligible for General Relief but for age restriction of statute and regulations, fact that waiting period for receipt of Supplemental Security Income benefits had expired as to named plaintiffs did not moot action since certification of class would relate back to filing of action and satisfy all requisites of true case or controversy. *Morales v. Minter (D. Mass. Apr. 22, 1975), 393 F Supp 88*.

318. —Termination

Class action attacking validity of law which authorized termination of welfare assistance without prior hearing is not moot, even though subsequent to filing of action plaintiffs began receiving public assistance on emergency basis. *Kelly v. Wyman (S.D.N.Y. May 17, 1968), 294 F Supp 887*.

Although action seeking preliminary injunction regarding state welfare regulation covering notice of discontinuance or reduction of public assistance payments was not certified as class action, circumstances present situation where issues would evade review thereby calling for relation back of class certification, so that action is not moot where one of named representatives of class lacked standing to sue and other named representative had benefits reinstated retroactively. *Lugo v. Dumpson (S.D.N.Y. Feb. 24, 1975), 390 F Supp 379, 20 Fed R Serv 2d (Callaghan) 114*.

Class action challenging termination of welfare payments without prior hearing was not moot, even though defendant had seemingly mooted case by fully satisfying all claims of named plaintiffs, as issue of capable of evading review by defendant's simply paying off named plaintiffs. *De Lao v. Weinberger (D. Ariz. Sept. 23, 1975), 400 F Supp 1043*, rev'd, *De Lao v. Califano (9th Cir. Ariz. Sept. 19, 1977), 560 F2d 1384*.

319. Other associations

Former softball team members appeared to be foreclosed from moving for class certification to obtain declaratory and injunctive relief because named plaintiffs' declaratory and injunctive claims were moot, and in class action, claim of named plaintiff, who sought to represent class, had to be live both at time he brought suit and when district court determined whether to certify putative class; if team members' claim was not live, court lacked justiciable controversy and had to dismiss claim as moot; therefore, to expeditiously determine proper scope of action, if team members still intended to file motion for class certification on all grounds outlined in their response, team members should file brief within 21 days of date of order explaining why they were not precluded from pursuing class claims for declaratory and injunctive relief. *Barrs v. Southern Conf. (N.D. Ala. Aug. 10, 2010), 734 F Supp 2d 1229*.

320. Miscellaneous

Plaintiffs' failure to move for class certification in lower court, coupled with this court's finding of mootness as to underlying substantive claims necessitates extending mootness to alleged class, where class certification issue does not relate to denial of certification and subsequent mootness of purported representatives' claims, but rather relates to failure to certify prior to dawn of mootness. *Sannon v. United States (5th Cir. Fla. Dec. 4, 1980), 631 F2d 1247, 30 Fed R Serv 2d (Callaghan) 964*.

Plaintiff's claims are not moot where plaintiff brings action pursuant to *42 USCS § 1983* on behalf of class consisting of state residents who (1) have been or currently are under support orders for benefit of state, (2) are indigent and are unable to procure counsel to represent them at civil contempt proceedings, and (3) are or may in

future be in arrears under these support orders and are thus under constant threat of incarceration. *Lake v. Speziale (D. Conn. Feb. 22, 1984), 580 F Supp 1318*.

Claims of named plaintiffs in class suits seeking declaratory and injunctive relief against anti-abortion protest activities at abortion and family planning clinic were not rendered moot by termination of their pregnancies since they might again become pregnant and law is not applied so rigidly when pregnancy is involved in litigation due to shortness of human gestation period. *Roe v. Operation Rescue, Inc. (E.D. Pa. Oct. 27, 1988), 123 FRD 500*.

Insurance companies' motions for summary judgment were granted on grounds that insureds' claims for injunctive relief were moot because insurance companies had abandoned liens against insureds to recover money obtained through insured's tort action, and insureds' class-based relief claims had to be dismissed because insureds' claims became moot before they filed class certification motion. *West v. Health Net of the Northeast (D.N.J. Aug. 7, 2003), 217 FRD 163*.

Where class action plaintiffs sued defendant based on claims that its standard lease violated federal law, their request for injunctive relief was not rendered moot due to changes defendant made to its lease, as defendant did not proffer copy of new lease provisions and did not assure court that its provisions would be applied to existing leases. *Owner-Operator Indep. Drivers Ass'n v. Allied Van Lines, Inc. (N.D. Ill. May 23, 2005), 231 FRD 280*.

Consumer's motion to certify, under *Fed. R. Civ. P. 23(b)(3)*, class of 455,000 consumers who received letters from auto dealership offering them pre-approved loans to buy new or used vehicles based on personal credit histories obtained from credit reporting agency was dismissed as moot; letters did not violate Fair Credit Reporting Act because they constituted "firm offer of credit" under *15 USCS § 1681a(l)*, even though they did not specify price, estimated price range, or rate of interest and would be honored only if consumer was determined to meet specific criteria used to select consumer for offer. *Hoffer v. Landmark Chevrolet Ltd. (S.D. Tex. Oct. 23, 2007), 245 FRD 588*.

G. Merits of Claim or Action

321. Generally

Plaintiff's burden of satisfying prerequisite for maintenance of class action does not involve convincing demonstration of merits of his underlying cause of action. *Wilcox v. Commerce Bank of Kansas City (10th Cir. Kan. Feb. 20, 1973), 474 F2d 336, 16 Fed R Serv 2d (Callaghan) 1244*.

Class certification is procedural question distinct from merits of action. *Garcia v Gloor (1980, CA5 Tex) 618 F2d 264, 22 BNA FEP Cas 1403, 23 CCH EPD P 30964, 29 FR Serv 2d 1331*, reh den *(1980, CA5 Tex) 625 F2d 1016* and cert den *(1981) 449 US 1113, 101 S Ct 923, 66 L Ed 2d 842, 24 BNA FEP Cas 1220, 24 CCH EPD P 31478* and (criticized in *EEOC v Premier Operator Servs. (2000, ND Tex) 113 F Supp 2d 1066, 79 CCH EPD P 40341*).

Appropriateness of class action certification is not dependent upon merits of case; merits of issues are entirely separate and distinct from whether class should be certified, and even failure to state cause of action is not necessarily fatal to class action certification. *Bogosian v Gulf Oil Corp. (1973, ED Pa) 62 FRD 124, 1973-2 CCH Trade Cases P 74840, 18 FR Serv 2d 98*, vacated on other grounds *(1977, CA3 Pa) 561 F2d 434, 1977-2 CCH Trade Cases P 61568, 23 FR Serv 2d 1050*, cert den *(1978) 434 US 1086, 98 S Ct 1280, 55 L Ed 2d 791* and (criticized in *Package Shop, Inc. v Anheuser-Busch, Inc. (1984, DC NJ) 1984 US Dist LEXIS 24942*) and (Abrogated in part as stated in *In re Ins. Brokerage Antitrust Litig. (2010, CA3 NJ) 618 F3d 300, 2010-2 CCH Trade Cases P 77135*).

On motion for class certification, in which it is plaintiffs' burden to demonstrate compliance with requirements of *FRCP 23*, court should accept as true plaintiffs' allegations concerning merits of case. *Becher v. Long Island Lighting Co. (E.D.N.Y. Jan. 6, 1996), 164 FRD 144*, amended, *(E.D.N.Y. Apr. 15, 1997), 172 FRD 28, 38 Fed R Serv 3d (Callaghan) 1102, 134 Lab Cas (CCH) P10032*.

Whether to certify class or subclass proceeds without examination of merits of case. *Bynum v. District of Columbia (D.D.C. Mar. 31, 2003), 214 FRD 27*.

322. Consideration of merits when determining certification question

It may be necessary for court to probe behind pleadings before coming to rest on class certification question; certification is proper only if trial court is satisfied, after rigorous analysis, that prerequisites for certification have been satisfied; such analysis will frequently entail overlap with merits of plaintiff's underlying claim since class determination generally involves considerations that are enmeshed in factual and legal issues comprising plaintiff's cause of action. *Comcast Corp. v. Behrend (U.S. Mar. 27, 2013), 569 US 27, 133 S Ct 1426, 185 L Ed 2d 515*.

It is inappropriate to decide case on its merits before determining whether it can be certified as class action. *Cruz v. Hauck (5th Cir. Tex. Oct. 8, 1980), 627 F2d 710, 30 Fed R Serv 2d (Callaghan) 494*.

It is not appropriate for trial court to delve into merits of substantive allegations in determining propriety of class certification. *Guarte v. Furniture Fair, Inc. (D. Md. 1977), 75 FRD 525, 23 Fed R Serv 2d (Callaghan) 1029*.

In reaching decision on class certification, court will not ignore merits of plaintiffs' claims, insofar as court must consider nature and character of claims in determining satisfaction of requirements of Rule 23. *Foster v. Bechtel Power Corp. (E.D. Ark. Mar. 24, 1981), 89 FRD 624, 32 Fed R Serv 2d (Callaghan) 867*.

In determining whether class should be certified, court must not delve into merits of action; nonetheless, court often must, to some extent, analyze elements of claims and defenses of parties. *Commander Properties Corp. v. Beech Aircraft Corp. (D. Kan. Dec. 5, 1995), 164 FRD 529, RICO Bus Disp Guide P9047*.

Although court is prohibited from considering merits of underlying claim when it is determining whether to certify class, class determination generally involves considerations that are enmeshed in factual and legal issues comprising plaintiff's cause of action; thus, it may be necessary for court to probe behind pleadings before coming to rest on certification question. *Hendricks-Robinson v. Excel Corp. (C.D. Ill. Mar. 4, 1996), 164 FRD 667*.

Although motion for class certification should not turn on court's evaluation of merits of parties' legal or factual claims, court may find it necessary to analyze elements of parties' substantive claims and review facts revealed in discovery in order to evaluate whether requirements of *FRCP 23* have been satisfied. *Wilks v. Ford Motor Co. (In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.) (D.N.J. Aug. 28, 1997), 174 FRD 332, 39 Fed R Serv 3d (Callaghan) 208*.

It was within bankruptcy court's discretion to consider merits of claims before their amenability to class certification. *Smith v. Fairbanks Capital Corp. (In re Smith) (Bankr. S.D. Ga. Aug. 15, 2003), 299 BR 687*.

323. Looking beyond pleadings by court

While District Court may look beyond pleadings to assess whether claims satisfy requirements of Rule 23, court should not conduct inquiry into merits of cause of action. *Davis v. Northside Realty Associates, Inc. (N.D. Ga. May 7, 1982), 95 FRD 39, 35 Fed R Serv 2d (Callaghan) 1266, 35 Fed R Serv 2d (Callaghan) 1266, 35 Fed R Serv 2d (Callaghan) 1275, 35 Fed R Serv 2d (Callaghan) 1275, 1982-83 Trade Cas (CCH) P64984* (criticized in *Package Shop, Inc. v Anheuser-Busch, Inc. (1984, DC NJ) 1984 US Dist LEXIS 24942*) and (criticized in *Gries v Std. Ready Mix Concrete, L.L.C. (2009, ND Iowa) 46 EBC 1353*).

Court may go beyond pleadings and consider legal and factual issues related to merits if necessary to determine whether each *Fed. R. Civ. P. 23* requirement has been met; Rule 23 itself contemplates that court will consider information beyond that contained in complaint. *Mulford v. Altria Group, Inc. (D.N.M. Mar. 22, 2007), 242 FRD 615*.

324. Frivolousness

Plaintiff's burden of satisfying prerequisite of Rule 23 for maintenance of class action does not involve convincing demonstration of merits of his underlying cause of action, but more than frivolous or insubstantial claims must be indicated, with motion for summary judgment or to dismiss on pleadings being available to test merits of claim. *Wilcox v. Commerce Bank of Kansas City (10th Cir. Kan. Feb. 20, 1973), 474 F2d 336, 16 Fed R Serv 2d (Callaghan) 1244*.

Reasonable prerequisite to maintainability of class action is that there be minimal demonstration that complaint is sincere or more than frivolous. *Katz v. Carte Blanche Corp. (D. Pa. 1971), 52 FRD 510, 15 Fed R Serv 2d (Callaghan) 557*.

325. —Particular cases

In dealing with motion for order declaring that action for alleged violation of § 10(b) of Securities Exchange Act (*15 USCS § 78j(b)*) and SEC Rule 10b-5 be maintained as class action it was not necessary to make determination of substantive factual issue, although it was reasonable to require minimal demonstration that complaint was not frivolous. *Hawk Industries, Inc. v. Bausch & Lomb, Inc. (S.D.N.Y. 1973), 59 FRD 619, Fed Sec L Rep (CCH) P93997*.

In civil rights action sought to be maintained as class action, where plaintiff claimed she was discriminated against and finally discharged from her employment pursuant to racially discriminatory policy of defendant company, court would have to determine if plaintiff had satisfied minimal burden as to whether requirement of Rule 23 were met and not whether plaintiff had stated cause of action; it was enough that allegations presented were more than frivolous. *Mason v. Calgon Corp. (D. Pa. Apr. 30, 1974), 63 FRD 98, 8 Empl Prac Dec (CCH) P9447*.

326. Possibility of success

In determining propriety of class action, question is not whether plaintiff or plaintiffs have stated cause of action or will prevail on merits, but rather whether requirements of Rule 23 are met. *Eisen v. Carlisle & Jacquelin (U.S. May 28, 1974), 417 US 156, 94 S Ct 2140, 40 L Ed 2d 732* (criticized in *Howard v Securitas Sec. Servs., USA (2009, ND Ill) 2009 US Dist LEXIS 3913*) and (criticized in *Drennan v PNC Bank, NA (In re Comty. Bank of N. Va. & Guaranty Nat'l Bank of Tallahassee Second Mortg. Loan Litig.) (2010, CA3 Pa) 622 F3d 275*) and (criticized in *Hecht v United Collection Bureau (2011, DC Conn) 2011 US Dist LEXIS 39507*) and (criticized in *Wal-Mart Stores, Inc. v Dukes (2011, US) 131 S Ct 2541, 180 L Ed 2d 374, 112 BNA FEP Cas 769, 94 CCH EPD P 44193, 161 CCH LC P 35919, 79 FR Serv 3d 1460, 22 FLW Fed S 1167*) and (criticized in *In re Ford Motor Co. E-350 Van Prods. Liab. Litig. (2012, DC NJ) 2012 US Dist LEXIS 13887*); *Miller v. Mackey International, Inc. (5th Cir. Fla. Nov. 23, 1971), 452 F2d 424, 15 Fed R Serv 2d (Callaghan) 780, Fed Sec L Rep (CCH) P93282*.

Class plaintiff who otherwise meets demands of Rule 23(a) and (b) should not be found to be disqualified solely by advance determination that his claim is predictably not winning claim. *Huff v. N. D. Cass Co. (5th Cir. Ala. Sept. 4, 1973), 485 F2d 710, 6 Empl Prac Dec (CCH) P8800, 17 Fed R Serv 2d (Callaghan) 934*.

There need be no preliminary showing that class is likely to win before it can be determined whether class action may be maintained. *Koos v. First Nat'l Bank (7th Cir. Ill. May 17, 1974), 496 F2d 1162, 18 Fed R Serv 2d (Callaghan) 996*.

Rule 23, as amended in 1966, specifically requires courts to make order concerning nature of action as soon as practicable after commencement of action brought as class action but does not require advance trial of merits on class action motion, and in order to be entitled to proceed with case as class action, plaintiffs need not convince court that there is substantial possibility that they will prevail on merits. *Fogel v. Wolfgang (S.D.N.Y. 1969), 47 FRD 213, 13 Fed R Serv 2d (Callaghan) 614, Fed Sec L Rep (CCH) P92407*.

Before litigation can proceed as class action, parties seeking to have it so designated must make preliminary showing that there is substantial possibility of success. *Milberg v. Western P. R. Co. (S.D.N.Y. 1970), 51 FRD 280, 14 Fed R Serv 2d (Callaghan) 975, Fed Sec L Rep (CCH) P92899*.

To require plaintiff to establish substantial possibility of success on merits would be inconsistent with letter and spirit of Rule 23. *Coniglio v. Highwood Services, Inc. (W.D.N.Y. 1972), 60 FRD 359, 16 Fed R Serv 2d (Callaghan) 1291, 1973-1 Trade Cas (CCH) P74314*.

It is inappropriate to consider whether plaintiffs will prevail on merits in determining whether class should be certified, but evidence which might have some relevance to merits is not thereby rendered inadmissible in class certification proceeding. *Strong v. Arkansas Blue Cross & Blue Shield, Inc. (E.D. Ark. Sept. 5, 1980), 87 FRD 496*.

327. —Securities, stocks and bonds

Action for alleged violations of various provisions of federal securities laws against corporation's officers and directors with respect to price manipulation scheme would not be allowed to proceed as class action unless plaintiffs could convince court there was substantial possibility that they would prevail on merits. *Dolgow v. Anderson (E.D.N.Y. 1968), 43 FRD 472, 11 Fed R Serv 2d (Callaghan) 565, Fed Sec L Rep (CCH) P92125*.

Where plaintiff brought suit under § 10(b) of Securities Exchange Act of 1934 (*15 USCS § 78j(b)*) and SEC Rule 10b-5 with respect to alleged misleading information in newspaper which analyzed securities and reports information of interest to financial community, but had little chance of success with what she euphemistically called "cause of action", motion for order declaring action to be class action would be denied. *Milberg v. Western P. R. Co. (S.D.N.Y. 1970), 51 FRD 280, 14 Fed R Serv 2d (Callaghan) 975, Fed Sec L Rep (CCH) P92899*.

Action arising out of merger of 2 corporations in which it was alleged that proxy statement and conduct of defendants involved violations of §§ 10(b) and 14(a) of Securities Exchange Act of 1934 (*15 USCS §§ 78j(b)*, *78n(a)*) might be prosecuted as class action without necessity for plaintiffs to show substantial possibility of their prevailing on merits. *Cole v. Schenley Industries, Inc. (S.D.N.Y. 1973), 60 FRD 81, 17 Fed R Serv 2d (Callaghan) 495, Fed Sec L Rep (CCH) P94003*.

328. —Other particular cases

Motion to qualify as class action in action brought for alleged unauthorized representation as patent practitioner under *35 USCS § 33* and for false representation of services in interstate commerce under *15 USCS § 1125(a)* would be denied where plaintiff failed to show in support of motion that there existed substantial probability that there had been a violation of *35 USCS § 33*. *Arnesen v. Raymond Lee Organization, Inc. (C.D. Cal. 1973), 59 FRD 145*.

In action brought against employer and union to redress alleged racially discriminatory employment practices, plaintiffs seeking to bring class action did not have to prove they would be successful in their individual claims in order to represent class; court would have to determine whether named plaintiffs could represent alleged class without regard to merits of plaintiffs' individual claims. *McMiller v. Bird & Son, Inc. (W.D. La. Aug. 25, 1975), 68 FRD 339, 20 Fed R Serv 2d (Callaghan) 1046*.

In action brought by Viet Nam War veterans and members of their families to recover damages for injuries allegedly suffered as result of exposure to Agent Orange, action is not certifiable as class action, under Rule 23, where enormous expenditure required to notify potential class members is not justified given almost nonexistent possibility of recovery against government on merits. *In re "Agent Orange" Prod. Liab. Litig. (E.D.N.Y. Feb. 11, 1985), 603 F Supp 239, 1 Fed R Serv 3d (Callaghan) 754*, aff'd, in part, dismissed, *(2d Cir. N.Y. Apr. 21, 1987), 818 F2d 194*.

329. Statute of limitations issues

Resolution of statute of limitations issue at class certification stage would impermissibly intrude upon merits of plaintiff's claim. *Kifafi v. Hilton Hotels Retirement Plan (D.D.C. May 11, 1999), 189 FRD 174*.

Court cannot refuse to certify class on ground that claim of sole class representative is time-barred, because ruling on statute of limitations constitutes reaching merits and such is forbidden in context of motion for class certification. *Kelley v. Galveston Autoplex (S.D. Tex. Sept. 29, 2000), 196 FRD 471*.

Consumer suit against motorcycle manufacturer for electronic odometer tampering under *49 USCS § 32703* was certified as class action under *Fed. R. Civ. P. 23*; to avoid individualized statute of limitations defenses under *49 USCS § 32710(b)*, court trimmed class to include only consumers who bought or leased particular model of manufacturer's motorcycle on or later than November 30, 2005. *Baxter v. Kawasaki Motors Corp., U.S.A. (N.D. Ill. Sept. 1, 2009), 259 FRD 336*.

In class action by plaintiff retiree, defendant former employer's argument that benefit-accrual class definition previously adopted had to be adjusted to exclude time-barred claims of absent class members was rejected under discovery rule because there was no assertion that statements finally provided class members with notice of information associated with employer's backloading of their benefit accruals or violations of plan's vesting provisions, and tolling statute of limitations for claims of putative class members served purposes of *Fed. R. Civ. P. 23* and encouraged judicial economy by eliminating need for putative members of sub-classes to file individual claims while parties engaged in discovery and court subsequently considered certification. *Kifafi v. Hilton Hotels Ret. Plan (D.D.C. May 15, 2009), 616 F Supp 2d 7*, aff'd, *(D.C. Cir. Dec. 14, 2012), 701 F3d 718*.

330. Denial or refusal of certification on basis of merits

Class certification may not be refused on ground that court thinks class will eventually lose on merits. *Loeb Indus. v. Sumitomo Corp. (7th Cir. Wis. Sept. 20, 2002), 306 F3d 469, RICO Bus Disp Guide P10330, 2002-2 Trade Cas (CCH) P73813*, cert. denied, *(U.S. June 2, 2003), 539 US 903, 123 S Ct 2247, 156 L Ed 2d 111*, cert. denied, *(U.S. June 2, 2003), 539 US 903, 123 S Ct 2248, 156 L Ed 2d 111*, cert. denied, *(U.S. June 2, 2003), 539 US 903, 123 S Ct 2251, 156 L Ed 2d 111*.

District court abused its discretion by denying class certification in action brought by plaintiffs, union and others, seeking class-wide relief under California law for employer's breaches of its legal obligation to provide employees with unpaid, 30-minute meal periods, totally relieved of all duties, because (1) district court not only judged validity of plaintiffs' "on duty" claims, it did so using nearly insurmountable standard, concluding that merely because it was not assured that plaintiffs would have prevailed on their primary legal theory, that theory was not appropriate basis for predominance inquiry; and (2) full inquiry into merits of putative class's legal claims was precisely what both U.S. Supreme Court and Ninth Circuit had cautioned was not appropriate for Rule 23 certification inquiry. *United Steel, Paper & Forestry, Rubber, Mfg. Energy v. ConocoPhillips Co. (9th Cir. Cal. Jan. 6, 2010), 593 F3d 802, 159 Lab Cas (CCH) P35681*.

Denial of class certification is not warranted on basis of issues going to merits of claims. *Irving Trust Co. v. Nationwide Leisure Corp. (S.D.N.Y. June 1, 1982), 95 FRD 51*.

Court cannot refuse to certify class on ground that claim of sole class representative is time-barred, because ruling on statute of limitations constitutes reaching merits and such is forbidden in context of motion for class certification. *Kelley v. Galveston Autoplex (S.D. Tex. Sept. 29, 2000), 196 FRD 471*.

331. Hearing on merits

Rule 23 does not authorize preliminary hearing on merits as part of determination whether suit may be maintained as class action; nothing in either language or history of Rule 23 gives court any authority to conduct preliminary inquiry into merits of suit in order to determine whether it may be maintained as class action. *Eisen v. Carlisle & Jacquelin (U.S. May 28, 1974), 417 US 156, 94 S Ct 2140, 40 L Ed 2d 732* (criticized in *Howard v Securitas Sec. Servs., USA (2009, ND Ill) 2009 US Dist LEXIS 3913*) and (criticized in *Drennan v PNC Bank, NA (In re Comty. Bank of N. Va. & Guaranty Nat'l Bank of Tallahassee Second Mortg. Loan Litig.) (2010, CA3 Pa) 622 F3d 275*) and (criticized in *Hecht v United Collection Bureau (2011, DC Conn) 2011 US Dist LEXIS 39507*) and (criticized in *Wal-Mart Stores, Inc. v Dukes (2011, US) 131 S Ct 2541, 180 L Ed 2d 374, 112 BNA FEP Cas 769, 94 CCH EPD P*

44193, 161 CCH LC P 35919, 79 FR Serv 3d 1460, 22 FLW Fed S 1167) and (criticized in *In re Ford Motor Co. E-350 Van Prods. Liab. Litig. (2012, DC NJ) 2012 US Dist LEXIS 13887*).

In determining whether suit may be maintained as class action, District Court is not obliged to conduct evidentiary hearing, however, when serious question of commonality or any other essential element is raised, hearing usually is necessary; preliminary hearing may avoid precipitous certification later vacated as improvident with unfortunate and intervening attendant costs for both sides. *Bradford v. Sears, Roebuck & Co. (5th Cir. Miss. Apr. 22, 1982), 673 F2d 792, 28 Empl Prac Dec (CCH) P32663, 33 Fed R Serv 2d (Callaghan) 1577*.

Whether action for alleged violations of federal securities laws was maintainable as class action would be decided after preliminary hearing at which evidence would be received with respect to possibility of plaintiffs' prevailing on merits. *Dolgow v. Anderson (E.D.N.Y. 1968), 43 FRD 472, 11 Fed R Serv 2d (Callaghan) 565, Fed Sec L Rep (CCH) P92125*.

In action brought under federal labor laws by 2 former employees of defendant company and members of defendant labor union, court would not interpose preliminary hearing on merits prior to determining maintainability of action as class action where court was well equipped under Rule 23(d) with means of ferreting out claims or issues that properly should be stricken from action, there was no indication that determination that action might be maintained as class action in itself would prompt adverse stock market repercussions for defendants, there was no assurance that some individual actions would be brought if class action were denied, problems of notice were not present, and plaintiffs' prevailing on merits did not seem so far beyond realm of possibility as to warrant further procedural impediments to resolution of case. *Buchholtz v. Swift & Co. (D. Minn. 1973), 62 FRD 581, 19 Fed R Serv 2d (Callaghan) 666, 75 Lab Cas (CCH) P10479*.

Although ruling of *In re Initial Public Offering Sec. Litig., 471 F. 3d 24* (2d Cir. 2006) (In re IPO), modified standard for applying class criteria under *Fed. R. Civ. P. 23(a)*, it did not require hearing on merits of claim in order to certify class; accordingly, in class suit by female employees against their employer and its affiliated entities (defendants), where class was certified prior to date In re IPO decision was rendered, defendants were not entitled to decertification of class based on In re IPO because certification order fully complied with In re IPO ruling, hearing on merits was not required for certification, and court did not rely on case that was partly overruled by In re IPO decision. *Hnot v. Willis Group Holdings, Ltd. (S.D.N.Y. Mar. 8, 2007), 241 FRD 204*.

332. Appeal and review

If action presents dispute which is capable of judicial resolution, plaintiff may appeal denial of class certification, even if plaintiff's personal stake in claim is moot or without substantive merit. *Alexander v Gino's, Inc. (1980, CA3 Pa) 621 F2d 71, 22 BNA FEP Cas 1253, 23 CCH EPD P 30892, 29 FR Serv 2d 782*, cert den *(1980) 449 US 953, 101 S Ct 358, 66 L Ed 2d 217, 24 BNA FEP Cas 254, 24 CCH EPD P 31301* and (criticized in *Aegis Sec. Ins. Co. v Fleming (2008) 32 CIT 410, 556 F Supp 2d 1359, 30 BNA Intl Trade Rep 1621*).

Although district court did not rule on plaintiffs' motion for class certification until after it had granted summary judgment with respect to two of plaintiffs' claims, denial of class certification was not reversible since plaintiffs' underlying claims clearly lacked merit and class certification would not have been appropriate even if court had considered question before disposing of two substantive claims. *Mira v. Nuclear Measurements Corp. (7th Cir. Ind. Feb. 14, 1997), 107 F3d 466, 36 Fed R Serv 3d (Callaghan) 1314, RICO Bus Disp Guide P9210*.

To appeal district court's denial of class certification is risky strategy, especially when class is proposed to be certified under *Fed. R. Civ. P. 23(b)(2)*; if denial of certification is reversed but decision on merits, adverse to class, is affirmed, claims of unnamed members, as of named members, will be barred unless their claims are dissimilar to those of named plaintiffs *Randall v. Rolls-Royce Corp. (7th Cir. Ind. Mar. 30, 2011), 637 F3d 818, 79 Fed R Serv 3d (Callaghan) 84, 161 Lab Cas (CCH) P35889*.

333. Other particular cases

District Court did not abuse its discretion in refusing to consider certification of class before determining whether named plaintiff and fortiori any putative of class which named plaintiff might properly seek to represent had federal cause of action, since claims of representative party must be typical of claims of class and adequacy of representation must be established before action may proceed on behalf of class, where plaintiffs asserted that class members who had paid money in response to allegedly extortionate letter might come forward to serve as representative but no named plaintiff claimed to have paid money to defendants as result of such letter. *Zimmerman v. HBO Affiliate Group (3d Cir. Pa. Dec. 9, 1987), 834 F2d 1163, 10 Fed R Serv 3d (Callaghan) 97*.

District Court did not abuse its discretion in refusing to permit securities case to proceed as class action given weakness of case on merits and plaintiff's inability to marshal evidence sufficient to establish prerequisites of class action. *Orlett v. Cincinnati Microwave, Inc. (6th Cir. Ohio Feb. 1, 1990), 953 F2d 224, 22 Fed R Serv 3d (Callaghan) 118, Fed Sec L Rep (CCH) P96493*.

District Court properly denied renewed certification motion seeking damages since decision on merits had already been rendered. *Hudson v. Chicago Teachers Union, Local No. 1 (7th Cir. Ill. Jan. 9, 1991), 922 F2d 1306, 18 Fed R Serv 3d (Callaghan) 1522*, cert. denied, *(U.S. June 24, 1991), 501 US 1230, 111 S Ct 2852, 115 L Ed 2d 1020*.

District judge exceeded bounds of permissible discretion in partially certifying class of hemophiliacs infected by AIDS virus as consequence of using defendants' blood products since fact that defendants had already won 12 of first 13 individuals suits demonstrated great likelihood that plaintiffs' claims lacked legal merit despite their human appeal, class action would force defendants to stake their companies on outcome of single jury trial or be forced by fear of risk of bankruptcy to settle even if they have no legal liability, when it was entirely feasible to allow final, authoritative determination of their liability to emerge from decentralized process of multiple trials involving different juries and different standards of liability in different jurisdictions; judge proposed to have jury determine defendants' negligence under legal standard that does not actually exist anywhere; and judge's proposal to bifurcate issues was inconsistent with principle that findings of one jury are not to be reexamined by subsequent jury since first jury will not determine liability but merely whether one or more defendants was negligence under one of two theories and, unless defendants settle, second and subsequent juries would have to decide in individualized, follow-on litigation issues such as comparative negligence and proximate causation which overlap issue of defendants' negligence. *In re Rhone-Poulenc Rorer Inc. (7th Cir. Ill. Mar. 16, 1995), 51 F3d 1293*, cert. denied, *(U.S. Oct. 2, 1995), 516 US 867, 116 S Ct 184, 133 L Ed 2d 122*.

District court did not err in dismissing case under Fair Debt Collection Practices Act on merits before acting on question of certification of plaintiff class, particularly where plaintiff never moved to certify class. *Schweizer v. Trans Union Corp. (2d Cir. N.Y. Jan. 26, 1998), 136 F3d 233*.

Bare allegation that racial discrimination has occurred neither determines whether class action may be maintained nor defines class that may be certified; rather, before district court determines efficacy of class certification, it may be required to make informed assessment of parties' evidence; that trial court does so does not mean that it has erroneously "reached merits" of litigation. *Cooper v Southern Co. (2004, CA11 Ga) 390 F3d 695, 94 BNA FEP Cas 1854, 18 FLW Fed C 11*, reh, en banc, den *(2005, CA11 Ga) 143 Fed Appx 310* and cert den *(2005) 546 US 960, 126 S Ct 478, 163 L Ed 2d 363, 96 BNA FEP Cas 1056* and (ovrld in part on other grounds by *Ash v Tyson Foods, Inc. (2006) 546 US 454, 126 S Ct 1195, 163 L Ed 2d 1053, 97 BNA FEP Cas 641, 87 CCH EPD P 42263, 19 FLW Fed S 99*) and (criticized in *White v Baxter Healthcare Corp. (2008, CA6 Mich) 533 F3d 381, 103 BNA FEP Cas 1121, 91 CCH EPD P 43249, 2008 FED App 242P*) and (ovrld on other grounds as stated in *Sylva-Kalonji v Bd. of Sch. Comm'rs (2009, SD Ala) 2009 US Dist LEXIS 43207*) and (Reversal noted in *Hazel v Monarch Windows & Doors, LLC (2012, ND Ala) 95 CCH EPD P 44519*).

Antitrust action brought against four manufacturers of lock and key systems with respect to alleged vertical and horizontal conspiracies and fraudulent concealment of conspiracies by defendants resulting in non-competitive pricing of lock and key systems would be conditionally maintainable as class action, and, where litigation was at such stage that plaintiffs had not had opportunity to develop case far beyond pleadings, plaintiffs would not be

required to make preliminary showing of merits to claims as prerequisite to maintenance of class action. *Philadelphia v. Emhart Corp. (E.D. Pa. 1970), 50 FRD 232, 14 Fed R Serv 2d (Callaghan) 332*.

Although plaintiff who brought action on his own behalf and on behalf of others would have burden of satisfying prerequisites of Rule 23(a) and provisions Rule 23(b)(3), none of such prerequisites and provisions would encumber plaintiff with burden of preliminarily demonstrating merit to his underlying cause of action. *Katz v. Carte Blanche Corp. (D. Pa. 1971), 52 FRD 510, 15 Fed R Serv 2d (Callaghan) 557*.

It was within bankruptcy court's discretion to consider merits of claims before their amenability to class certification; if complaint could not survive motion to dismiss, class action was moot, and as result, dismissal was considered before addressing issue of class certification. *Smith v. Fairbanks Capital Corp. (In re Smith) (Bankr. S.D. Ga. Aug. 15, 2003), 299 BR 687*.

334. —Labor and employment

In employment discrimination suit in which certification of class action was deferred to trial date, court would not certify class action where much evidence that might have been presented was not presented, much of evidence presented was faulty, evidence did not state claim, and was so deficient it raised inference that something more existed than was placed before court, since it would have been denial of due process of absent class members and violation of Rule 23(a)(4) to certify class under these circumstances. *Clark v. South Cent. Bell Tel. Co. (W.D. La. Sept. 17, 1976), 419 F Supp 697*.

Former employee was not entitled to class certification under *Fed. R. Civ. P. 23* on his claim that his former employer's conversion from defined benefits pension plan to cash balance pension plan constituted unlawful age discrimination under *29 USCS § 1054(b)(1)(H)(i)*, part of Employee Retirement Income Security Act (ERISA), *29 USCS § 1001* et seq., where employee failed to state claim upon which relief could be granted; applying either ERISA provisions for defined contribution plans or by measuring benefit accrual by changes in individual's account balance from year to year, cash balance plan did not discriminate against employees because of their age. *Tootle v. Arinc, Inc. (D. Md. June 10, 2004), 222 FRD 88*.

335. Miscellaneous

It is inappropriate to decide case on its merits before determining whether it can be certified as class action, and since dismissal on ground of mootness is in essence decision on merits, it is inappropriate for court to consider alleged mootness of claims of putative class members in determining whether to grant certification. *Cruz v. Hauck (5th Cir. Tex. Oct. 8, 1980), 627 F2d 710, 30 Fed R Serv 2d (Callaghan) 494*.

Suit may be properly designated class action even though complaint fails to state cause of action and may subsequently be dismissed. *62 FRD 160, 18 Fed R Serv 2d (Callaghan) 258*.

Plaintiff is not required to prove merits of class claim on motion for certification, or even to establish probability that action will be successful; however, courts are not likely to allow class action if convinced that there is no realistic chance of success. *Haley v. Medtronic, Inc. (C.D. Cal. Dec. 12, 1996), 169 FRD 643*.

General Telephone Co. v. Falcon, 457 U.S. 147 (1982), requires only that court not accept bald assertions of complaint regarding class action certification and, instead, imposes duty on court to carefully scrutinize record to determine if there is evidentiary basis for plaintiffs' request for certification without deciding merits of controversy. *Ketchum v. Sunoco, Inc. (E.D. Pa. July 11, 2003), 217 FRD 354*.

H. Procedural Matters

1. In General

336. Choice of law

In nationwide class actions, choice of law constraints are constitutionally mandated. *Wilks v. Ford Motor Co. (In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.) (D.N.J. Aug. 28, 1997), 174 FRD 332, 39 Fed R Serv 3d (Callaghan) 208*.

Consideration of choice of law issues at class certification stage is generally premature. *Singer v. AT&T Corp. (S.D. Fla. Mar. 4, 1998), 185 FRD 681*.

When putative class consisted of persons from numerous states pursuing common law claims, court had to conduct choice-of-law analysis before considering requirements of *Fed. R. Civ. P. 23*. *Tyler v. Alltel Corp. (E.D. Ark. Feb. 23, 2010), 265 FRD 415, 76 Fed R Serv 3d (Callaghan) 18*.

337. —Particular cases

Certification of class action with residents of different states as plaintiffs does not reduce all disputes within litigation to one subject to substantive and conflicts of laws rules of forum state where suits were begun in other states and transferred to forum court under *28 USCS §§ 1404* or *1407*. *In re "Agent Orange" Prod. Liab. Litig. (E.D.N.Y. Feb. 21, 1984), 580 F Supp 690*.

Under state's choice of law doctrine, court would have been required to interpret, apply, and instruct jury on law of at least 19 states in area of punitive damages; this task was unmanageably complicated; accordingly, punitive damages claim of named plaintiffs in purported class action was not certified for class treatment. *In re Tri-State Crematory Litig. (N.D. Ga. Mar. 17, 2003), 215 FRD 660*.

Proposed classes of women, who alleged they had been harmed by estrogen-plus-progestin medication manufactured and marketed by pharmaceutical company, while not nationwide, included women from 29 states and involved laws of 24–29 different states; however, in response to choice-of-law issues raised by their motion for class certification, class members failed in their burden to submit either trial plan or jury instructions effectively demonstrating that certification was appropriate in light of differences in state law; to contrary, their proposed groupings, jury instructions, and trial plan reflected complications that made any of proposed subclasses ill-suited for class certification; because class members did not make satisfactory showing that variations in state laws could be reasonably reconciled with, at very least, jury instructions capable of being understood by jury, and trial plan that adequately set forth how case would proceed, class certification was not warranted. *In re Prempro Prods. Liab. Litig. (E.D. Ark. Aug. 30, 2005), 230 FRD 555*.

Where companies did not contest fact that named consumers had standing to bring their individual claims, and consumers' complaint made clear that so-called "sister state" consumer protection laws were only implicated by members of putative class, fact that consumers may not have individual standing to allege violations of consumer protection laws in states other than those in which they purchased companies' calling cards was immaterial. *Ramirez v. STi Prepaid LLC (D.N.J. Mar. 17, 2009), 644 F Supp 2d 496*.

Unpublished decision: Choice-of-law analysis was incomplete and did not support certification of nationwide class under *Fed. R. Civ. P. 23(a)* and *(b)(3)* in unjust enrichment and breach of implied warranty action brought against engine manufacturers by aircraft purchasers; conclusion that Pennsylvania law applied uniformly to claims was based on mischaracterization of unjust enrichment as hybrid of contract and tort law rather than form of restitution, and there was insufficient discussion of policies and factors relevant to choice of law for both claims. *Powers v. Lycoming Engines (3d Cir. Pa. Mar. 31, 2009), 328 Fed Appx 121*.

338. Collateral estoppel

Prior decision of Court of Appeals that it would not address merits of claim of individual employee plaintiff in instant suit because District Court lacked jurisdiction to litigate it prevents employer from raising defense of collateral estoppel on basis of prior unsuccessful class action on behalf of all black employees, alleging company-wide pattern or practice of ratio discrimination, in which current plaintiff appeared as witness but was not named plaintiff.

Edwards v. Boeing Vertol Co. (3d Cir. Pa. Nov. 29, 1984), 750 F2d 13, 36 Empl Prac Dec (CCH) P34951, 40 Fed R Serv 2d (Callaghan) 500.

Class action concerning Haitian refugees was not collaterally estopped by earlier action by other Haitian refugees since that one involved program of preliminary screening before return, while one at issue in instant case was program of summary return without screening. *Haitian Ctrs. Council v. McNary (2d Cir. N.Y. July 29, 1992), 969 F2d 1350*, rev'd, *(U.S. June 21, 1993), 509 US 155, 113 S Ct 2549, 125 L Ed 2d 128*.

Comity between federal district judges' rulings on class certification under *Fed. R. Civ. P. 23* was not preclusive: thus, decisions to deny class certification by judges in two prior, similar cases in same federal district did not preclude decision by judge in instant case to grant class certification; effect of doctrine of comity, when it was successfully invoked, was preclusive, but unlike res judicata, it was doctrine that did not require but merely permitted preclusion, except when it governed choice of forum; defendants, county and its sheriff, were wrong to think comity synonym for collateral estoppel. *Smentek v. Dart (7th Cir. Ill. June 19, 2012), 683 F3d 373, 82 Fed R Serv 3d (Callaghan) 1393*.

339. Counsel, generally

District court did not abuse its discretion in sanctioning attorney for filing class action suit since allegations were not well grounded in fact and not warranted by existing law or good faith argument for its extension or modification. *Retired Chicago Police Ass'n v. Firemen's Annuity & Benefit Fund (7th Cir. Ill. May 27, 1998), 145 F3d 929, 40 Fed R Serv 3d (Callaghan) 1050*.

Permissive use of class action permitted by Rule 23 was not intended as device for client solicitation and it should not be permitted to be used for such purpose. *Baim & Blank, Inc. v. Warren-Connelly Co. (D.N.Y. 1956), 19 FRD 108, 1956 Trade Cas (CCH) P68285*.

Absence of order certifying class rendered plaintiff's motion to substitute counsel of record moot, despite fact that parties and court had previously treated action as class action. *Doe v. Bolton (N.D. Ga. May 2, 1989), 126 FRD 85*.

Attorney may not serve both as class representative and as class counsel. *In re California Micro Devices Sec. Litig. (N.D. Cal. Feb. 2, 1996), 168 FRD 257, 35 Fed R Serv 3d (Callaghan) 88, Fed Sec L Rep (CCH) P99105*.

It was easy for district court to conclude that proposed class counsel would perform adequately in representing class, as required by *Fed. R. Civ. P. 23(g)(1)(A)*, because he had initiated suit before he passed Wisconsin bar examination, he had already preformed most of tasks of representation, and he had already successfully obtained reversal and remand from appeals court; counsel's direct demonstration of competency in case was pertinent and controlling within meaning of R. 23(g)(1)(B). *Wiesmueller v. Kosubucki (W.D. Wis. June 13, 2008), 251 FRD 365*.

In action involving 25 consolidated cases, federal district court, pursuant to *Fed. R. Civ. P. 23(g)*, appointed interim lead counsel pending class certification, choosing smaller group of lawyers with state law experience, as larger group's experience with similar data theft cases was not critical and centralization would be more efficient. *In re Hannaford Bros. Co. (D. Me. July 25, 2008), 252 FRD 66*.

340. Decertification

Although district court may decertify class if it appears that requirements of *FRCP 23* are not in fact met, it need not decertify whenever it later appears that named plaintiffs were not class members or were otherwise inappropriate class representatives. *Umar v. Johnson (N.D. Ill. June 9, 1997), 173 FRD 494*.

Decertification is warranted where materially changed or clarified circumstances have been shown that would make continuation of class action improper. *Cook v. Rockwell Int'l Corp. (D. Colo. July 28, 1998), 181 FRD 473*.

District court's decision to decertify class is committed to its sound discretion, and party seeking decertification bears burden of demonstrating that elements of FRCP 23 have not been established. *Slaven v. BP Am., Inc. (C.D. Cal. Feb. 7, 2000), 190 FRD 649*.

Class certification is conditional until judgment is entered, and court may certify class initially and then, if appropriate under all circumstances, decertify class after adjudication of liability; it is court's duty to reassess class certification decisions in light of case's development. *In re Ikon Office Solutions, Inc. Sec. Litig. (E.D. Pa. Mar. 13, 2000), 191 FRD 457*.

In considering motion to decertify class, court adheres to legal standard required for class certification; thus, court accepts as true facts pled in controlling complaint, and focuses its inquiry as to whether or not requirements of *FRCP 23* are met. *Chisolm v. TranSouth Fin. Corp. (E.D. Va. May 12, 2000), 194 FRD 538*.

Court need not decertify class simply because it later appears that named plaintiffs were not class members or were otherwise inappropriate class representatives. *Anderson v. Rochester-Genesee Reg'l Transp. Auth. (W.D.N.Y. Aug. 14, 2001), 206 FRD 56*, aff'd in part and rev'd in part, *(2d Cir. N.Y. July 23, 2003), 337 F3d 201*.

In considering motion for class decertification, only question before court is whether class meets requirements of *Fed. R. Civ. P. 23*. *Williams v. Brown (N.D. Ill. Apr. 15, 2003), 214 FRD 484*.

341. —Mootness of representative's claim

Decertification is not required where former named plaintiffs' claims become moot; where court is confronted with named plaintiffs who no longer have live interests, appropriate course is to substitute new named class members. *Wyatt by & Through Rawlins v. Poundstone (M.D. Ala. Oct. 3, 1995), 169 FRD 155*.

Class was decertified where class of employees was conditionally certified under *Fed. R. Civ. P. 23(b)(2)* in suit under Fair Credit Reporting Act FCRA), *15 USCS §§ 1681* et seq., to obtain judgment declaring that employer violated FCRA by wrongfully terminating employees for refusal to sign written authorization to allow employer to obtain consumer reports about employees, as employer was granted partial summary judgment on employee's FRCA claims and dismissal of FCRA claims rendered certification moot. *Kelchner v. Sycamore Manor Health Ctr. (M.D. Pa. Feb. 27, 2004), 305 F Supp 2d 429*, aff'd, *(3d Cir. Pa. Mar. 3, 2005), 135 Fed Appx 499*.

342. —Other particular cases

Permanent injunction entered in dispute over credit disability insurance was overbroad because it provided for relief for putative class members after class had been decertified; injunction required insurer to follow certain procedures and to apply particular definition of "total disability" in processing claim forms, but district court lacked jurisdiction over any of claims of putative class members and could not grant relief to any claimant other than insured who brought suit. *Meyer v. CUNA Mut. Ins. Soc'y (3d Cir. Pa. May 26, 2011), 648 F3d 154*.

District court's decertification of subclasses in class action to enforce Fair Labor Standards Act and parallel state law governing wages and overtime was correct because there was no feasible plan for trying variable claims for damages of class members; testimony by 42 "representative" witnesses, supplemented by other kinds of evidence that plaintiffs failed to specify, would not have enabled rational determination of damages for each of over 2000 class members. *Espenscheid v. DirectSat USA, LLC (7th Cir. Wis. Feb. 4, 2013), 705 F3d 770, 84 Fed R Serv 3d (Callaghan) 799, 163 Lab Cas (CCH) P36097*.

In class action charging with employer with sexual discrimination in hiring and advancement practices, motion by employer, to decertify class of female employees because advancement of class representative to different position allegedly belies existence of discriminatory practices, will be denied since unresolved issue remains whether certain jobs have been reserved exclusively for men. *Retail Wholesale & Dep't Store Union v. Standard Brands, Inc. (N.D. Ill. Dec. 6, 1979), 85 FRD 599, 29 Fed R Serv 2d (Callaghan) 69*.

Securities fraud class would be decertified rather than members given additional opt-out period, where they no longer satisfied requirements for class certification, their claims would be time-barred if they continued, and decertification would give class members freedom to choose forum in which to pursue their claims, including claims resolution process pursuant to defendant's settlement agreement with SEC. *In re Prudential Sec. Inc. Ltd. Pshps. Litig. (S.D.N.Y. Nov. 16, 1994), 158 FRD 301*.

Employer's motion to decertify compensation discrimination class that was certified in January 2005 was granted where named plaintiffs had not demonstrated standing in first instance to maintain such claims. *Williams v. Boeing Co. (W.D. Wash. Nov. 4, 2005), 2005 US Dist LEXIS 27491*.

In this Fair Labor Standards Act action, plaintiffs met numerosity requirement of *Fed. R. Civ. P. 23(a)* where plaintiffs claimed that there were at least thirty-five members in Washington, D.C. sub-class and at least thirty members in Maryland sub-class. *Encinas v. J.J. Drywall Corp. (D.D.C. Mar. 8, 2010), 265 FRD 3*.

Motion to decertify class was granted because *Fed. R. Civ. P. 23* provided named plaintiffs no power to file administrative "class claim" with Federal Deposit Insurance Corporation (FDIC), and administrative "class claim" did not exhaust administrative remedies of absent class members. *Cassese v. Wash. Mut., Inc. (E.D.N.Y. May 13, 2010), 711 F Supp 2d 261*.

Employer's motion to decertify class of employees was denied where common proof was required to determine whether administrate employee or learned profession exemptions to California's overtime requirements applied, thereby meeting commonality requirement of *Fed. R. Civ. P. 23(a)(2)* and predominance requirement of *Fed. R. Civ. P. 23(b)(3)*. *Campbell v. PricewaterhouseCoopers, LLP (E.D. Cal. Nov. 28, 2012), 287 FRD 615*.

Bankruptcy court denied plaintiffs' *Fed. R. Civ. P. 60(b)* motion for relief from order granting defendant credit union's motion to decertify two classes, as Classes 1 and 2 were not properly defined and did not meet requirements of *Fed. R. Civ. P. 23(a)(1)*, (2), or (3); and Class 2 did not meet requirements of Rule 23(b)(3). *Montano v. First Light Fed. Credit Union (In re Montano) (Bankr. D.N.M. May 21, 2013), 493 BR 852*.

343. — —Employment matters

In suit for failure to pay wages, former employer's motion to decertify class under *Fed. R. Civ. P. 23(c)(1)(C)* was denied as no asserted error by class counsel was serious enough to warrant decertification; specifically, former employer was found to have waived any objection to class counsel's simultaneous filing of, and district court's decisions on, suing employee's motions for partial summary judgment and for class certification as simultaneous filing of those two motions did not demonstrate any inadequacy on part of class counsel, and class counsel's delay in sending notice to class what not serious enough error to warrant decertification in light of class counsel being otherwise diligent in prosecuting action. *Mendez v. Radec Corp. (W.D.N.Y. Aug. 20, 2009), 260 FRD 38*.

In suit for failure to pay wages, former employer's motion to decertify class under *Fed. R. Civ. P. 23(c)(1)(C)* was denied based on ground that individual issues predominated over class issues since fact that some issues related to damages may require individualized proof regarding Fair Labor Standards Act, *29 USCS §§ 201* et seq., claims was not basis for finding that *Fed. R. Civ. P. 23(b)(3)*'s predominance criterion had not been met; additionally, *N.Y. C.P.L.R. 901(b)* did not generally bar class action as long as class members either waived their claims for liquidated damages or opted out, thus, district court ordered that any plaintiff who did not opt out of class would have to waive any claims to liquidated damages under New York's Labor Law. *Mendez v. Radec Corp. (W.D.N.Y. Aug. 20, 2009), 260 FRD 38*.

Insurer's motion to decertify class action under Maryland law asserting breach of contract and other claims involving personal injury protection benefits was granted because insured could not satisfy prerequisites of commonality or typicality under *Fed. R. Civ. P. 23* since each claim was unique and required individualized inquiry. *Kuei-I Wu v. Mamsi Life & Health Ins. Co. (D. Md. Oct. 18, 2010), 269 FRD 554, 77 Fed R Serv 3d (Callaghan) 1033*.

In civil action alleging that defendant disqualified applicants for employment on basis of consumer reports in manner violative of Fair Credit Reporting Act, decertification of pre-adverse action sub-class members that were allegedly not hired for reasons totally unrelated to their consumer reports was denied because fact that defendant could raise distinct factual defenses as to some members of sub-class was not fatal to predominance requirement's fulfillment; and class action was superior method of resolving common issue of whether defendant's final hiring decision was based on sub-class members consumer reports. *Reardon v. ClosetMaid Corp. (W.D. Pa. Dec. 2, 2013), 2013 US Dist LEXIS 169821*.

344. Defenses

Prior decision of Court of Appeals that it would not address merits of claim of individual employee plaintiff in instant suit because District Court lacked jurisdiction to litigate it prevents employer from raising defense of collateral estoppel on basis of prior unsuccessful class action on behalf of all black employees, alleging company-wide pattern or practice of ratio discrimination, in which current plaintiff appeared as witness but was not named plaintiff. *Edwards v. Boeing Vertol Co. (3d Cir. Pa. Nov. 29, 1984), 750 F2d 13, 36 Empl Prac Dec (CCH) P34951, 40 Fed R Serv 2d (Callaghan) 500*.

Possible availability to defendant in truth in lending action of defense of taking measures to correct deficiency of disclosures will not itself bar class certification. *George v. Beneficial Finance Co. (N.D. Tex. 1977), 81 FRD 4*.

While distributor's answer provided for defense of lack of personal jurisdiction meeting threshold requirements of *Fed. R. Civ. P. 12(h)(1)*, neither five month duration of its silence in bringing matter before court nor scope of its passive participation in litigation by attending *Fed. R. Civ. P. 23* discovery depositions constituted waiver of defense. *Matthews v. Brookstone Stores, Inc. (S.D. Ala. May 24, 2006), 431 F Supp 2d 1219*.

345. Denial of certification motion

Before plaintiff moves for class certification, defendant may test propriety of action by motion for denial of class certification; however, even where defendant moves for denial of class certification before plaintiff has sought certification, burden of establishing propriety of class action remains with plaintiff. *Parker v. Time Warner Entertainment Co., L.P. (E.D.N.Y. Jan. 9, 2001), 198 FRD 374*, vacated, *(2d Cir. N.Y. June 2, 2003), 331 F3d 13, 55 Fed R Serv 3d (Callaghan) 791*.

Where trial court previously determined that royalty owners of mineral leases had provided insufficient notice to putative class members, pursuant to *La. Rev. Stat. Ann. § 31:137*, and accordingly, they could not make royalty demand of oil companies, companies' motion to deny class certification pursuant to *Fed. R. Civ. P. 23* was granted because Rule 23 would have had to interpret and apply notice requirements of *La. Rev. Stat. Ann. § 31:137*, which were previously deemed insufficient; additionally, applying *Fed. R. Civ. P. 23* would create substantive right in class action members, which would violate *28 USCS § 2072(b)*. *Chevron USA, Inc. v. Vermilion Parish Sch. Bd. (W.D. La. Apr. 16, 2003), 215 FRD 511*, aff'd, *(5th Cir. La. July 6, 2004), 377 F3d 459*.

Defendant's motion to deny class certification was premature where plaintiff had not yet moved to certify class. *Thomas v. Sheahan (N.D. Ill. Apr. 5, 2005), 370 F Supp 2d 704*.

Although proposed class met prerequisites of *Fed. R. Civ. P. 23(a)*, it could not be certified under either Rule 23(b)(2) or (b)(3); proposed class's claims for monetary damages were not incidental to injunctive relief and damages could not be determined by formula on class-wide basis; due to numerous individualized questions relating to breach, damages, and potential defenses, plaintiff failed to demonstrate that common questions predominated over individualized issues. *O'Gara v. Countrywide Home Loans, Inc. (D. Del. July 12, 2012), 282 FRD 81*.

346. Exhaustion of administrative or other available remedies

Doctrine requiring exhaustion of administrative remedies applies to class actions as well as individual actions, and while there is some divergence as to circumstances under which exhaustion by one member is sufficient to meet exhaustion by at least one member of class is necessary prerequisite for class action. *Phillips v. Klassen (D.C. Cir. May 10, 1974), 502 F2d 362, 18 Fed R Serv 2d (Callaghan) 1021*, cert. denied, *(U.S. Nov. 11, 1974), 419 US 996, 95 S Ct 309, 42 L Ed 2d 269*.

Exhaustion of administrative remedies by at least one member seeking to represent class is necessary prerequisite for standing to maintain class action. *Barlow v. Marion County Hospital Dist. (M.D. Fla. Dec. 10, 1980), 88 FRD 619, 31 Fed R Serv 2d (Callaghan) 115*.

It is not necessary for each member of alleged class to exhaust administrative remedies in order for class action to be maintained; rule is that exhaustion by at least one member seeking to represent class is necessary prerequisite. *Wolkenstein v. Reville (W.D.N.Y. Jan. 20, 1982), 539 F Supp 87, 33 Fed R Serv 2d (Callaghan) 462*, aff'd, *(2d Cir. N.Y. Nov. 18, 1982), 694 F2d 35*.

347. —Employment discrimination

District Court improperly refused to certify class in civil rights action brought with respect to alleged sex discrimination in employment on ground that putative members failed to show interest in reemployment either by filing grievance with union or complaint with Equal Employment Opportunity Commission, since filing of charge with Commission is not prerequisite to recovery as member of injured class where one member of class has done so, and each member of class does not have to exhaust other remedies before recovering. *Romasanta v. United Airlines, Inc. (7th Cir. Ill. July 1, 1976), 537 F2d 915, 12 Empl Prac Dec (CCH) P11042, 22 Fed R Serv 2d (Callaghan) 954*, aff'd, *(U.S. June 20, 1977), 432 US 385, 97 S Ct 2464, 53 L Ed 2d 423*.

In class action under Title VII, *42 USCS §§ 2000e* et seq., for employment discrimination, it is not necessary that each class member file charge with EEOC, however, only those who could have filed charge at or after time charge was filed by class representative can be included in class. *Movement for Opportunity & Equality v. General Motors Corp. (7th Cir. Ind. Apr. 23, 1980), 622 F2d 1235, 22 Empl Prac Dec (CCH) P30863*; *Williamson v. Bethlehem Steel Corp. (W.D.N.Y. Apr. 24, 1980), 488 F Supp 827*.

Two prerequisites to institution of action under Title VII of Civil Rights Act of 1964 (*42 USCS §§ 2000e* et seq.) are: (1) Rule 23 must be satisfied and (2) issues raised must be those plaintiff has standing to raise and in fact did raise before Equal Employment Opportunity Commission. *Newmon v. Delta Air Lines, Inc. (N.D. Ga. Dec. 31, 1973), 374 F Supp 238, 7 Empl Prac Dec (CCH) P9154*.

Action brought for alleged race discrimination in employment under § 717 of Title VII of Civil Rights Act of 1964 (*42 USCS § 2000e-16*) as amended by Equal Employment Opportunity Act of 1972 (*86 Stat. 103*) could not be maintained as class action in light of fact that legislative history of 1972 Act indicated no right to trial de novo and fact that class action cannot be maintained if there is not administrative record for each prospective member of class. *Pointer v. Sampson (D.D.C. Apr. 18, 1974), 62 FRD 689, 7 Empl Prac Dec (CCH) P9326*, disapproved, *Sperling v. United States (3d Cir. N.J. Apr. 18, 1975), 515 F2d 465, 9 Empl Prac Dec (CCH) P10100*.

Class action for alleged employment discrimination is not maintainable unless class representative has filed timely charges of employment discrimination with Equal Employment Opportunity Commission which reflect complaint of members to extent required by Rule 23(a). *American Finance System, Inc. v. Harlow (D. Md. Oct. 17, 1974), 65 FRD 94, 8 Empl Prac Dec (CCH) P9773, 19 Fed R Serv 2d (Callaghan) 486*.

Since review of administrative record, after exhaustion of administrative remedies, does not contemplate trial de novo, action arising out of alleged racially discriminatory employment practices in agency of Defense Department and brought under Title VII of Civil Rights Act of 1964 as amended by Equal Employment Opportunity Act of 1972 (*42 USCS § 2000e-16*) would not be certified as class action. *Spencer v. Schlesinger (D.D.C. Apr. 23, 1974), 374 F Supp 840, 7 Empl Prac Dec (CCH) P9302*, disapproved, *Sperling v. United States (3d Cir. N.J. Apr. 18, 1975), 515*

F2d 465, 9 Empl Prac Dec (CCH) P10100, vacated without op., (D.C. Cir. Aug. 6, 1976), 12 Empl Prac Dec (CCH) P11228.

Plaintiff may bring class action on behalf of those who have not filed charges with Equal Employment Opportunity Commission. Jones v. United Gas Improv. Corp. (E.D. Pa. July 16, 1975), 68 FRD 1, 11 Empl Prac Dec (CCH) P10600.

In action brought by black, former employees and former union members for defendants' alleged discrimination under Labor Management Relations Act (29 USCS §§ 141 et seq.) and federal civil rights laws (*42 USCS § 1981*, *42 USCS §§ 2000e* et. seq.), membership in plaintiff subclasses asserting causes of action under *42 USCS § 1981* and 29 USCS §§ 141 et seq. is limited to those individuals who could have filed suit in their own right when class representatives brought action, since filing of charges with Equal Employment Opportunity Commission does not toll statute of limitations for purposes of such statutes, and while individuals who did not file charges with Equal Employment Opportunity Commission can be included within class, no one whose grievance did not arise after or continue in existence until 90 days before filing of charges by plaintiffs can be member of any subclass seeking relief under *42 USCS §§ 2000e* et seq., since under such statute jurisdictional prerequisite is that charge be filed with Equal Employment Opportunity Commission within 90 days after occurrence of alleged unlawful employment practices. Marshall v. Electric Hose & Rubber Co. (D. Del. Sept. 8, 1975), 68 FRD 287, 10 Empl Prac Dec (CCH) P10394, 22 Fed R Serv 2d (Callaghan) 57.

Plaintiffs were not precluded from raising class action claims in consolidated actions brought under Title VII of Civil Rights Act of 1964 (*42 USCS §§ 2000e* et. seq.) for alleged discrimination on basis of race and sex, because of their failure to file third-party allegations through administrative procedures outlined in regulation. Ellis v. Naval Air Rework Facility (N.D. Cal. Sept. 22, 1975), 404 F Supp 391, 10 Empl Prac Dec (CCH) P10422, 20 Fed R Serv 2d (Callaghan) 1356.

In employment discrimination actions brought under § 717 of Civil Rights Act of 1964, as amended, 42 USCS § 2000e-16, only named representative plaintiff is required to meet administrative exhaustion requirements. Valentino v. United States Postal Service (D.D.C. Nov. 18, 1977), 24 Fed R Serv 2d (Callaghan) 815, 1977 US Dist LEXIS 12848.

Application of Rule 23 to discrimination suit on behalf of class brought by Equal Employment Opportunity Commission under § 706 of Title VII, 42 USCS §§ 2000(e) et seq., is not prerequisite to protection of defendant from multiple liability as EEOC defendants are protected from multiple liability without imposition of Rule 23 for two reasons: first, no person may bring action under Title VII unless that person has filed charge with EEOC within 180 days of alleged act of discrimination, and, second, where EEOC has already filed suit, private party will rarely be able to file separate lawsuit and will be limited to intervention; moreover, receipt of back pay award in settlement is usually conditioned upon waiver of individual's personal cause of action. EEOC v. Whirlpool Corp. (N.D. Ind. Feb. 3, 1978), 80 FRD 10, 16 Empl Prac Dec (CCH) P8144, 25 Fed R Serv 2d (Callaghan) 63.

All members of employee class-wide discrimination need not file and comply with jurisdictional prerequisites under Title VII of Civil Rights Act of 1964 (*42 USCS §§ 2000e* to 2000e-17) to share in court-ordered relief, because timely administrative filing by one class member adequately serves purposes of filing requirements with respect to all members; because EEOC filing by one class member cannot revive claims of others which are no longer viable at time of that filing, only members capable of having made timely EEOC filing on or after date of that filing are eligible to join in class action. League of United Latin American Citizens (LULAC) v. Salinas Fire Dep't (N.D. Cal. Aug. 19, 1980), 88 FRD 533, aff'd, League of United Latin American Citizens (LULAC), Monterey Chapter 2055 v. Salinas Fire Dep't (9th Cir. Cal. Aug. 24, 1981), 654 F2d 557, 26 Empl Prac Dec (CCH) P32067.

In action by employee charging employer with unlawful discrimination on basis of sex, proposed plaintiffs may not intervene at time of reargument on motion for summary judgment, where neither proposed plaintiff has met jurisdictional prerequisites for filing Title VII suit, in that neither has filed EEOC charge and received right-to-sue letter, and where summary judgment has been awarded against only plaintiff who was entitled to file suit in first

instance, and that plaintiff failed to bring motion for class certification at any time prior to filing of motion for summary judgment. *Schaulis v. CTB/McGraw-Hill, Inc. (N.D. Cal. Aug. 15, 1980), 496 F Supp 666, 24 Empl Prac Dec (CCH) P31223, 30 Fed R Serv 2d (Callaghan) 1463*.

In class action charging company with liability under Title VII for racially discriminatory employment practices, class consists only of those employees or former employees who could have filed valid charges of discrimination with EEOC at time class representative filed his charge, and liability under Title VII may therefore be predicated only on discriminatory actions by company occurring on or after date which is 108 days prior to date plaintiff's EEOC charge was filed. *Pouncy v. Prudential Ins. Co. (S.D. Tex. July 9, 1980), 499 F Supp 427, 23 Empl Prac Dec (CCH) P31114*, aff'd, *(5th Cir. Tex. Feb. 22, 1982), 668 F2d 795, 28 Empl Prac Dec (CCH) P32451*.

In sex discrimination suit by female flight attendants challenging employer's maternity leave policies, individual plaintiffs' failure to file timely EEOC charge is not jurisdictional bar to their suit, where plaintiffs' union has filed EEOC charge which outlines same issues raised by plaintiffs. *Association of Flight Attendants v. Texas International Airlines, Inc. (S.D. Tex. Jan. 5, 1981), 89 FRD 52, 25 Empl Prac Dec (CCH) P31680, 31 Fed R Serv 2d (Callaghan) 1048*.

Employees may litigate individual cases and serve as class members in suit charging employer with maintaining performance appraisal system which discriminates against class members based on race despite their failure to file proper administrative charges, because one member of class had properly filed administrative charge and exhausted administrative remedies. *Huguley v. General Motors Corp. (E.D. Mich. July 21, 1986), 638 F Supp 1301*, aff'd in part and rev'd in part, *(6th Cir. Mich. Sept. 20, 1994), 35 F3d 1052*.

If no named plaintiffs in Title VII (*42 USCS §§ 2000e* et seq.) action have filed EEOC charge which alleged, or at least put defendants on notice of, class-wide discrimination charges, plaintiffs may not proceed with their class claims in district court. *Kresefsky v. Panasonic Communs. & Sys. Co. (D.N.J. Aug. 9, 1996), 169 FRD 54*.

Plaintiffs could not seek trial de novo as class under *FRCP 23* based on exhaustion of their individual claims because they failed to timely challenge denial of their class claims by Equal Opportunity Commission pursuant to *42 USCS § 2000e-16*. *James v. England (D.D.C. Dec. 23, 2004), 226 FRD 2*.

348. —Social Security

In Rule 23(b)(2) class action on behalf of all state recipients of and applicants for supplemental security income, challenging Social Security Administration's regulation which requires that difference between fair market value and actual price paid by recipient or applicant for necessity of life be considered as countable, in-kind income, resulting in reduction, termination or denial of benefits, it is not necessary that all class members fully exhaust all administrative steps under "final decision" requirement of *42 USCS § 405(g)*, and all members of class who have submitted claims for benefits and have had challenged regulation applied to their claims will be treated as though they have received "final decision," where there is no indication that application of challenged regulation in their cases would be different from application in case of named plaintiff who has fully exhausted all administrative steps. *Jackson v. Harris (N.D. Ind. 1980), 86 FRD 452*.

Each member of proposed class challenging decision of Social Security Administration must satisfy presentation requirement under *42 USCS § 405(g)*, whereby plaintiff must present claim to Secretary and obtain from him final decision on claim as prerequisite to court's jurisdiction. *Morrell v. Harris (E.D. Pa. Jan. 26, 1981), 505 F Supp 1063*.

349. —Other particular cases

Order conditionally certifying class would be rescinded for lack of showing that members of purported class exhausted administrative remedies, where only undisputed jurisdictional basis for approaching merits of action requires that individuals seeking judicial review thereunder exhaust administrative remedies. *Hodges v. Weinberger (D. Md. Mar. 7, 1977), 429 F Supp 756*.

In subdivision residents' suit against U.S. and 2 private defendants for damages arising out of adjacent jet fuel storage and distribution facility, court's jurisdiction was not fatally affected by fact that not all plaintiffs had exhausted their administrative remedies under FTCA; nothing in rule requires that all members of class must pursue claims against all defendants, so that those class members who had met requirements of FTCA would be permitted to proceed against all three defendants and those who had not filed administrative claims would be permitted to pursue their claims only against private defendants. *Bates v. Tenco Services, Inc. (D.S.C. Sept. 24, 1990), 132 FRD 160*.

One class member's exhaustion of administrative remedies satisfied exhaustion requirement of Prison Litigation Reform Act, *42 USCS § 1997e(a)*, as to entire class of inmates. *Lewis v. Washington (N.D. Ill. May 30, 2003), 265 F Supp 2d 939*.

On issue of whether school board violated federal disability discrimination laws by having intentionally dysfunctional infrastructure and system for offering instructional method that systematically failed to provide that method to class of students who were qualified for special education based on specific learning disability in reading, class certification was denied because proposed members had not exhausted their administrative remedies, and individualized fact-intensive inquiry with benefit of agency expertise as to each student was needed, as well as fully developed administrative record; fashioning uniform group remedy or effecting system-wide policy change was not manageable task for court. *Miller ex rel. S.M. v. Bd. of Educ. (D.N.M. July 31, 2006), 455 F Supp 2d 1286*, aff'd, *(10th Cir. N.M. May 11, 2009), 565 F3d 1232*.

Plaintiffs were not excused from exhaustion requirement under FIRREA by FDIC's failure to give individual notice after it took over failed bank as receiver, as statute requiring notice to creditors did not provide penalty for failure to comply, and remedy provided by other provision required only actual notice of receivership, rather than mailed individual notice; further, notice was given to class counsel for then-certified class, and individual notice to each class member was not required under FIRREA or Rules of Professional Conduct. *In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig. (W.D. Pa. June 27, 2013), 954 F Supp 2d 360*.

350. Findings and conclusions

District court is not required to accept complaint's allegations when deciding whether to certify class, rather must make whatever factual and legal inquiries are necessary under Rule 23, including inquiries into merits to determine whether Rule's requirements have been met. *Szabo v Bridgeport Machs., Inc. (2001, CA7 Ind) 249 F3d 672, 49 FR Serv 3d 716*, cert den *(2001) 534 US 951, 122 S Ct 348, 151 L Ed 2d 263* and (criticized in *In re Initial Pub. Offering Sec. Litig. (2004, SD NY) 227 FRD 65, CCH Fed Secur L Rep P 93014*) and (criticized in *In re Natural Gas Commodities Litig. (2005, SD NY) 231 FRD 171, 164 OGR 505*) and (criticized in *Heerwagen v Clear Channel Communs. (2006, CA2 NY) 435 F3d 219, 2006-1 CCH Trade Cases P 75081*) and (criticized in *Mednick v Precor, Inc. (2014, ND Ill) 2014 US Dist LEXIS 159687*).

Where district court certified class without any findings of fact, legal analysis, or even cursory reference to *Fed. R. Civ. P. 23*'s requirements, court was unable to determine whether record supported district court's decision; therefore, action was remanded to district court to make appropriate findings that specified how plaintiff met requirements of Rule 23. *Vizena v. Union Pac. R.R. Co. (5th Cir. La. Feb. 26, 2004), 360 F3d 496, 57 Fed R Serv 3d (Callaghan) 1308, 63 Fed R Evid Serv (CBC) 962*.

Where basis of district court's ruling is obvious in context, appellate court will not reverse class certification simply because district court has not explicitly recited each finding. *Salim Shahriar v. Smith & Wollensky Rest. Group, Inc. (2d Cir. N.Y. Sept. 26, 2011), 659 F3d 234, 80 Fed R Serv 3d (Callaghan) 1075, 161 Lab Cas (CCH) P35953*.

District court failed to conduct rigorous analysis required by *Fed. R. Civ. P. 23* in deciding to certify proposed class; in finding that proposed class claims raised common questions of fact, district court failed to consider or explain how determination of those questions would resolve issue that was central to validity of each one of individual class member's claims in one stroke; rather, district court merely found that named plaintiffs' various allegations of

systemic deficiencies in State's administration of its permanent managing conservatorship raised common questions of fact. *M.D. v. Perry (5th Cir. Tex. Mar. 23, 2012), 675 F3d 832, 82 Fed R Serv 3d (Callaghan) 219*.

District court abused its discretion by certifying class that lacked cohesiveness under *Fed. R. Civ. P. 23(b)(2)*; requested individual relief implicitly established that at least some of proposed class's underlying claims alleged individual injuries that were not uniform across class; thus, as pled, proposed class lacked cohesiveness to proceed as 23(b)(2) class. *M.D. v. Perry (5th Cir. Tex. Mar. 23, 2012), 675 F3d 832, 82 Fed R Serv 3d (Callaghan) 219*.

District courts are to specifically delineate how class proceeding would allow court to resolve discrete question of law whose determination will resolve issue that is central to validity of each of individual plaintiff's claims in one stroke; further, district court must explain its reasoning with specific reference to claims, defenses, relevant facts, and applicable substantive law raised by class claims, in order to ensure that dissimilarities within proposed class do not have potential to impede generation of common answers. *M.D. v. Perry (5th Cir. Tex. Mar. 23, 2012), 675 F3d 832, 82 Fed R Serv 3d (Callaghan) 219*.

If parties agree to class certification, or if opposing party does not contest assertions of party seeking class certification as to existence of *FRCP 23* prerequisites, court may conclude that certification is proper, or that prerequisites are properly established without making specific finding. *Ilhardt v. A.O. Smith Corp. (S.D. Ohio Aug. 16, 1996), 168 FRD 613, 36 Fed R Serv 3d (Callaghan) 986*.

District court ruling on class certification motion should set forth findings of fact and conclusions of law. *Death Row Prisoners v. Ridge (E.D. Pa. Oct. 17, 1996), 169 FRD 618*.

351. Parens patriae status

Parens patriae actions may, in theory, be related to class actions, but latter are definitely preferable in antitrust area. *Hawaii v. Standard Oil Co. (U.S. Mar. 1, 1972), 405 US 251, 92 S Ct 885, 31 L Ed 2d 184* (criticized in *In re Mental Health of K.G.F. (2001) 2001 MT 140, 306 Mont 1, 29 P3d 485*).

State's Consumer Protection Act gave Division of Consumer Protection parens patriae standing to proceed against debtor in bankruptcy court to forestall his discharge since division acted on behalf of state's quasi-sovereign interest in insuring consumer protection and in securing its borders against violation, and not as class representative, so that class certification and other aspects of rule were inappropriate. *In re Edmond (1991, CA4 Md) 934 F2d 1304*,*In re Edmond (4th Cir. Md. May 28, 1991), 934 F2d 1304, 20 Fed R Serv 3d (Callaghan) 542*.

Because plaintiff West Virginia's action against defendant pharmacies, for failure to pass generic drug savings to consumers under *West Virginia Code § 30-5-12b(g)* and West Virginia Consumer Credit Protection Act, *W. Va. Code §§ 46A-6-104*, 46A-7-111, seeking disgorgement of ill-gotten gains, was not typical of claims consumers would have, it was not "similar" to *Fed. R. Civ. P. 23* and was not removable under *28 USCS § 1332(d)(1)(B)*; action was classic parens patriae action intended to vindicate state's quasi sovereign interests and individual interests of its citizens. *West Virginia v. CVS Pharm., Inc. (4th Cir. W. Va. May 20, 2011), 646 F3d 169*, cert. denied, *(U.S. Nov. 28, 2011), 565 US 1059, 132 S Ct 761, 181 L Ed 2d 484*.

Motion of plaintiff states to amend complaints to allege right to recover damages under Clayton Act as "parens patriae" on behalf of individual consumers within states would be denied in light of fact that to allow plaintiff state to recover damages for individual claimants in substitute type of representative suit without safeguards provided in Rule 23 would undermine aims of that rule. *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp. (E.D. Pa. Sept. 24, 1969), 309 F Supp 1057, 1970 Trade Cas (CCH) P73013*.

Status of parens patriae cannot be used to substitute for class action as to individual claims of residents of political subdivision. *In re Motor Vehicle Air Pollution Control Equipment (C.D. Cal. Sept. 4, 1970), 52 FRD 398, 1970 Trade Cas (CCH) P73317, 1970 Trade Cas (CCH) P73318*.

352. Parties and addition thereof, generally

Motion to add trustee in reorganization under predecessor to Chapter XI of Bankruptcy Act as party to class action brought under *42 USCS §§ 1981*, *2000e* was properly denied by District Court, since such addition would have interfered with orderly administration of reorganization proceeding, even though class action was filed nearly one month before petition for reorganization. *Young v. Kerr Industries, Inc. (4th Cir. N.C. Sept. 8, 1976), 540 F2d 755, 13 Empl Prac Dec (CCH) P11382*.

Having granted plaintiffs' motion to intervene, notwithstanding defendant union's opposition, there was no reason why class certification, assuming existence of proper class, could not be made if intervenor would be proper class representative. *EEOC v. Local 638 (S.D.N.Y. Oct. 27, 2004), 2004 US Dist LEXIS 21682*.

Putative class members are not parties to action prior to class certification. *Saleh v. Titan Corp. (S.D. Cal. Dec. 29, 2004), 353 F Supp 2d 1087, 60 Fed R Serv 3d (Callaghan) 976*, transferred, *(S.D. Cal. Mar. 21, 2005), 361 F Supp 2d 1152*.

353. Remand

In putative class action in which airline had removed case to federal court, asserting federal question jurisdiction, and passenger had moved to remand case back to state court, claims under *Convention for Unification of Certain Rules for International Carriage by Air*, May 28, 1999, S. Treaty Doc. No. 106-45, (*Montreal Convention*), which formed basis for airline's removal of case, were alleged only on behalf of prospective unnamed members of proposed class; passenger lacked standing to raise *Montreal Convention* claims, and there were currently no plaintiffs with standing to raise *Montreal Convention* claims; without federal claims, federal district court lacked subject matter jurisdiction. *Biscone v. JetBlue Airways Corp. (E.D.N.Y. Feb. 4, 2010), 681 F Supp 2d 383*.

Motion to remand matter to state court was denied because defendants had stated appropriate grounds for removal under Class Action Fairness Act at time removal was made, and court's subsequent decision to deny class certification under *Fed. R. Civ. P. 23* did not mean that remand to state court was warranted, particularly when court had addressed number of motions and proceedings in case and was in good position to address resolution of case expeditiously. *Lewis v. Ford Motor Co. (W.D. Pa. Jan. 5, 2010), 685 F Supp 2d 557*.

354. Renewed motion

Plaintiffs were granted leave to file renewed motion for class certification under *Fed. R. Civ. P. 23(c)(1)(C)*; they had offered new evidence, which defendant had produced belatedly, to rebut basis of court's denial of class certification—lack of state-specific evidence of numerosity. *Terrill v. Electrolux Home Prods. (S.D. Ga. Mar. 24, 2011), 274 FRD 698*.

355. Settlement-only class certification

Confronted with request for settlement-only class certification, district court need not inquire whether case, if tried, would present intractable management problems, for proposal is that there be no trial; however, settlement is not cure-all, and other specifications of *Fed. R. Civ. P. 23*—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in settlement context. *Smith v. Sprint Communs. Co., L.P. (7th Cir. Ill. Oct. 19, 2004), 387 F3d 612*, cert. denied, *(U.S. June 20, 2005), 545 US 1135, 125 S Ct 2939, 162 L Ed 2d 879*.

Conditional class should be certified for purpose of considering proposed settlements in multidistrict litigation where, inter alia, (1) plaintiffs have spoken with one consistent voice during settlement discussions and case is not one where several different counsel were competing for designation as class representatives, (2) class members have been provided with full opportunity to object to terms of settlement while remaining members of class and, as alternative, plaintiffs can opt out of settlement class and pursue their litigation goals either individually or as another putative class, (3) proposed settlement presented to court for preliminary approval is at least sufficiently fair, reasonable, and adequate to justify notice to those affected and opportunity to be heard, (4) class members are readily identifiable, and (5) court cannot find that class members who may have special or unique state law claims

should be denied access to settlement information or denied opportunity to decide for themselves whether or not to opt out of proposed class. *In re Baldwin-United Corp. (S.D.N.Y. Nov. 28, 1984), 105 FRD 475, 1 Fed R Serv 3d (Callaghan) 1589*.

356. —Labor and employment matters

Requirements of *Fed. R. Civ. P. 23(a)* and *(b)* had been satisfied because: numerosity requirement had been satisfied; commonality requirement was satisfied since employees all raised identical claim that they were incorrectly classified as independent contractors and thus denied overtime compensation for hours worked over 40 in certain work weeks and subjected to improper deductions; named plaintiffs' claims arose from same circumstances as those that give rise to class members' claims; and class counsel was well-qualified to conduct litigation; moreover, common questions of law and fact predominated over any questions affecting individual class members since all members of class asserted that they were incorrectly classified as independent contractors by employer and that, as result of that improper classification, they were not paid overtime wages for hours worked in excess of 40 hours per week and were subject to improper deductions; finally, class representation was both superior method of adjudication and was vital to successful resolution of matter; therefore, pursuant to consent of both parties, court granted certification of class for sole purpose of settlement. *Odom v. Hazen Transp., Inc. (W.D.N.Y. Aug. 5, 2011), 275 FRD 400*.

357. —Other particular cases

Certification of class for settlement was granted because settlement agreed upon between parties, that addressed claims under Real Estate Settlement Procedures Act of 1974, *12 USCS § 2607*, and *N.Y. Gen. Bus. Law § 349*, was fair and reasonable, settlement provided for refunds of 100 percent of post-closing fees plus interest to defined set of claimants, attorney's fees and costs were to be paid from separate fund, and plaintiff's claims met all requirements of *Fed. R. Civ. P. 23(a)* and *23(b)(3)*. *Cohen v. J.P. Morgan Chase & Co. (E.D.N.Y. Sept. 23, 2009), 262 FRD 153*.

Although residents met requirements of *Fed. R. Civ. P. 23(a)* for proposed class settlement of nuisance and negligence claims against owners and lessees of nearby chemical manufacturing facility, injunction purporting to bind non-parties was unfair and beyond court's power to enforce under *Fed. R. Civ. P. 65(d)(2)*; however, decision to aggregate settlement proceeds in scholarship fund for benefit of current and future residents was reasonable because only realistic claims sounded in nuisance under *Ky. Rev. Stat. Ann. §§ 411.550* and 411.560(3) and residents tendered no reliable evidence of lost property value. *Bell v. DuPont Dow Elastomers, LLC (W.D. Ky. July 1, 2009), 640 F Supp 2d 890*.

In antitrust suit wherein plaintiffs alleged that defendants engaged in illegal price fixing of waterborne cabotage prices between United States and Puerto Rico for years, court granted certification of proposed class settlement upon finding that all of requirements under *Fed. R. Civ. P. 23* were met since numerosity was easily established; plaintiffs identified seven issues which were common to all of them; typicality was shown since all plaintiffs were entities who purchased cabotage from defendants at price that was allegedly inflated; class counsel was properly experienced; factors of predominance and superiority were established; and settlement was found to be reasonable solution. *In re Puerto Rican Cabotage Antitrust Litig. (D.P.R. July 12, 2010), 269 FRD 125*.

358. Summary judgment

Summary judgment, pursuant to *USCS Rules of Civil Procedure, Rule 56*, is ordinarily not proper vehicle for resolution of dispute concerning state of mind and interpretations of perceived events; inquiry as to when statute of limitations began to run, focusing upon time at which plaintiff, acting with reasonable diligence, could have discovered fraud, is mixed question of fact and law not appropriate for resolution by summary judgment. *Schmidt v. McKay (2d Cir. N.Y. May 12, 1977), 555 F2d 30*.

It is within discretion of District Court to rule on summary judgment motion prior to ruling on certification of plaintiff class, where defendant assumes risk that summary judgment in his favor will have only stare decisis effect on

members of putative class, and where early resolution of motion for summary judgment seems likely to protect both parties and court from needless and costly further litigation. *Kim v. Commandant, Defense Language Institute, Foreign Language Center (9th Cir. Cal. Sept. 24, 1985), 772 F2d 521, 38 Empl Prac Dec (CCH) P35755, 3 Fed R Serv 3d (Callaghan) 66*.

District court acted well within its discretion in deciding motion for summary judgment before it decided class certification motion where many of violations claimed by inmates who complained about county jail facility's conditions had been remedied or never existed, and neither plaintiffs nor class members were prejudiced by order of court's rulings. *Thompson v. County of Medina (6th Cir. Ohio June 23, 1994), 29 F3d 238*.

Although rule requires certification of class action as soon as practicable, which will usually be before case is ripe for summary judgment, usually is not always, and summary judgment before class certification is therefore not improper. *Cowen v. Bank United, FSB (7th Cir. Ill. Nov. 22, 1995), 70 F3d 937, 33 Fed R Serv 3d (Callaghan) 138*.

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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

#28332

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

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PRELIMINARY STATEMENT

Appellant Yankton Sioux Tribe will be referred to as "YST," 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 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 and/or paragraph 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 YST's jurisdictional statement.

STATEMENT OF ISSUES AND AUTHORITIES

Issue A. Whether the Commission was justified in issuing its Order Granting Motions to Join and Denying Motions to Dismiss on January 8, 2015?

The Commission correctly concluded that the Petition does not on its face demonstrate that the Project no longer meets the permit conditions set forth in the Decision and that a decision on the merits should only be made after discovery and thorough opportunity to investigate the facts and proceed to an evidentiary hearing, and such rulings did not constitute an arbitrary and capricious exercise of authority or an abuse of discretion because there is no evidence whatsoever in the record of conduct demonstrating arbitrary and capricious motives and discretion isn't involved in the Commission's decision making under SDCL 49-41B-27.

SDCL 49-41B-27

S.D. Dep't of GF&P v. Troy Twp., 2017 S.D. 50, 900 N.W.2d 840

Issue B. Whether the Commission was justified in issuing its Order Granting Motion to Define Issues and Setting Procedural Schedule on December 17, 2014?

The Commission does not believe that limiting discovery to the matter at issue in the case was reversible error and the order explicitly stated that "it shall not be grounds for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

SDCL 49-41B-27

S.D. Dep't of GF&P v. Troy Twp., 2017 S.D. 50, 900 N.W.2d 840

Issue C. Whether the Commission's Final Decision and Order Finding Certification Valid and Accepting Certification correctly concluded that Keystone's burden of proof under SDCL 49-41B-27 is distinct from its burden of proof under SDCL 49-41B-22?

The Commission correctly applied the burden of proof. 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. SDCL 49-41B-27, which governs this matter, requires the applicant to "certify . . . that such facility continues to meet the conditions upon which the permit was issued." Keystone did not, however, rest on its certification, and the Decision was based on evidence admitted in a very lengthy hearing and judicially noticed information.

SDCL 49-41B-27

S.D. Dep't of GF&P v. Troy Twp., 2017 S.D. 50, 900 N.W.2d 840

Issue D. Whether the Commission abused its discretion by accepting Keystone's certification that it continues to comply with all permit conditions, or in the case of prospective conditions, has the capability to comply with such conditions?

Prospective conditions are allowed, and the Commission's Decision that Keystone would have the capability to comply with prospective conditions in the future is proper.

SDCL 49-41B-27

S.D. Dep't of GF&P v. Troy Twp., 2017 S.D. 50, 900 N.W.2d 840

Issue E. Whether the Commission should have considered aboriginal title or usufructuary rights?

The Commission does not have jurisdiction or legal authority to decide issues pertaining to treaty rights, aboriginal title, or usufructuary rights, no court case recognizes such rights outside the current boundaries of reservations, and the Commission correctly issued its June 15, 2015, Order Granting Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights.

SDCL 49-41B-27

S.D. Dep't of GF&P v. Troy Twp., 2017 S.D. 50, 900 N.W.2d 840

Issue F. Whether the commission correctly applied condition 6, which refers to local governmental units?

As stated previously, this proceeding is not a re-adjudication of the permit issuance in Docket HP09-001. The KXL Decision was not appealed by any party, none of whom were tribes, and is therefore a final and binding decision. The Commission correctly concluded that tribes are not specifically mentioned in the KXL Decision as local units of government, because they are not under the jurisdiction of state law regarding the establishment and regulation of local units of government but rather are sovereign entities. Furthermore, the evidence admitted at the hearing in this matter indicated that Keystone attempted to communicate with the Cheyenne River Sioux Tribe, which is the only tribe in the vicinity of the Project, and was rebuffed.

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 Intervenor YST 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 heard and issued decision orders on a very large number of motions filed by the parties. The evidentiary hearing was held by the Commission on July 27-31, 2015, and August 1 and 3-4, 2015. The record in this case on file with the Court contains over 31,000 pages. In its Decision, the Commission determined Keystone's Certification to be valid and accepted the Certification as meeting the standard set forth in SDCL 49-41B-27. The Findings of Fact, including the Procedural History incorporated by reference therein, provide a detailed statement of the procedural and evidentiary facts in this case, which the Commission will not reiterate here.

ARGUMENT

STANDARD OF REVIEW

"The separation-of-powers doctrine proscribes de novo review of administrative action that is not quasi-judicial." *S.D. Dep't of GF&P v. Troy Twp.*, 2017 S.D. 50, ¶ 51, 900 N.W.2d 840, 858. The administrative act of accepting a company's certification is not quasi-judicial. Therefore, the correctness of the Commission's decision to accept the certification at issue may not be reviewed; this Court may consider only whether the Commission acted arbitrarily. "The [appellants] have the burden of proof." *Id.*

If the Court determines that the administrative act of accepting a company's certification is quasi-judicial, the standard of review in an appeal from the circuit court's review of a contested case proceeding is governed by SDCL 1-26-37. *Dakota Trailer Manufacturing, Inc. v. United Fire & Casualty Company*, 2015 S.D. 55, ¶ 11, 866 N.W.2d 545, 548. "[I]n reviewing the circuit court's decision under SDCL 1-26-37, we are actually making the 'same review of the administrative tribunal's action as did the circuit court.'" [citations omitted] "The agency's findings are reviewed for clear error." *Martz v. Hills Materials*, 2014 S.D. 83, ¶ 14, 857 N.W.2d 413, 417. "A review of an administrative agency's decision requires this Court to give great weight to the findings made and inferences drawn by an agency on questions of fact. We will reverse an agency's decision only if it is 'clearly erroneous in light of the entire evidence in the record.'" *In Re Pooled Advocate Trust*, 2012 S.D. 24, ¶ 49, 813 N.W.2d 130, 146; citing *Snelling v. S.D. Dep't of Soc. Serv.,* 2010 S.D. 24, ¶ 13, 780 N.W.2d 472, 477. While statutory interpretation and other questions of law within an administrative appeal are

reviewed under the de novo standard of review, "[a]n agency is usually given a reasonable range of informed discretion in the interpretation and application of its own rules when the language subject to construction is technical in nature or ambiguous, or when the agency interpretation is one of long standing." *Krsnak v. S. Dakota Dep't of Env't & Natural Res.,* 2012 S.D. 89, ¶ 16, 824 N.W.2d 429, 436 (quoting *State v. Guerra*, 2009 S.D. 74, ¶ 32, 772 N.W.2D 907, 916.

"A reviewing court must consider the evidence in its totality and set the [PUC's] findings aside if the court is definitely and firmly convinced a mistake has been made." *In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 SD 5, ¶ 26, 744 N.W.2d 594, 602. (citing *Sopko v. C & R Transfer Co., Inc.,* 1998 S.D. 8, ¶ 7, 575 N.W.2d 225, 228-29). Mixed questions of fact and law that require the Court to apply a legal standard are reviewed de novo. *Permann v. Department of Lab*or, 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 WAS JUSTIFIED IN ISSUING ITS ORDER GRANTING MOTIONS TO JOIN AND DENYING MOTIONS TO DISMISS ON JANUARY 8, 2015?

On December 2, 2014, YST filed a Motion to Dismiss pursuant to SDCL 15-6-12(b)(5), arguing that Keystone failed to state a claim upon which relief can be granted.

In its Motion, YST alleged that the thirty differences described in Keystone's Appendix C to the Petition render the subject of this proceeding a different project than was permitted in HP09-001 and, therefore, ineligible for certification. The Commission took the position that while the individual updates described in Keystone's Appendix C might possibly constitute a change in conditions, it would not be appropriate to grant the Motion to Dismiss.

The certification proceeding in question was brought pursuant to SDCL 49-41B-27, which requires the Applicant who has received a permit to certify that the project continues to meet the conditions upon which the permit was granted if construction has not commenced within four years of issuance of the permit. To dispose of the issue of whether the project continues to meet those conditions on a Motion to Dismiss would render meaningless the entire process of certification by establishing a precedent that any minor changes to the facts surrounding a project would prevent an Applicant from reaching the point of an evidentiary hearing. The Commission concluded that the appropriate time in which to address whether there have been material changes which would prevent the project from meeting the conditions of its permit is following an evidentiary hearing, after an opportunity for discovery.

A motion to dismiss under SDCL 15-6-12(b) tests the legal sufficiency of the pleading, not the facts which support it. *Guthmiller v. Deloitte & Touche, LLP* 2005 SD 77, ¶ 4, 699 N.W.2d 493, 496. For purposes of the pleading, the court must treat as true all facts properly pled in the complaint and resolve all doubts in favor of the pleader. The standard of review of a trial court's grant or denial of a motion to dismiss is whether or not the pleader is entitled to judgment as a matter of law. Thus, all reasonable inferences

of fact must be drawn in favor of the non-moving party, and no deference is given to the trial court's conclusions of law. *Vitek v. Bon Homme County Bd. of Com'rs*, 2002 SD 100, ¶ 7, 650 N.W.2d 513, 516 (internal citations omitted). "The motion is viewed with disfavor and is rarely granted." *Thompson v. Summers*, 1997 SD 103, ¶ 5, 567 N.W.2d 387, 390. "Pleadings should not be dismissed merely because the court entertains doubts as to whether the pleader will prevail in the action." *Id.* ¶ 7. The rules of procedure favor the resolution of cases upon the merits by trial or summary judgment rather than on failed or inartful accusations. *Id.* The court accepts the pleader's description of what happened along with any conclusions reasonably drawn therefrom. *Id.* ¶ 5. "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.*

At this early stage, the Commission simply chose not to consider whether any of the updates identified in Exhibit C constituted grounds for dismissal. The Commission was not willing to take the position that every change constitutes an inability to meet the conditions upon which the permit was issued. Depending on the facts presented throughout the course of discovery and the evidentiary hearing, changes may be deemed immaterial. Changes may not have any bearing as to whether or not the project will comply with the conditions of the permit. If that proves to be the case, a different project would not exist, as YST asserts. It is expected that changes will occur over a period of four years, and the Legislature must have known that at the time SDCL 49-41B-27 was passed. Surely the Legislature did not intend to create a complete bar to certification simply by establishing a standard that no project could satisfy.

For example, one such change that was noted by Keystone and would likely apply to any project that was dormant for four years was an increase in cost. The Commission determined that it would consider this and other changes at the evidentiary hearing to determine whether the increase in cost or other changes constitute an inability to meet the conditions upon which the permit was issued. In many cases, such as a case of increased cost, to interpret the statute so narrowly would lead to an absurd result by nullifying the statute, as likely no project could ever satisfy the requirement that absolutely nothing has changed at all, such as cost increase. "It is presumed that the Legislature [does] not intend for an absurd or unreasonable result." *Krukow v. S.D. Bd. of Pardons*, 2006 SD 46, ¶ 12, 716 N.W.2d 121, 124.

Furthermore, it is noteworthy that in a past certification docket, some project updates were present. In Docket EL12-063, the Commission granted certification of an electric transmission line that was granted a construction permit in 2007. In the time between the granting of the permit and application for certification in that docket, certain aspects of the project and circumstances surrounding the project, such as the size and the presence of a federal nexus, had changed. However, the Commission found that the project nonetheless continued to meet the conditions upon which the permit was granted, and certification was approved.

ISSUE B.

WHETHER THE COMMISSION WAS JUSTIFIED IN ISSUING ITS ORDER GRANTING MOTION TO DEFINE ISSUES AND SETTING PROCEDURAL SCHEDULE ON DECEMBER 17, 2014?

The Commission's issuance of the December 17, 2014, Order Granting Motion to Define Issues and Setting Procedural Schedule that limited discovery to 1) whether the

proposed Keystone XL Pipeline continues to meet the 50 permit conditions set forth in Exhibit A to the Amended Final Decision and Order; Notice of Entry issued on June 29, 2010, in Docket HP09-001, or 2) the proposed changes to the Findings of Fact in the Decision identified in Keystone's Tracking Table of Changes attached to the Petition as Appendix C was justified based on the statute at issue and did not result in prejudice to any Intervenor given the very significant number of motion filings and decisions pertaining to discovery rendered after the order and the participation by all Intervenors who elected to participate in such proceedings and at hearing and post-hearing briefing and argument, such order did not result in prejudice to any Intervenor. Furthermore, it is important to note that the order further provided "that it shall not be grounds for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

With respect to statutory construction of the statute at issue in this proceeding, SDCL 49-41B-27, the Commission's construction of such statute and corresponding limitation on discovery was in accord with South Dakota statutes and case law precedent. It is crystal clear which statute is the statute with which SDCL 49-41B-27 must be read *in pari materia*. That statute is SDCL 49-41B-24 which states as follows:

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

Three sections later SDCL 49-41B-27 states:

> Utilities which have acquired a permit in accordance with the provisions of this chapter may proceed to improve, expand, or construct the facility

> for the intended purposes at any time, subject to the provisions of this chapter; provided, however, that if such construction, expansion and improvement commences more than four years after a permit has been issued, then the utility must certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued. (emphasis supplied)

As the South Dakota Supreme Court has stated: "Statutes are construed to be *in pari materia* when they relate to the same person or thing, to the same class of person or things, or have the same purpose or object." *Goetz v. State*, 2001 S.D. 138, ¶ 26, 636 N.W.2d 675, 683. In this case the same "purpose or object" would clearly seem to be "the conditions upon which the permit was issued" as expressly authorized in SDCL 49-41B-24. Nothing in SDCL 49-41B-27 references a revocation of the permit or indicates that the permit holder must relitigate the original permit proceeding under SDCL 49-41B-22. In this case, the statute at issue, SDCL 49-41B-27, states simply that the permit holder must "certify" that "the facility continues to meet the conditions upon which the permit was issued." Therefore, limiting discovery to 1) whether the proposed Keystone XL Pipeline continues to meet the 50 permit conditions set forth in Exhibit A to the Amended Final Decision and Order; Notice of Entry issued on June 29, 2010, in Docket HP09-001, or 2) the identified minor factual changes from the Findings of Fact in the Decision identified in Keystone's Tracking Table of Changes attached to the Petition as Appendix C was appropriate.

Furthermore, the proceedings in this case following the Commission's issuance on December 17, 2014, of its Order Granting Motion to Define Issues and Setting Procedural Schedule involved a very large number of motions filed by numerous parties, including motions to compel discovery filed by YST and other Intervenors, several of which were granted, at least in part, by the Commission. In response to such motions to

compel, Keystone produced 42.54 GB of electronic data, consisting of 6,214 total files, plus numerous additional documents that it had already produced. AR 002475, 005072, 005240, 005247-005250, 005256-006303, 021109.

Again, as stated previously, the issue in this case is a narrow one, i.e., whether Keystone XL continues to meet the conditions upon which the permit was granted. The massive amount of documents and discovery responses produced by Keystone went far beyond what should have been required for making such a determination. Despite limiting discovery to 1) whether the proposed Keystone XL Pipeline continues to meet the 50 permit conditions set forth in Exhibit A to the Amended Final Decision and Order; Notice of Entry issued on June 29, 2010, in Docket HP09-001, or 2) the proposed changes to the Findings of Fact in the Decision identified in Keystone's Tracking Table of Changes attached to the Petition as Appendix C, the Commission's proceedings in this docket resulted in a record consisting of over 31,000 pages, including a hearing lasting nine days. YST's argument that the Commission abused its discretion and committed prejudicial error in that portion of its December 17, 2014, Order Granting Motion to Define Issues and Setting Procedural Schedule concerning discovery limitations has no merit. "'[T]he extent of discovery permitted by either side rests in the discretion of the court"' *State v. Erickson*, 525 N.W.2d 703, 711 (S.D.1994). The Commission did not abuse its discretion in its oversight of discovery conducted by the parties over a period of many months.

The party alleging error on appeal must show such error affirmatively by the record and not only must the error be demonstrated but it must also be shown to be prejudicial error. *Shaffer v. Honeywell, Inc.*, 249 N.W.2d 251 (S.D. 1976). "Prejudicial

error" is error which in all probability must have produced some effect upon the final result of the trial. *State Highway Commission v. Beets*, 88 S.D. 536, 224 N.W.2d 567 (1974). The Court has previously said:

> The rulings of the trial court are presumptively correct; we have no duty to seek reasons to reverse. The party alleging error must show prejudicial error.... To show such prejudicial error[,] an appellant must establish affirmatively from the record that under the evidence the jury might and probably would have returned a different verdict if the alleged error had not occurred.

Supreme Pork, Inc., 2009 S.D. 20, ¶ 58, 764 N.W.2d 491. (quoting *Sander v. Geib, Elston, Frost Prof'l Ass'n*, 506 N.W.2d 107, 113 (S.D. 1993)).

The record in this matter does not demonstrate error by the Commission in its conduct of a very protracted and inclusive set of proceedings. YST participated fully in these proceedings. YST, along with the other active Intervenors in the case, participated in the hearing, presented oral testimony, introduced exhibits, including their prefiled testimony, and conducted cross-examination.

Given this active evidentiary hearing participation, the multitude of motions and responses to motions filed by Intervenors, and Intervenors' active participation in the numerous Commission motion hearings conducted during this proceeding that lasted more than fifteen months, neither YST nor any other Intervenor's due process rights or procedural rights under SDCL Chap. 1-26 were violated by the original order defining issues. Ample due process was certainly afforded to Intervenors in this docket, based on the voluminous record before this Court. YST has failed to demonstrate prejudicial error resulting from the Commission's order defining the issues.

ISSUE C.

WHETHER THE COMMISSION'S FINAL DECISION AND ORDER FINDING CERTIFICATION VALID AND ACCEPTING CERTIFICATION CORRECTLY

CONCLUDED THAT KEYSTONE'S BURDEN OF PROOF UNDER SDCL 49-41B-27 IS DISTINCT FROM ITS BURDEN OF PROOF UNDER SDCL 49-41B-22?

The Commission correctly applied the burden of proof. 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. SDCL 49-41B-27, which governs this matter, requires the applicant to "certify" that it continues to meet the permit conditions. The language is mandatory and leaves no discretion with the Commission. The statute simply directs the applicant to certify. The statute is clear on this point: "the utility must certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued."

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" could certainly be construed to mean that Keystone met its burden under the statute by filing with the Commission the 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," it can certainly be argued that Keystone met its initial burden of production and proof by submitting its Certification that it continues to meet the conditions set forth in the KXL Decision. Apx A2-A39. As the Federal Communications Commission stated in a certification proceeding before it:

> Thus, we find that, in this context, the ordinary meaning of the certification signifies an assertion or representation by the certifying party, not, as Defendants assert, a demonstration of proof of the facts being asserted. . . . The Commission did not institute a separate additional requirement that LECs prove in advance to the Commission, IXC, or any other entity that the prerequisites had been met.

In the Matter of Bell Atlantic-Delaware, et al v. Frontier Communications Services, Inc., et al and Bell Atlantic-Delaware, et al., v. MCI Telecommunications Corporation, 17

Communications Reg. (P&F) 955, ¶ 17, 1999 WL 754402 (1999). The language of SDCL 49-41B-27 would certainly seem to imply that, if the Commission or a third party wishes to challenge the authenticity or accuracy of the certification, the burden of proof and persuasion in a case involving the validity or accuracy of the certification lies with the parties challenging the certification.

ISSUE D.

WHETHER THE COMMISSION ABUSED ITS DISCRETION BY ACCEPTING KEYSTONE'S CERTIFICATION THAT IT CONTINUES TO COMPLY WITH ALL PERMIT CONDITIONS, OR IN THE CASE OF PROSPECTIVE CONDITIONS, HAS THE CAPABILITY TO COMPLY WITH SUCH CONDITIONS?

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 (AR 026769); Ex 1003 (AR 002918-002920). Ms. Sibson also testified, however, that it takes "quite a while" for native grasses to re-establish, and that her property has been reseeded at her request five times since 2009. TR 1977-1978 (AR 026781-026782). She also testified that she has been paid compensation for loss of use of the easement area, and she did not state that Keystone has failed to pay reasonable compensation. The process of reclaiming her property is ongoing, and it is undisputed that Keystone has continued to work with Sibson. TR 1975, 1978, 306-307 (AR 026779, 026782, 024304-024305). Corey Goulet testified that Keystone was committed to continue reclamation

efforts on the Sibson property until the Sibsons are satisfied. He also testified that out of 535 tracts on the Keystone Pipeline in South Dakota, all but nine had been reclaimed to the satisfaction of the landowner. TR 306-307, 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. 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.

SDCL 49-41B-27 does not even explicitly require the Commission to make a factual determination as to whether Keystone is able to construct the proposed project given present conditions. 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.

The commission did not abuse its discretion by accepting Keystone's certification that it continues to comply with all permit conditions, or in the case of prospective conditions, has the capability to comply with such conditions. The Commission's responsibilities under SDCL 49-41B-27 do not involve an exercise of discretion but rather a factual and legal determination of whether the applicant has met the standard set forth in SDCL 49-41B-27 which 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)

This is a case of first impression regarding this statute. No previous filing under this statute has been contested before the Commission or appealed to the Circuit Court. The term "discretion" is typically characterized by specific language conferring discretion, see e.g. SDCL 49-41B-20, or by the use of the word "may" in terms of the decision-making authority delegated to the agency. *In re Application of Benton*, 691 N.W. 2d 598, ¶ 20, (2005 S.D. 2) (citing *Farmland Ins. Companies of Des Moines, Iowa v. Heitmann*, 498 N.W.2d 620, 625 (S.D. 1993)). There is nothing in the language of SDCL 49-41B-27 indicating that the Commission has discretionary authority to disallow or reject a certification submitted by an existing facility permit holder[1]; rather, the Commission's role is to determine, based on the certification itself and other evidence presented in a case where the certification is contested, whether the certification should be accepted as valid and accurate.

[1] The Legislature has specifically delegated discretion to the Commission in several of the statutes found within SDCL Chapter 49-41B. See e.g. 49-41B-3(4): "Any other relevant information as may be requested by the commission."; 49-41B-12: "If the commission determines that an environmental impact statement should be prepared"; 49-41B-13: "at the discretion of the Public Utilities Commission"; 49-41B-14; "The Public Utilities Commission may require" and "The commission . . . may also request"; 49-41B-20: "at the discretion of the commission"; 49-41B-22.2: "the Public Utilities Commission may in its discretion decide"; 49-41B-23: "The Public Utilities Commission may waive"; 49-41B-24: "as the commission may deem appropriate"; 49-41B-25: "as the commission may deem appropriate"; 49-41B-33; "A permit may be revoked or suspended by the Public Utilities Commission"; and 49-41B-35: "Rules may be adopted by the commission."

Keystone submitted a Certification to the Commission signed by Corey Goulet, the president of Keystone Projects, the corporate entity in charge of constructing the Keystone XL Pipeline project under the permit issued in Docket HP09-001 for which the Certification was made. Keystone also submitted a Petition for Order Accepting Certification under SDCL § 49-41B-27 in support of the Certification and supporting Appendices. Based on the language of SDCL 49-41B-27 it is certainly arguable that nothing more needed to be done, absent the initiation of a proceeding by action of the Commission or the complaint of another person. The Commission, however, opened a docket for consideration of the certification, and ultimately, after the Certification was contested by Intervenors, Keystone presented testimony from seven witnesses and introduced a number of exhibits at the evidentiary hearing in support of the validity of the Certification.

With respect to prospective conditions, and there is no evidence in the record demonstrating that Keystone will be unable to complete the prospective conditions in the future; all major siting projects permitted by the Commission have required additional permits beyond those issued by the Commission, and the Commission has approved permits to construct for all recent siting dockets before all other jurisdictional permits/approvals were obtained. See e.g. Dockets HP09-001, HP07-001, EL13-020, EL13-028, EL14-061, and EL15-020. Permit applicants must be afforded the opportunity to seek permits and approvals from multiple jurisdictions and governmental agencies sequentially in order to avoid the impractical reality of having the dozens of permits and approvals required to construct and operate a linear project such as Keystone XL

conducted simultaneously or in some form of multi-jurisdictional proceeding. Prospective conditions make sense. An absurd result would inevitably occur otherwise.

For example, Keystone has previously had an application for a Presidential Permit denied, and this did not prevent Keystone from reapplying, which it did. If Keystone had not applied for and obtained a Presidential Permit in the future, it would not be able to construct the Project under the permit issued in Docket HP09-001.

Furthermore, the South Dakota Legislature considered Senate Bill 134 in the 2016 Legislative Session which would have amended SDCL 49-41B-24 to require that an applicant seeking a facility permit that requires a Presidential Permit must obtain such Presidential Permit before the Commission could grant such facility a permit to construct. The bill was defeated before the Senate Commerce and Energy Committee.[2]

The Commission's Decision, Apx. A41-A68, in this matter did not involve an exercise of discretion, but rather a decision based on the Certification filed by Keystone and the evidence introduced into the record by Keystone and the other parties. If the Court determines that an exercise of discretion was involved, the Commission did not abuse such exercise of discretion. The Commission's Decision validating and accepting Keystone's Certification should not be overturned because Keystone has not yet completed the prospective conditions that are required in the future before commencing construction. Apx A26, #2.

Importantly, this administrative certification proceeding was not a revocation proceeding under SDCL 49-41B-33(2), but rather a certification proceeding under SDCL 49-41B-27. The issue of revocation was not raised during the proceedings. Does this

[2] See: http://legis.sd.gov/Legislative_Session/Bills/Bill.aspx?Bill=134&Session=2016

mean the permit remains intact in perpetuity? It does not. SDCL 49-41B-33 allows the Commission to revoke Keystone's permit for "failure to comply with the terms or conditions of the permit." At a point where Staff or the Commission determines that prospective conditions cannot be complied with by Keystone, Staff or the Commission can commence an action to revoke the permit. At this point, the Commission has not determined that such time has yet arrived.

ISSUE E.

WHETHER THE COMMISSION SHOULD HAVE CONSIDERED ABORIGINAL TITLE OR USUFRUCTUARY RIGHTS?

The Commission excluded specific types of evidence such as usufructuary and aboriginal rights (see June 15, 2015, Order Granting Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights), and the grounds for such exclusion were based on sound evidentiary legal principles, such as relevancy or lack of jurisdiction. For example, the Commission determined that it has no jurisdiction to adjudicate tribal rights. Such determinations are properly litigated in the courts of this state or in federal court. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977). The Project will not cross any tribally owned property, land owned by the United States and held in trust for Indians, or any Indian reservation lands. TR 394 (AR 024392); Petition App. C, ¶ 54. No court has held that Native American Tribes have aboriginal title or usufructuary rights with respect to any of the real property crossed by the proposed KXL route in South Dakota. Lastly, the issue of usufructuary and aboriginal rights does not address whether Keystone's continues to meet any of the KXL Conditions since no condition addresses this subject. Apx A26-A39.

ISSUE F.

WHETHER THE COMMISSION CORRECTLY APPLIED CONDITION 6, WHICH REFERS TO LOCAL GOVERNMENTAL UNITS?

Again, this proceeding is not a re-adjudication of the permit issuance proceeding in Docket HP09-001. Two Intervenors testified about their concerns that Keystone had not consulted with Tribal officials about the Project. The Honorable Phyllis Young testified on behalf of the Standing Rock Sioux Tribe as an at-large Tribal Council Member that Keystone did not consult with the Tribe and, similarly, that the Department of State failed to consult with the Tribe in preparing the FSEIS. Ex. 8001, last page (029121); TR 1722, 1732-1733 (AR 026330, 026340- 026341). The Honorable Wayne Frederick testified on behalf of the Rosebud Sioux Tribe as a member of the Council that the Rosebud Sioux Tribe was not consulted by TransCanada. TR 2088 (AR 026892). Keystone witness Corey Goulet testified that Keystone has tried to reach out to Tribes in the vicinity of the Project and employs a manager of tribal relations, but that such consultations have not been achievable in cases such as Cheyenne River Sioux Tribe because the Tribe was not willing to speak with Keystone's representatives and has passed legislation that forbids Keystone or any of its contractors from entering the reservation boundaries. TR 178-183, 273-280, 301 (AR 024136-024141, 024271-024278, 024299).

Multiple witnesses testified that the Tribes in South Dakota passed resolutions opposing the Project and that Keystone's representatives were not welcome on Tribal land. TR 1745-1746, 1873, 2084, 2096-2097, 2104-2105 (AR 026353-026354, 026481,

026888, 026900-026901, 026908-026909). That being said, no permit condition requires that Keystone consult with the Tribes about the Project. Condition 6, Apx 27, #6, refers to "local governmental units," but does not specify Tribes. Condition 34, Apx 35, #34, requires that Keystone must "consider local knowledge" in assessing and evaluating environmentally sensitive and high consequence areas. In support of its Certification, Keystone submitted its Quarterly Report in which Keystone's public liaison officer stated that Keystone has sought out local knowledge. Petition, App. B, Condition 34(b).

VI. CONCLUSION

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

Dated this 13th day of December, 2017

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

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APPENDIX

To the Appellee's Reply Brief

In Response to Brief of Appellant Yankton Sioux Tribe

Supreme Court #28332

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

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

PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FINDINGS OF FACT

Parties

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

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

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

Procedural Findings

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

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

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

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

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

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

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

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

A. Applicant's March 12, 2009, Direct Testimony.
- Robert Jones
- John Phillips
- Richard Gale
- Jon Schmidt
- Meera Kothari
- John Hayes
- Donald Scott
- Heidi Tillquist
- Tom Oster

B. Supplemental Direct Testimony of August 31, 2009.
- John Phillips

C. Intervenors' Direct Testimony of September 11, 2009.
- David Niemi
- Debra Niemi

D. Staff's September 25, 2009, Direct Testimony.
- Kim McIntosh
- Brian Walsh
- Derric Iles
- Tom Kirschenmann
- Paige Hoskinson Olson
- Michael Kenyon
- Ross Hargove
- Patrick Robbiee
- James Arndt
- William Walsh
- Jenny Hudson
- David Schramm
- William Mampre
- Michael K. Madden
- Tim Binder

E. Applicant's Updated Direct and Rebuttal Testimony.
- Robert Jones Updated Direct (10/23/09)
- Jon Schmidt Updated Direct and Rebuttal (10/19/09)
- Meera Kothari Updated Direct and Rebuttal (10/19/09)
- Donald M. Scott Updated Direct (10/19/09)
- John W. Hayes Updated Direct (10/19/09)
- Heidi Tillquist Updated Direct (10/20/09)
- Steve Hicks Direct and Rebuttal (10/19/09)

F. Staff's Supplemental Testimony of October 29, 2009.
- William Walsh
- William Mampre
- Ross Hargrove

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

Applicable Statutes and Regulations

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

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

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

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

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

The Project

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

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

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

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

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

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

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

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

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

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

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

Demand for the Facility

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

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

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

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

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

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

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

Environmental

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Design and Construction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ex TC-1, Exhibit B.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Operation and Maintenance

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

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

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

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

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

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

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

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

97. As required by US DOT regulations, Keystone will prepare an emergency response plan ("ERP") for the system. Ex TC-11, ¶ 13. The ERP will be submitted to PHMSA for review prior to commencement of pipeline operations. Ex TC-11, ¶ 13. The Commission finds that the ERP and manual of written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies as required under 49 CFR195.402 should also be submitted to the Commission at the time it is submitted to PHMSA to apprise the Commission of its details. Keystone has agreed to do this. The Commission has so specified in Condition 36.

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

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

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

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

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

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

Rural Water Crossings

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

Alternative Routes

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

106. SDCL 49-41B-36 explicitly states that Chapter 49-41B "shall not be construed as a delegation to the Public Utilities Commission of the authority to route a facility." The Commission accordingly finds and concludes that it lacks authority to compel the Applicant to select an alternative route or to base its decision on whether to grant or deny a permit for a proposed facility on whether the selected route is the route the Commission itself might select.

Socio-Economic Factors

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

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

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

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

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

General

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

2. The TransCanada Keystone Pipeline Project is a transmission facility as defined in SDCL 49-41B-2.1(3).

3. Applicant's permit application, as amended and supplemented through the proceedings in this matter, complies with the applicable requirements of SDCL Chapter 49-41B and ARSD Chapter 20:10:22.

4. The Project, if constructed and operated in accordance with the terms and conditions of this decision, will comply with all applicable laws and rules, including all requirements of SDCL Chapter 49-41B and ARSD 20:10:22.

5. The Project, if constructed and operated in accordance with the terms and conditions of this decision, will not pose an unacceptable threat of serious injury to the environment nor to the social and economic conditions of inhabitants or expected inhabitants in the siting area.

6. The Project, if constructed and operated in accordance with the terms and conditions of this decision, will not substantially impair the health, safety or welfare of the inhabitants in the siting area.

7. The Project, if constructed and operated in accordance with the terms and conditions of this decision, will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.

8. The standard of proof is by the preponderance of evidence. The Applicant has met its burden of proof pursuant to SDCL 49-41B-22 and is entitled to a permit as provided in SDCL 49-41B-25.

9. The Commission has authority to revoke or suspend any permit granted under the South Dakota Energy Facility Permit Act for failure to comply with the terms and conditions of the permit pursuant to SDCL 49-41B-33 and must approve any transfer of the permit granted by this Order pursuant to SDCL 49-41B-29.

10. To the extent that any of the Findings of Fact in this decision are determined to be conclusions of law or mixed findings of fact and conclusions of law, the same are incorporated herein by this reference as a Conclusion of Law as if set forth in full herein.

11. Because a federal EIS will be required and completed for the Project and because the federal EIS complies with the requirements of SDCL Chapter 34A-9, the Commission appropriately exercised its discretion under SDCL 49-41B-21 in determining not to prepare or require the preparation of a second EIS.

12. PHMSA is delegated exclusive authority over the establishment and enforcement of safety-orientated design and operational standards for hazardous materials pipelines. 49 U.S.C. 60101, et seq.

13. SDCL 49-41B-36 explicitly states that SDCL Chapter 49-41B "shall not be construed as a delegation to the Public Utilities Commission of the authority to route a facility." The

Commission accordingly concludes that it lacks authority (i) to compel the Applicant to select an alternative route or (ii) to base its decision on whether to grant or deny a permit for a proposed facility on whether the selected route is the route the Commission might itself select.

14. The Commission concludes that it needs no other information to assess the impact of the proposed facility or to determine if Applicant or any Intervenor has met its burden of proof.

15. The Commission concludes that the Application and all required filings have been filed with the Commission in conformity with South Dakota law and that all procedural requirements under South Dakota law, including public hearing requirements, have been met or exceeded.

16. The Commission concludes that it possesses the authority under SDCL 49-41B-25 to impose conditions on the construction, operation and maintenance of the Project, that the Conditions set forth in Exhibit A are supported by the record, are reasonable and will help ensure that the Project will meet the standards established for approval of a construction permit for the Project set forth in SDCL 49-41B-22 and that the Conditions are hereby adopted.

It is therefore

ORDERED, that a permit to construct the Keystone Pipeline Project is granted to TransCanada Keystone Pipeline, LP, subject to the Conditions set forth in Exhibit A.

NOTICE OF ENTRY AND OF RIGHT TO APPEAL

PLEASE TAKE NOTICE that this Amended Final Decision and Order was duly issued and entered on the ____ day of June, 2010. Pursuant to SDCL 1-26-32, this Final Decision and Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties. Pursuant to ARSD 20:10:01:30.01, an application for a rehearing or reconsideration may be made by filing a written petition with the Commission within 30 days from the date of issuance of this Final Decision and Order; Notice of Entry. Pursuant to SDCL 1-26-31, the parties have the right to appeal this Final Decision and Order to the appropriate Circuit Court by serving notice of appeal of this decision to the circuit court within thirty (30) days after the date of service of this Notice of Decision.

Dated at Pierre, South Dakota, this 29th of June, 2010.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, electronically.

By: _____

Date: 06/29/10

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

DUSTIN M. JOHNSON, Chairman

STEVE KOLBECK, Commissioner

GARY HANSON, Commissioner

Exhibit A

AMENDED PERMIT CONDITIONS

I. Compliance with Laws, Regulations, Permits, Standards and Commitments

1. Keystone shall comply with all applicable laws and regulations in its construction and operation of the Project. These laws and regulations include, but are not necessarily limited to: the federal Hazardous Liquid Pipeline Safety Act of 1979 and Pipeline Safety Improvement Act of 2002, as amended by the Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006, and the various other pipeline safety statutes currently codified at 49 U.S.C. § 60101 et seq. (collectively, the "PSA"); the regulations of the United States Department of Transportation implementing the PSA, particularly 49 C.F.R Parts 194 and 195; temporary permits for use of public water for construction, testing or drilling purposes, SDCL 46-5-40.1 and ARSD 74:02:01:32 through 74:02:01:34.02 and temporary discharges to waters of the state, SDCL 34A-2-36 and ARSD Chapters 74:52:01 through 74:52:11, specifically, ARSD § 74:52:02:46 and the General Permit issued thereunder covering temporary discharges of water from construction dewatering and hydrostatic testing.

2. Keystone shall obtain and shall thereafter comply with all applicable federal, state and local permits, including but not limited to: Presidential Permit from the United States Department of State, Executive Order 11423 of August 16, 1968 (33 Fed. Reg. 11741) and Executive Order 13337 of April 30, 2004 (69 Fed. Reg. 25229), for the construction, connection, operation, or maintenance, at the border of the United States, of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels to or from a foreign country; Clean Water Act § 404 and Rivers and Harbors Act Section 10 Permits; Special Permit if issued by the Pipeline and Hazardous Materials Safety Administration; Temporary Water Use Permit, General Permit for Temporary Discharges and federal, state and local highway and road encroachment permits. Any of such permits not previously filed with the Commission shall be filed with the Commission upon their issuance. To the extent that any condition, requirement or standard of the Presidential Permit, including the Final EIS Recommendations, or any other law, regulation or permit applicable to the portion of the pipeline in this state differs from the requirements of these Conditions, the more stringent shall apply.

3. Keystone shall comply with and implement the Recommendations set forth in the Final Environmental Impact Statement when issued by the United States Department of State pursuant to its Amended Department of State Notice of Intent To Prepare an Environmental Impact Statement and To Conduct Scoping Meetings and Notice of Floodplain and Wetland Involvement and To Initiate Consultation Under Section 106 of the National Historic Preservation Act for the Proposed Transcanada Keystone XL Pipeline; Notice of Intent--Rescheduled Public Scoping Meetings in South Dakota and extension of comment period (FR vol. 74, no. 54, Mar. 23, 2009). The Amended Notice and other Department of State and Project Documents are available on-line at: http://www.keystonepipeline-xl.state.gov/clientsite/keystonexl.nsf?Open.

4. The permit granted by this Order shall not be transferable without the approval of the Commission pursuant to SDCL 49-41B-29.

5. Keystone shall undertake and complete all of the actions that it and its affiliated entities committed to undertake and complete in its Application as amended, in its testimony and

exhibits received in evidence at the hearing, and in its responses to data requests received in evidence at the hearing.

II. Reporting and Relationships

6. The most recent and accurate depiction of the Project route and facility locations is found on the maps in Exhibit TC-14. The Application indicates in Section 4.2.3 that Keystone will continue to develop route adjustments throughout the pre-construction design phase. These route adjustments will accommodate environmental features identified during surveys, property-specific issues, and civil survey information. The Application states that Keystone will file new aerial route maps that incorporate any such route adjustments prior to construction. Ex TC-1.4.2.3, p. 27. Keystone shall notify the Commission and all affected landowners, utilities and local governmental units as soon as practicable if material deviations are proposed to the route. Keystone shall notify affected landowners of any change in the route on their land. At such time as Keystone has finalized the pre-construction route, Keystone shall file maps with the Commission depicting the final pre-construction route. If material deviations are proposed from the route depicted on Exhibit TC-14 and accordingly approved by this Order, Keystone shall advise the Commission and all affected landowners, utilities and local governmental units prior to implementing such changes and afford the Commission the opportunity to review and approve such modifications. At the conclusion of construction, Keystone shall file detail maps with the Commission depicting the final as-built location of the Project facilities.

7. Keystone shall provide a public liaison officer, approved by the Commission, to facilitate the exchange of information between Keystone, including its contractors, and landowners, local communities and residents and to promptly resolve complaints and problems that may develop for landowners, local communities and residents as a result of the Project. Keystone shall file with the Commission its proposed public liaison officer's credentials for approval by the Commission prior to the commencement of construction. After the public liaison officer has been approved by the Commission, the public liaison officer may not be removed by Keystone without the approval of the Commission. The public liaison officer shall be afforded immediate access to Keystone's on-site project manager, its executive project manager and to contractors' on-site managers and shall be available at all times to the Staff via mobile phone to respond to complaints and concerns communicated to the Staff by concerned landowners and others. Keystone shall also implement and keep an up-dated web site covering the planning and implementation of construction and commencement of operations in this state as an informational medium for the public. As soon as the Keystone's public liaison officer has been appointed and approved, Keystone shall provide contact information for him/her to all landowners crossed by the Project and to law enforcement agencies and local governments in the vicinity of the Project. The public liaison officer's contact information shall be provided to landowners in each subsequent written communication with them. If the Commission determines that the public liaison officer has not been adequately performing the duties set forth for the position in this Order, the Commission may, upon notice to Keystone and the public liaison officer, take action to remove the public liaison officer.

8. Until construction of the Project, including reclamation, is completed, Keystone shall submit quarterly progress reports to the Commission that summarize the status of land acquisition and route finalization, the status of construction, the status of environmental control activities, including permitting status and Emergency Response Plan and Integrity Management Plan development, the implementation of the other measures required by these conditions, and the overall percent of physical completion of the project and design changes of a substantive nature. Each report shall include a summary of consultations with the South Dakota Department of Environment and Natural Resources and other agencies concerning the issuance of permits. The

reports shall list dates, names, and the results of each contact and the company's progress in implementing prescribed construction, land restoration, environmental protection, emergency response and integrity management regulations, plans and standards. The first report shall be due for the period ending June 30, 2010. The reports shall be filed within 31 days after the end of each quarterly period and shall continue until the project is fully operational.

9. Until one year following completion of construction of the Project, including reclamation, Keystone's public liaison officer shall report quarterly to the Commission on the status of the Project from his/her independent vantage point. The report shall detail problems encountered and complaints received. For the period of three years following completion of construction, Keystone's public liaison officer shall report to the Commission annually regarding post-construction landowner and other complaints, the status of road repair and reconstruction and land and crop restoration and any problems or issues occurring during the course of the year.

10. Not later than six months prior to commencement of construction, Keystone shall commence a program of contacts with state, county and municipal emergency response, law enforcement and highway, road and other infrastructure management agencies serving the Project area in order to educate such agencies concerning the planned construction schedule and the measures that such agencies should begin taking to prepare for construction impacts and the commencement of project operations.

11. Keystone shall conduct a preconstruction conference prior to the commencement of construction to ensure that Keystone fully understands the conditions set forth in this order. At a minimum, the conference shall include a Keystone representative, Keystone's construction supervisor and Staff.

12. Once known, Keystone shall inform the Commission of the date construction will commence, report to the Commission on the date construction is started and keep the Commission updated on construction activities as provided in Condition 8.

III. Construction

13. Except as otherwise provided in the conditions of this Order and Permit, Keystone shall comply with all mitigation measures set forth in the Construction Mitigation and Reclamation Plan (CMR Plan) as set forth in Exhibit TC-1, Exhibit B. If modifications to the CMR Plan are made by Keystone as it refines its construction plans or are required by the Department of State in its Final EIS Record of Decision or the Presidential Permit, the CMR Plan as so modified shall be filed with the Commission and shall be complied with by Keystone.

14. Keystone shall incorporate environmental inspectors into its CMR Plan and obtain follow-up information reports from such inspections upon the completion of each construction spread to help ensure compliance with this Order and Permit and all other applicable permits, laws, and rules.

15. Prior to construction, Keystone shall, in consultation with area NRCS staff, develop specific construction/reclamation units (Con/Rec Units) that are applicable to particular soil and subsoil classifications, land uses and environmental settings. The Con/Rec Units shall contain information of the sort described in response to Staff Data Request 3-25 found in Exhibit TC-16.

a) In the development of the Con/Rec Units in areas where NRCS recommends, Keystone shall conduct analytical soil probing and/or soil boring and analysis in areas of

particularly sensitive soils where reclamation potential is low. Records regarding this process shall be available to the Commission and to the specific land owner affected by such soils upon request.

b) Through development of the Con/Rec Units and consultation with NRCS, Keystone shall identify soils for which alternative handling methods are recommended. Alternative soil handling methods shall include but are not limited to the "triple-lift" method where conditions justify such treatment. Keystone shall thoroughly inform the landowner regarding the options applicable to their property, including their respective benefits and negatives, and implement whatever reasonable option for soil handling is selected by the landowner. Records regarding this process shall be available to the Commission upon request.

c) Keystone shall, in consultation with NCRS, ensure that its construction planning and execution process, including Con/Rec Units, CMR Plan and its other construction documents and planning shall adequately identify and plan for areas susceptible to erosion, areas where sand dunes are present, areas with high concentrations of sodium bentonite, areas with sodic, saline and sodic-saline soils and any other areas with low reclamation potential.

d) The Con/Rec Units shall be available upon request to the Commission and affected landowners. Con/Rec Units may be evaluated by the Commission upon complaint or otherwise, regarding whether proper soil handling, damage mitigation or reclamation procedures are being followed.

e) Areas of specific concern or of low reclamation potential shall be recorded in a separate database. Action taken at such locations and the results thereof shall also be recorded and made available to the Commission and the affected property owner upon request.

16. Keystone shall provide each landowner with an explanation regarding trenching and topsoil and subsoil/rock removal, segregation and restoration method options for his/her property consistent with the applicable Con/Rec Unit and shall follow the landowner's selected preference as documented on its written construction agreement with the landowner, as modified by any subsequent amendments, or by other written agreement(s).

a) Keystone shall separate and segregate topsoil from subsoil in agricultural areas, including grasslands and shelter belts, as provided in the CMR Plan and the applicable Con/Rec Unit.

b) Keystone shall repair any damage to property that results from construction activities.

c) Keystone shall restore all areas disturbed by construction to their preconstruction condition, including their original preconstruction topsoil, vegetation, elevation, and contour, or as close thereto as is feasible, except as is otherwise agreed to by the landowner.

d) Except where practicably infeasible, final grading and topsoil replacement and installation of permanent erosion control structures shall be completed in non-residential areas within 20 days after backfilling the trench. In the event that seasonal or other weather conditions, extenuating circumstances, or unforeseen developments beyond Keystone's control prevent compliance with this time frame, temporary erosion controls shall be maintained until conditions allow completion of cleanup and reclamation. In the event

Keystone can not comply with the 20-day time frame as provided in this Condition, it shall give notice of such fact to all affected landowners, and such notice shall include an estimate of when such restoration is expected to be completed.

e) Keystone shall draft specific crop monitoring protocols for agricultural lands. If requested by the landowner, Keystone shall provide an independent crop monitor to conduct yield testing and/or such other measurements of productivity as he shall deem appropriate. The independent monitor shall be a qualified agronomist, rangeland specialist or otherwise qualified with respect to the species to be restored. The protocols shall be available to the Commission upon request and may be evaluated for adequacy in response to a complaint or otherwise.

f) Keystone shall work closely with landowners or land management agencies to determine a plan to control noxious weeds. Landowner permission shall be obtained before the application of herbicides.

g) Keystone's adverse weather plan shall apply to improved hay land and pasture lands in addition to crop lands.

h) The size, density and distribution of rock within the construction right-of-way following reclamation shall be similar to adjacent undisturbed areas. Keystone shall treat rock that cannot be backfilled within or below the level of the natural rock profile as construction debris and remove it for disposal offsite except when the landowner agrees to the placement of the rock on his property. In such case, the rock shall be placed in accordance with the landowner's directions.

i) Keystone shall utilize the proposed trench line for its pipe stringing trucks where conditions allow and shall employ adequate measures to decompact subsoil as provided in its CMR Plan. Topsoil shall be decompacted if requested by the landowner.

j) Keystone shall monitor and take appropriate mitigative actions as necessary to address salinity issues when dewatering the trench, and field conductivity and/or other appropriate constituent analyses shall be performed prior to disposal of trench water in areas where salinity may be expected. Keystone shall notify landowners prior to any discharge of saline water on their lands or of any spills of hazardous materials on their lands of one pint or more or of any lesser volume which is required by any federal, state, or local law or regulation or product license or label to be reported to a state or federal agency, manufacturer, or manufacturer's representative.

k) Keystone shall install trench and slope breakers where necessary in accordance with the CMR Plan as augmented by Staff's recommendations in Post Hearing Commission Staff Brief, pp. 26-27.

l) Keystone shall apply mulch when reasonably requested by landowners and also wherever necessary following seeding to stabilize the soil surface and to reduce wind and water erosion. Keystone shall follow the other recommendations regarding mulch application in Post Hearing Commission Staff Brief, p. 27.

m) Keystone shall reseed all lands with comparable crops to be approved by landowner in landowner's reasonable discretion, or in pasture, hay or native species areas with comparable grass or forage crop seed or native species mix to be approved by landowner in

landowner's reasonable discretion. Keystone shall actively monitor revegetation on all disturbed areas for at least two years.

n) Keystone shall coordinate with landowners regarding his/her desires to properly protect cattle, shall implement such protective measures as are reasonably requested by the landowner and shall adequately compensate the landowner for any loss.

o) Prior to commencing construction, Keystone shall file with the Commission a confidential list of property owners crossed by the pipeline and update this list if route changes during construction result in property owner changes.

p) Except in areas where fire suppression resources as provided in CMR Plan 2.16 are in close proximity, to minimize fire risk, Keystone shall, and shall cause its contractor to, equip each of its vehicles used in pre-construction or construction activities, including off-road vehicles, with a hand held fire extinguisher, portable compact shovel and communication device such as a cell phone, in areas with coverage, or a radio capable of achieving prompt communication with Keystone's fire suppression resources and emergency services.

17. Keystone shall cover open-bodied dump trucks carrying sand or soil while on paved roads and cover open-bodied dump trucks carrying gravel or other materials having the potential to be expelled onto other vehicles or persons while on all public roads.

18. Keystone shall use its best efforts to not locate fuel storage facilities within 200 feet of private wells and 400 feet of municipal wells and shall minimize and exercise vigilance in refueling activities in areas within 200 feet of private wells and 400 feet of municipal wells.

19. If trees are to be removed that have commercial or other value to affected landowners, Keystone shall compensate the landowner for the fair market value of the trees to be cleared and/or allow the landowner the right to retain ownership of the felled trees. Except as the landowner shall otherwise agree in writing, the width of the clear cuts through any windbreaks and shelterbelts shall be limited to 50 feet or less, and he width of clear cuts through extended lengths of wooded areas shall be limited to 85 feet or less. The environmental inspection in Condition 14 shall include forested lands.

20. Keystone shall implement the following sediment control practices:

a) Keystone shall use floating sediment curtains to maintain sediments within the construction right of way in open water bodies with no or low flow when the depth of non-flowing water exceeds the height of straw bales or silt fence installation. In such situations the floating sediment curtains shall be installed as a substitute for straw bales or silt fence along the edge or edges of each side of the construction right-of-way that is under water at a depth greater than the top of a straw bale or silt fence as portrayed in Keystone's construction Detail #11 included in the CMR Plan.

b) Keystone shall install sediment barriers in the vicinity of delineated wetlands and water bodies as outlined in the CMR Plan regardless of the presence of flowing or standing water at the time of construction.

c) The Applicant should consult with South Dakota Game, Fish and Parks (SDGFP) to avoid construction near water bodies during fish spawning periods in which in-stream

construction activities should be avoided to limit impacts on specific fisheries, if any, with commercial or recreational importance.

21. Keystone shall develop frac-out plans specific to areas in South Dakota where horizontal directional drilling will occur. The plan shall be followed in the event of a frac-out. If a frac-out event occurs, Keystone shall promptly file a report of the incident with the Commission. Keystone shall also, after execution of the plan, provide a follow-up report to the Commission regarding the results of the occurrence and any lingering concerns.

22. Keystone shall comply with the following conditions regarding construction across or near wetlands, water bodies and riparian areas:

a) Unless a wetland is actively cultivated or rotated cropland or unless site specific conditions require utilization of Keystone's proposed 85 foot width and the landowner has agreed to such greater width, the width of the construction right-of-way shall be limited to 75 feet in non-cultivated wetlands unless a different width is approved or required by the United States Army Corps of Engineers.

b) Unless a wetland is actively cultivated or rotated cropland, extra work areas shall be located at least 50 feet away from wetland boundaries except where site-specific conditions render a 50-foot setback infeasible. Extra work areas near water bodies shall be located at least 50 feet from the water's edge, except where the adjacent upland consists of actively cultivated or rotated cropland or other disturbed land or where site-specific conditions render a 50-foot setback infeasible. Clearing of vegetation between extra work space areas and the water's edge shall be limited to the construction right-of-way.

c) Water body crossing spoil, including upland spoil from crossings of streams up to 30 feet in width, shall be stored in the construction right of way at least 10 feet from the water's edge or in additional extra work areas and only on a temporary basis.

d) Temporary in-stream spoil storage in streams greater than 30 feet in width shall only be conducted in conformity with any required federal permit(s) and any applicable federal or state statutes, rules and standards.

e) Wetland and water body boundaries and buffers shall be marked and maintained until ground disturbing activities are complete. Keystone shall maintain 15-foot buffers where practicable, which for stream crossings shall be maintained except during the period of trenching, pipe laying and backfilling the crossing point. Buffers shall not be required in the case of non-flowing streams.

f) Best management practices shall be implemented to prevent heavily silt-laden trench water from reaching any wetland or water body directly or indirectly.

g) Erosion control fabric shall be used on water body banks immediately following final stream bank restoration unless riprap or other bank stabilization methods are utilized in accordance with federal or state permits.

h) The use of timber and slash to support equipment crossings of wetlands shall be avoided.

i) Subject to Conditions 37 and 38, vegetation restoration and maintenance adjacent to water bodies shall be conducted in such manner to allow a riparian strip at least 25 feet wide as measured from the water body's mean high water mark to permanently re-vegetate with native plant species across the entire construction right-of way.

23. Keystone shall comply with the following conditions regarding road protection and bonding:

a) Keystone shall coordinate road closures with state and local governments and emergency responders and shall acquire all necessary permits authorizing crossing and construction use of county and township roads.

b) Keystone shall implement a regular program of road maintenance and repair through the active construction period to keep paved and gravel roads in an acceptable condition for residents and the general public.

c) Prior to their use for construction, Keystone shall videotape those portions of all roads which will be utilized by construction equipment or transport vehicles in order to document the pre-construction condition of such roads.

d) After construction, Keystone shall repair and restore, or compensate governmental entities for the repair and restoration of, any deterioration caused by construction traffic, such that the roads are returned to at least their preconstruction condition.

e) Keystone shall use appropriate preventative measures as needed to prevent damage to paved roads and to remove excess soil or mud from such roadways.

f) Pursuant to SDCL 49-41B-38, Keystone shall obtain and file for approval by the Commission prior to construction in such year a bond in the amount of $15.6 million for the year in which construction is to commence and a second bond in the amount of $15.6 million for the ensuing year, including any additional period until construction and repair has been completed, to ensure that any damage beyond normal wear to public roads, highways, bridges or other related facilities will be adequately restored or compensated. Such bonds shall be issued in favor of, and for the benefit of, all such townships, counties, and other governmental entities whose property is crossed by the Project. Each bond shall remain in effect until released by the Commission, which release shall not be unreasonably denied following completion of the construction and repair period. Either at the contact meetings required by Condition 10 or by mail, Keystone shall give notice of the existence and amount of these bonds to all counties, townships and other governmental entities whose property is crossed by the Project.

24. Although no residential property is expected to be encountered in connection with the Project, in the event that such properties are affected and due to the nature of residential property, Keystone shall implement the following protections in addition to those set forth in its CMR Plan in areas where the Project passes within 500 feet of a residence:

a) To the extent feasible, Keystone shall coordinate construction work schedules with affected residential landowners prior to the start of construction in the area of the residences.

b) Keystone shall maintain access to all residences at all times, except for periods when it is infeasible to do so or except as otherwise agreed between Keystone and the occupant. Such periods shall be restricted to the minimum duration possible and shall be coordinated with affected residential landowners and occupants, to the extent possible.

c) Keystone shall install temporary safety fencing, when reasonably requested by the landowner or occupant, to control access and minimize hazards associated with an open trench and heavy equipment in a residential area.

d) Keystone shall notify affected residents in advance of any scheduled disruption of utilities and limit the duration of such disruption.

e) Keystone shall repair any damage to property that results from construction activities.

f) Keystone shall separate topsoil from subsoil and restore all areas disturbed by construction to at least their preconstruction condition.

g) Except where practicably infeasible, final grading and topsoil replacement, installation of permanent erosion control structures and repair of fencing and other structures shall be completed in residential areas within 10 days after backfilling the trench. In the event that seasonal or other weather conditions, extenuating circumstances, or unforeseen developments beyond Keystone's control prevent compliance with this time frame, temporary erosion controls and appropriate mitigative measures shall be maintained until conditions allow completion of cleanup and reclamation.

25. Construction must be suspended when weather conditions are such that construction activities will cause irreparable damage, unless adequate protection measures approved by the Commission are taken. At least two months prior to the start of construction in South Dakota, Keystone shall file with the Commission an adverse weather land protection plan containing appropriate adverse weather land protection measures, the conditions in which such measures may be appropriately used, and conditions in which no construction is appropriate, for approval of or modification by the Commission prior to the start of construction. The Commission shall make such plan available to impacted landowners who may provide comment on such plan to the Commission.

26. Reclamation and clean-up along the right-of-way must be continuous and coordinated with ongoing construction.

27. All pre-existing roads and lanes used during construction must be restored to at least their pre-construction condition that will accommodate their previous use, and areas used as temporary roads during construction must be restored to their original condition, except as otherwise requested or agreed to by the landowner or any governmental authority having jurisdiction over such roadway.

28. Keystone shall, prior to any construction, file with the Commission a list identifying private and new access roads that will be used or required during construction and file a description of methods used by Keystone to reclaim those access roads.

29. Prior to construction, Keystone shall have in place a winterization plan and shall implement the plan if winter conditions prevent reclamation completion until spring. The plan shall be provided to affected landowners and, upon request, to the Commission.

30. Numerous Conditions of this Order, including but not limited to 16, 19, 24, 25, 26, 27 and 51 relate to construction and its effects upon affected landowners and their property. The Applicant may encounter physical conditions along the route during construction which make compliance with certain of these Conditions infeasible. If, after providing a copy of this order, including the Conditions, to the landowner, the Applicant and landowner agree in writing to modifications of one or more requirements specified in these conditions, such as maximum clearances or right-of-way widths, Keystone may follow the alternative procedures and specifications agreed to between it and the landowner.

IV. Pipeline Operations, Detection and Emergency Response

31. Keystone shall construct and operate the pipeline in the manner described in the application and at the hearing, including in Keystone's exhibits, and in accordance with the conditions of this permit, the PHMSA Special Permit, if issued, and the conditions of this Order and the construction permit granted herein.

32. Keystone shall require compliance by its shippers with its crude oil specifications in order to minimize the potential for internal corrosion.

33. Keystone's obligation for reclamation and maintenance of the right-of-way shall continue throughout the life of the pipeline. In its surveillance and maintenance activities, Keystone shall, and shall cause its contractor to, equip each of its vehicles, including off-road vehicles, with a hand held fire extinguisher, portable compact shovel and communication device such as a cell phone, in areas with coverage, or a radio capable of achieving prompt communication with emergency services.

34. In accordance with 49 C.F.R. 195, Keystone shall continue to evaluate and perform assessment activities regarding high consequence areas. Prior to Keystone commencing operation, all unusually sensitive areas as defined by 49 CFR 195.6 that may exist, whether currently marked on DOT's HCA maps or not, should be identified and added to the Emergency Response Plan and Integrity Management Plan. In its continuing assessment and evaluation of environmentally sensitive and high consequence areas, Keystone shall seek out and consider local knowledge, including the knowledge of the South Dakota Geological Survey, the Department of Game Fish and Parks and local landowners and governmental officials.

35. The evidence in the record demonstrates that in some reaches of the Project in southern Tripp County, the High Plains Aquifer is present at or very near ground surface and is overlain by highly permeable sands permitting the uninhibited infiltration of contaminants. This aquifer serves as the water source for several domestic farm wells near the pipeline as well as public water supply system wells located at some distance and upgradient from the pipeline route. Keystone shall identify the High Plains Aquifer area in southern Tripp County as a hydrologically sensitive area in its Integrity Management and Emergency Response Plans. Keystone shall similarly treat any other similarly vulnerable and beneficially useful surficial aquifers of which it becomes aware during construction and continuing route evaluation.

36. Prior to putting the Keystone Pipeline into operation, Keystone shall prepare, file with PHMSA and implement an emergency response plan as required under 49 CFR 194 and a manual of written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies as required under 49 CFR 195.402. Keystone shall also prepare and implement a written integrity management program in the manner and at such time as required under 49 CFR 195.452. At such time as Keystone files its Emergency Response Plan and

Integrity Management Plan with PHMSA or any other state or federal agency, it shall also file such documents with the Commission. The Commission's confidential filing rules found at ARSD 20:10:01:41 may be invoked by Keystone with respect to such filings to the same extent as with all other filings at the Commission. If information is filed as "confidential," any person desiring access to such materials or the Staff or the Commission may invoke the procedures of ARSD 20:10:01:41 through 20:10:01:43 to determine whether such information is entitled to confidential treatment and what protective provisions are appropriate for limited release of information found to be entitled to confidential treatment.

37. To facilitate periodic pipeline leak surveys during operation of the facilities in wetland areas, a corridor centered on the pipeline and up to 15 feet wide shall be maintained in an herbaceous state. Trees within 15 feet of the pipeline greater than 15 feet in height may be selectively cut and removed from the permanent right-of-way.

38. To facilitate periodic pipeline leak surveys in riparian areas, a corridor centered on the pipeline and up to 10 feet wide shall be maintained in an herbaceous state.

V. Environmental

39. Except to the extent waived by the owner or lessee in writing or to the extent the noise levels already exceed such standard, the noise levels associated with Keystone's pump stations and other noise-producing facilities will not exceed the L10=55dbA standard at the nearest occupied, existing residence, office, hotel/motel or non-industrial business not owned by Keystone. The point of measurement will be within 100 feet of the residence or business in the direction of the pump station or facility. Post-construction operational noise assessments will be completed by an independent third-party noise consultant, approved by the Commission, to show compliance with the noise level at each pump station or other noise-producing facility. The noise assessments will be performed in accordance with applicable American National Standards Institute standards. The results of the assessments will be filed with the Commission. In the event that the noise level exceeds the limit set forth in this condition at any pump station or other noise producing facility, Keystone shall promptly implement noise mitigation measures to bring the facility into compliance with the limits set forth in this condition and shall report to the Commission concerning the measures taken and the results of post-mitigation assessments demonstrating that the noise limits have been met.

40. At the request of any landowner or public water supply system that offers to provide the necessary access to Keystone over his/her property or easement(s) to perform the necessary work, Keystone shall replace at no cost to such landowner or public water supply system, any polyethylene water piping located within 500 feet of the Project with piping that is resistant to permeation by BTEX. Keystone shall not be required to replace that portion of any piping that passes through or under a basement wall or other wall of a home or other structure. At least forty-five (45) days prior to commencing construction, Keystone shall publish a notice in each newspaper of general circulation in each county through which the Project will be constructed advising landowners and public water supply systems of this condition.

41. Keystone shall follow all protection and mitigation efforts as identified by the US Fish and Wildlife Service ("USFWS") and SDGFP. Keystone shall identify all greater prairie chicken and greater sage and sharp-tailed grouse leks within the buffer distances from the construction right of way set forth for the species in the FEIS and Biological Assessment (BA) prepared by DOS and USFWS. In accordance with commitments in the FEIS and BA, Keystone shall avoid or restrict

construction activities as specified by USFWS within such buffer zones between March 1 and June 15 and for other species as specified by USFWS and SDGFP.

42. Keystone shall keep a record of drain tile system information throughout planning and construction, including pre-construction location of drain tiles. Location information shall be collected using a sub-meter accuracy global positioning system where available or, where not available by accurately documenting the pipeline station numbers of each exposed drain tile. Keystone shall maintain the drain tile location information and tile specifications and incorporate it into its Emergency Response and Integrity Management Plans where drains might be expected to serve as contaminant conduits in the event of a release. If drain tile relocation is necessary, the applicant shall work directly with landowner to determine proper location. The location of permanent drain tiles shall be noted on as-built maps. Qualified drain tile contractors shall be employed to repair drain tiles.

VI. Cultural and Paleontological Resources

43. In accordance with Application, Section 6.4, Keystone shall follow the "Unanticipated Discoveries Plan," as reviewed by the State Historical Preservation Office ("SHPO") and approved by the DOS and provide it to the Commission upon request. Ex TC-1.6.4, pp. 94-96; Ex S-3. If during construction, Keystone or its agents discover what may be an archaeological resource, cultural resource, historical resource or gravesite, Keystone or its contractors or agents shall immediately cease work at that portion of the site and notify the DOS, the affected landowner(s) and the SHPO. If the DOS and SHPO determine that a significant resource is present, Keystone shall develop a plan that is approved by the DOS and commenting/signatory parties to the Programmatic Agreement to salvage avoid or protect the archaeological resource. If such a plan will require a materially different route than that approved by the Commission, Keystone shall obtain Commission and landowner approval for the new route before proceeding with any further construction. Keystone shall be responsible for any costs that the landowner is legally obligated to incur as a consequence of the disturbance of a protected cultural resource as a result of Keystone's construction or maintenance activities.

44. Keystone shall implement and comply with the following procedures regarding paleontological resources:

a) Prior to commencing construction, Keystone shall conduct a literature review and records search, and consult with the BLM and Museum of Geology at the S.D. School of Mines and Technology ("SDSMT") to identify known fossil sites along the pipeline route and identify locations of surface exposures of paleontologically sensitive rock formations using the BLM's Potential Fossil Yield Classification system. Any area where trenching will occur into the Hell Creek Formation shall be considered a high probability area.

b) Keystone shall at its expense conduct a pre-construction field survey of each area identified by such review and consultation as a known site or high probability area within the construction ROW. Following BLM guidelines as modified by the provisions of Condition 44, including the use of BLM permitted paleontologists, areas with exposures of high sensitivity (PFYC Class 4) and very high sensitivity (PFYC Class 5) rock formations shall be subject to a 100% pedestrial field survey, while areas with exposures of moderately sensitive rock formations (PFYC Class 3) shall be spot-checked for occurrences of scientifically or economically significant surface fossils and evidence of subsurface fossils. Scientifically or economically significant surface fossils shall be avoided by the Project or mitigated by collecting them if avoidance is not feasible. Following BLM guidelines for the assessment

and mitigation of paleontological resources, scientifically significant paleontological resources are defined as rare vertebrate fossils that are identifiable to taxon and element, and common vertebrate fossils that are identifiable to taxon and element and that have scientific research value; and scientifically noteworthy occurrences of invertebrate, plant and trace fossils. Fossil localities are defined as the geographic and stratigraphic locations at which fossils are found.

c) Following the completion of field surveys, Keystone shall prepare and file with the Commission a paleontological resource mitigation plan. The mitigation plan shall specify monitoring locations, and include BLM permitted monitors and proper employee and contractor training to identify any paleontological resources discovered during construction and the procedures to be followed following such discovery. Paleontological monitoring will take place in areas within the construction ROW that are underlain by rock formations with high sensitivity (PFYC Class 4) and very high sensitivity (PFYC Class 5), and in areas underlain by rock formations with moderate sensitivity (PFYC Class 3) where significant fossils were identified during field surveys.

d) If during construction, Keystone or its agents discover what may be a paleontological resource of economic significance, or of scientific significance, as defined in subparagraph (b) above, Keystone or its contractors or agents shall immediately cease work at that portion of the site and, if on private land, notify the affected landowner(s). Upon such a discovery, Keystone's paleontological monitor will evaluate whether the discovery is of economic significance, or of scientific significance as defined in subparagraph (b) above. If an economically or scientifically significant paleontological resource is discovered on state land, Keystone will notify SDSMT and if on federal land, Keystone will notify the BLM or other federal agency. In no case shall Keystone return any excavated fossils to the trench. If a qualified and BLM-permitted paleontologist, in consultation with the landowner, BLM, or SDSMT determines that an economically or scientifically significant paleontological resource is present, Keystone shall develop a plan that is reasonably acceptable to the landowner(s), BLM, or SDSMT, as applicable, to accommodate the salvage or avoidance of the paleontological resource to protect or mitigate damage to the resource. The responsibility for conducting such measures and paying the costs associated with such measures, whether on private, state or federal land, shall be borne by Keystone to the same extent that such responsibility and costs would be required to borne by Keystone on BLM managed lands pursuant to BLM regulations and guidelines, including the BLM Guidelines for Assessment and Mitigation of Potential Impacts to Paleontological Resources, except to the extent factually inappropriate to the situation in the case of private land (e.g. museum curation costs would not be paid by Keystone in situations where possession of the recovered fossil(s) was turned over to the landowner as opposed to curation for the public). If such a plan will require a materially different route than that approved by the Commission, Keystone shall obtain Commission approval for the new route before proceeding with any further construction. Keystone shall, upon discovery and salvage of paleontological resources either during pre-construction surveys or construction and monitoring on private land, return any fossils in its possession to the landowner of record of the land on which the fossil is found. If on state land, the fossils and all associated data and documentation will be transferred to the SDSM; if on federal land, to the BLM.

e) To the extent that Keystone or its contractors or agents have control over access to such information, Keystone shall, and shall require its contractors and agents to, treat the locations of sensitive and valuable resources as confidential and limit public access to this information.

VII. Enforcement and Liability for Damage

45. Keystone shall repair or replace all property removed or damaged during all phases of construction and operation of the proposed transmission facility, including but not limited to, all fences, gates and utility, water supply, irrigation or drainage systems. Keystone shall compensate the owners for damages or losses that cannot be fully remedied by repair or replacement, such as lost productivity and crop and livestock losses or loss of value to a paleontological resource damaged by construction or other activities.

46. In the event that a person's well is contaminated as a result of construction or pipeline operation, Keystone shall pay all costs associated with finding and providing a permanent water supply that is at least of similar quality and quantity; and any other related damages, including but not limited to any consequences, medical or otherwise, related to water contamination.

47. Any damage that occurs as a result of soil disturbance on a persons' property shall be paid for by Keystone.

48. No person will be held responsible for a pipeline leak that occurs as a result of his/her normal farming practices over the top of or near the pipeline.

49. Keystone shall pay commercially reasonable costs and indemnify and hold the landowner harmless for any loss, damage, claim or action resulting from Keystone's use of the easement, including any resulting from any release of regulated substances or from abandonment of the facility, except to the extent such loss, damage claim or action results from the gross negligence or willful misconduct of the landowner or its agents.

50. The Commission's complaint process as set forth in ARSD 20:10:01 shall be available to landowners, other persons sustaining or threatened with damage or the consequences of Keystone's failure to abide by the conditions of this permit or otherwise having standing to obtain enforcement of the conditions of this Order and Permit.

Exhibit B

RULINGS ON PROPOSED FINDINGS OF FACT

Rulings on Applicants' Proposed Findings of Fact

As Applicant is the prevailing party, most of Applicant's Proposed Findings of Fact have been accepted in their general substance and incorporated in the Findings of Fact, with additions and modifications to reflect the Commission's understanding of the record.

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE PETITION OF TRANSCANADA KEYSTONE PIPELINE, LP FOR ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE	**FINAL DECISION AND ORDER FINDING CERTIFICATION VALID AND ACCEPTING CERTIFICATION; NOTICE OF ENTRY** **HP14-001**

PROCEDURAL HISTORY

On September 15, 2014, TransCanada Keystone Pipeline, LP (Keystone, TransCanada, or Applicant) filed with the Commission a Certification signed by Corey Goulet on September 12, 2014, in Calgary, Alberta, Canada, and a Petition for Order Accepting Certification under SDCL § 49-41B-27 (Petition). Attached to the Petition were Appendix A, Project Overview Map, Appendix B, Quarterly Report for the Quarter Ending 6/30/14, and Appendix C, Tracking Table of Changes, including Attachment A, Redlined Construction, Mitigation, and Reclamation Plan, and Attachment B, Preliminary Site-Specific Crossing Plans. The Commission opened Docket HP14-001 for consideration of the Certification and Petition.[1] The purpose of these filings was to provide the Commission with Keystone's certified statement that such facility continues to meet the conditions upon which the permit was issued and to otherwise verify that Keystone continues to meet the 50 conditions imposed in the Amended Final Decision and Order; Notice of Entry issued by the Commission on June 29, 2010, in Docket HP09-001 (Amended Final Decision) granting a permit to Keystone to construct the Keystone XL Pipeline (Project).[2] Since more than four years have elapsed since the Commission's issuance of the Amended Decision granting the permit to construct, Keystone now seeks an order from the Commission accepting Keystone's certification pursuant to SDCL 49-41B-27.

On September 18, 2014, the Commission electronically transmitted notice of the certification filing and the intervention deadline of October 15, 2014, to interested individuals and entities on the Commission's PUC Weekly Filings electronic listserv, and on October 1, 2014, the Commission issued an Order Assessing Filing Fee. Forty-three individuals and entities sought to intervene as parties by submitting applications between September 30 and October 17, 2014. On November 4, 2014, the Commission entered an Order Granting Intervention and Party Status to the following forty-two persons: John Harter, Rosebud Sioux Tribe-Tribal Utility Commission, Elizabeth Lone Eagle, Paul F. Seamans, Viola Waln, Cindy Myers, RN, Bold Nebraska, Diana L. Steskal, Cheryl Frisch, Terry Frisch, Standing Rock Sioux Indian Tribe, Byron T. Steskal, Arthur R. Tanderup, Lewis GrassRope, Carolyn P. Smith, Robert G. Allpress, Jeff Jensen, Amy Schaffer, Louis T. Genung, Nancy Hilding, Gary F. Dorr, Bruce Boettcher, Rosebud Sioux Tribe, Wrexie Lainson Bardaglio, South Dakota Wildlife Federation, Cheyenne River Sioux Tribe, Jerry D. Jones, Cody Jones, Debbie J. Trapp, Gena M. Parkhurst,

[1] The Commission's Orders in the case and all other filings and documents in the record are available on the Commission's web page for Docket HP14-001 at: http://puc.sd.gov/Dockets/HydrocarbonPipeline/2014/hp14-001.aspx

[2] The Commission's Orders in the case and all other filings and documents in the record are available on the Commission's web page for Docket HP09-001 at: http://puc.sd.gov/Dockets/HydrocarbonPipeline/2009/hp09-001.aspx

Sierra Club, Joyce Braun, 350.org, Yankton Sioux Tribe, Dakota Rural Action (DRA), Chastity Jewett, Indigenous Environmental Network, Dallas Goldtooth, RoxAnn Boettcher, Bonny Kilmurry, Ronald Fees, and Intertribal Council on Utility Policy (collectively, Intervenors). On March 4, 2015, the Commission issued an Order Granting Request to Withdraw Party Status allowing the South Dakota Wildlife Federation and the Sierra Club to withdraw as parties, and on April 21, 2015, the Commission issued an Order Granting Request to Withdraw Party Status allowing Jeff Jensen to withdraw as a party.

On October 30, 2014, Keystone filed Keystone's Motion to Define the Scope of Discovery under SDCL §49-41B-27 (Motion to Define Scope). On November 4, 2014, the Commission issued a Prehearing Scheduling Conference Order setting a telephonic scheduling conference to be conducted by General Counsel John Smith on November 13, 2014. On November 5, 2014, the Commission issued an Order for and Notice of Motion Hearing setting the Motion to Define Scope for hearing on November 25, 2014. The prehearing scheduling conference was held as scheduled on November 13, 2014. On November 14, 2014, a number of motions for extension of time to respond to the Motion to Define Scope were filed by Intervenors. Keystone did not object to the extension. On November 14, 2014, the Commission issued an Order Changing Motion Hearing Date and Order for and Notice of Scheduling Hearing setting the Motion to Define Scope and to establish a procedural schedule for hearing on December 9, 2014. Responses to the Motion to Define Scope and setting forth procedural schedule recommendations were filed by the Commission's staff (Staff) and many of the Intervenors. After hearing from the parties regarding the Motion to Define Scope and the procedural schedule, on December 17, 2014, the Commission issued an Order Granting Motion to Define Issues and Setting Procedural Schedule. In this order, the Commission decided that the scope of discovery would be limited to any matter relevant to: (1) whether the Project continues to meet the 50 conditions in Exhibit A to the Amended Final Decision; and (2) the changes in the Findings of Fact identified in the Tracking Table of Changes attached to Keystone's Certification Petition as Appendix C. The Commission also established the following deadlines: January 6, 2015, for serving initial discovery; February 6, 2015, for responding to initial discovery; February 20, 2015, for a second round of discovery; March 10, 2015, for responding to the second round of discovery; April 2, 2015, for submitting pre-filed direct testimony; April 23, 2015, for submitting pre-filed rebuttal testimony; and May 5-8, 2015, for an evidentiary hearing.

On December 2, 2014, Yankton Sioux Tribe (Yankton) filed Yankton Sioux Tribe's Motion to Dismiss, and on December 29, 2014, Rosebud Sioux Tribe (Rosebud) filed Rosebud Sioux Tribe's Motion to Dismiss and Request for Oral Argument. The motions contended that the Certification Petition on its face established that the Project was a different project than the one permitted in the Amended Final Decision in Docket HP09-001 and that Keystone could therefore not prove that it could continue to meet the conditions on which the permit was issued. A number of Intervenors filed motions to join in Yankton Sioux Tribe's Motion to Dismiss. On December 29, 2014, Keystone filed Applicant's Opposition to Yankton Sioux Tribe's Motion to Dismiss, and Staff filed Commission Staff's Response to Yankton Sioux Tribe's Motion to Dismiss. On January 2, 2015, Yankton Sioux Tribe filed Yankton Sioux Tribe's Reply in Support of Its Motion to Dismiss. After hearing from the parties at the hearing on the motions to join and dismiss on January 6, 2015, on January 8, 2015, the Commission issued an Order Granting Motions to Join and Denying Motions to Dismiss which granted the Intervenors' motions to join and to consider Rosebud's motion to dismiss together with Yankton's but denied the motions to dismiss.

On March 17, 2015, Staff filed a Motion to Amend Procedural Schedule to add to the procedural schedule a deadline by which parties must file a witness list and an exhibit list. On April 2, 2015, the Commission issued an Order Amending Procedural Schedule (Witness and Exhibit Lists) requiring that witness lists and exhibit lists must be filed and served by all parties no later than 5:00 p.m. CDT, on April 21, 2015. On March 25, 2015, Rosebud Sioux Tribe filed a Motion to Amend Order Setting Procedural Schedule requesting that the Commission amend the procedural schedule in the Order Setting Procedural Schedule to delay the date set for pre-filed testimony. The Commission heard Rosebud's motion to amend on March 31, 2015, and on April 3 issued an Order Granting in Part Motion to Amend Procedural Schedule extending the date for the filing of pre-filed rebuttal testimony to April 27, 2015, and allowing testimony regarding new information acquired as a result of any motion to compel granted by the Commission to be included in rebuttal testimony. On April 8, 2014, Rosebud Sioux Tribe filed Rosebud Sioux Tribe's Motion for Reconsideration. After hearing the Motion to Reconsider on April 9, 2015, on April 10 the Commission issued an Order Granting Motion to Reconsider and Amending In Part Procedural Schedule which granted reconsideration with respect to expert testimony, extended the deadline for Rosebud's pre-filed testimony for its expert witnesses to April 24, 2015, except to the extent it qualifies for later filing on April 27, 2015, pursuant to the Amended Scheduling Order, and extended the deadline for Keystone to file its rebuttal testimony with respect to the pre-filed testimony of Rosebud's expert witnesses to May 5, 2015. On March 27, 2015, Standing Rock Sioux Tribe (Standing Rock) filed a Motion to Amend Order Setting Procedural requesting that the Commission amend the procedural schedule to delay the dates set for close of discovery, pre-filed testimony, rebuttal testimony, filing of exhibits, and the evidentiary hearing. The Commission heard Standing Rock's motion to amend on March 31, 2015, and on April 2 issued an Order Denying Motion to Amend Order Setting Procedural Schedule as requested by Standing Rock.

The Commission decided a number of discovery-related motions. Dakota Rural Action, Standing Rock Sioux Tribe, Yankton Sioux Tribe, Gary Dorr, and Rosebud Sioux Tribe filed motions to compel discovery against Keystone and Staff. The Commission entered orders dated April 17, 2015, granting in part and denying in part the motions filed by Dakota Rural Action, Standing Rock Sioux Tribe, and Yankton Sioux Tribe, and compelling Keystone to answer certain discovery requests by April 17, 2015. The Commission denied the motions filed by Gary Dorr and Rosebud Sioux Tribe by orders dated April 22, 2015, and April 23, 2015.

On March 23, 2015, Keystone filed a Motion to Preclude Certain Intervenors (John Harter, BOLD Nebraska, Carolyn Smith, Gary Dorr, and Yankton Sioux Tribe) from Offering Evidence or Witnesses at Hearing (Motion to Preclude). On March 25, 2015, Keystone filed an Amended Motion to Preclude Certain Intervenors from Offering Evidence or Witnesses at Hearing and to Compel Discovery requesting: (1) that certain Intervenors be precluded from offering any evidence or witnesses at the hearing based on their complete failure to respond to Keystone's discovery requests (Rosebud Sioux Tribe-Tribal Utility Commission, Viola Wain, Cheryl & Terry Frisch, Louis Grass Rope, Robert Allpress, Jeff Jensen, Louis Genung, Jerry Jones, Debbie Tripp, Gina Parkhurst, Joye Braun, 350.org, Chastity Jewett, Dallas Goldtooth, and Ronald Fees); and (2) that certain Intervenors (John Harter, BOLD Nebraska, Carolyn Smith, Gary Dorr, and Yankton Sioux Tribe) be prohibited from offering evidence or witnesses at the hearing because of their failure to respond fully to Keystone's discovery requests. On April 17, 2015, the Commission issued an Order Granting In Part Keystone's Motion for Discovery Sanctions precluding the seventeen Intervenors who did not respond at all to Keystone's requests for discovery from presenting evidence or witnesses at the evidentiary hearing, precluding John Harter, BOLD Nebraska, and Carolyn Smith from presenting evidence or witnesses at the evidentiary hearing for not sufficiently responding to Keystone's discovery

requests, but not precluding Yankton Sioux Tribe and Gary Dorr from presenting evidence or witnesses at the evidentiary hearing.

On April 2, 2015, Dakota Rural Action filed a Statement and Objections on behalf of Dakota Rural Action with respect to Submission of Written Testimony arguing that the Commission's pre-filed testimony rule, ARSD 20:10:01:06, violates SDCL 15-6-43(a) and 49-1-11. Several Intervenors filed statements in support of DRA's Statement and Objections. In Staff's Brief in Response to Motion to Preclude Witnesses from Offering Testimony Who Did Not File Pre-Filed Testimony filed on April 10, 2015, Staff pointed out that pre-filed testimony does not become evidence in the case unless and until it is received in evidence as an exhibit upon proper foundation by a live witness or stipulation and that ARSD 20:10:01:06 is not therefore violative of SDCL 15-6-43(a). In complex contested case proceedings, it is normal practice for the Commission to require pre-filed testimony as part of the discovery and hearing preparation process, and no court has ever ruled that such requirement is unlawful.

On April 6, 2015, Keystone filed Keystone's Motion to Preclude Witnesses from Testifying at Hearing Who Did Not File Prefile Testimony asking that the Commission preclude testimony from any witness who did not pre-file testimony as required by the Commission's procedural order. Responses to this motion were filed by Staff and numerous Intervenors. On April 23, 2015, the Commission issued an Order Granting Motion to Preclude Witnesses from Testifying at Hearing Who Did Not File Prefiled Testimony, precluding persons for whom pre-filed testimony was not filed from testifying at the hearing, subject to the condition that pre-filed rebuttal testimony would be allowed to be filed by all parties until the April 27, 2015, deadline, including testimony and exhibits addressing information obtained as a result of any order to compel discovery granted by the Commission.

On April 7, 2015, the Commission received Dakota Rural Action's, Rosebud Sioux Tribe's, Cheyenne River Sioux Tribe's and Indigenous Environmental Network's Joint Motion for Appointment of Special Master to oversee the discovery process in this docket (Special Master Motion). Responses in opposition to the Special Master Motion were filed by Staff and Keystone on April 8 and April 9, 2015, respectively. On April 22, 2015, the Commission issued an Order Denying Motion for Special Master, finding that the Commission has sufficient resources and is competent to hear and act on the discovery issues presented in this proceeding.

On April 7, 2015, the Commission received Dakota Rural Action's, Rosebud Sioux Tribe's, Standing Rock Sioux Tribe's, Cheyenne River Sioux Tribe's and Indigenous Environmental Network's Joint Motion for Stay of Proceedings (Motion for Stay) requesting a stay pending the Presidential Permit decision and the conclusion of the investigation initiated by the Canadian National Energy Board regarding allegations of pipeline safety violations. Keystone and Staff filed responses in opposition to the Motion for Stay on April 9 and 10, 2015, respectively. On April 22, 2015, the Commission issued an Order Denying Motion for Stay.

At a motion hearing on April 14, 2015, the Commission considered a number of discovery related motions filed by Keystone and a number of Intervenors. In response to objections raised by Keystone based on the confidential nature of many documents requested by intervenor parties, on April 17, 2015, the Commission issued a Protective Order imposing protective provisions on parties' discovery of materials deemed confidential, subject to the provisions of ARSD 20:10:01:40 through 20:10:01:44. On April 24, 2015, Dakota Rural Action, Rosebud Sioux Tribe, Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe (Cheyenne River), Yankton Sioux Tribe, Indigenous Environmental Network, and BOLD Nebraska filed a Joint Motion to Vacate or, in the Alternative, to Clarify or Amend Protective Order. On April 27,

2015, Keystone filed Applicant's Opposition to Joint Motion to Vacate or Amend the Protective Order arguing that Keystone had in fact allowed Intervenors to provide access to confidential materials to co-counsel and experts. On April 28, 2015, Staff filed Staff's Brief in Response to Joint Motion to Vacate or, in the Alternative, to Clarify or Amend Protective Order. In response to Intervenors' motion, on May 13, 2015, the Commission issued an Amended Protective Order authorizing disclosure of confidential information to co-counsel, professional staff, and experts, in addition to attorneys of record, provided that notice of such disclosure is provided by the disclosing party and the persons receiving the information sign the non-disclosure agreement.

On April 24, 2015, Dakota Rural Action, Rosebud Sioux Tribe, Yankton Sioux Tribe, BOLD Nebraska, Cheyenne River Sioux Tribe, and Standing Rock Sioux Tribe filed a Joint Motion for Continuance and Relief from Scheduling Order requesting a later date for the evidentiary hearing to allow additional time for consideration of discovery documents and preparation for hearing. Indigenous Environmental Network joined the motion on April 27, 2015. On April 24, 2015, the Commission received Keystone's Opposition to Joint Motion for Continuance. On April 27, 2015, the Commission issued an Order Granting Joint Motion for Continuance and Relief from Scheduling Order in which the Commission granted the Joint Motion for Continuance and instructed Staff to propose a revised schedule at the next regularly scheduled Commission meeting. On May 5, 2015, the Commission issued an Order Amending Procedural Schedule establishing the following deadlines and dates: (1) substantive motions filed by May 26, 2015; (2) responses to substantive motions filed by June 2, 2015; (3) hearing on substantive motions on June 11, 2015; (4) rebuttal testimony filed by June 26, 2015; (5) witness and exhibit lists filed by July 7, 2015; (6) motions *in limine* filed by July 10, 2015; (7) responses to motions *in limine* filed by July 17, 2015; (8) motion hearing on motions *in limine* on July 21, 2015; and (5) an evidentiary hearing from July 27-31, and continuing August 3-4, 2015.

On April 27, 2015, the Commission received Standing Rock, Cheyenne River, Rosebud Sioux, and Yankton Sioux Tribes, Dakota Rural Action, Indigenous Environmental Network, Intertribal COUP and BOLD Nebraska Motion to Exclude Evidence and Testimony by Transcanada seeking to preclude Keystone from offering testimony or witnesses at the hearing based on its alleged failure to comply with discovery. On May 1, 2015, Intervenor Gary Dorr filed Gary Dorr's Motion to Join Joint Motion by Standing Rock, Cheyenne River, Rosebud, and Yankton Sioux Tribes, Dakota Rural Action, Indigenous Environmental Network, Intertribal COUP, and BOLD Nebraska to Exclude Evidence and Testimony by Transcanada. On April 27, 2015, Keystone filed Keystone's Opposition to Joint Motion to Exclude Evidence and Testimony. On May 18, 2015, Staff filed Staff's Brief in Response to Joint Motion to Exclude Evidence and Testimony. On May 19, 2015, Keystone filed Keystone's Supplemental Opposition to Joint Motion to Exclude Testimony and Evidence. Finding that TransCanada had produced a very large volume of documents in response to intervenor discovery requests and the Commission's Orders to Compel and that movants had not demonstrated that TransCanada had acted in bad faith or with willfulness or fault, on May 28, 2015, the Commission issued an Order Granting Motion to Join and Denying Joint Motion to Exclude Evidence and Testimony by Transcanada, granting Gary Dorr's motion to join and denying the joint motion to exclude.

On April 27, 2015, Intertribal Council on Utility Policy (COUP) filed a Notice of Request for a Time Certain for an Expert Rebuttal Witness for the Intertribal Council on Utility Policy asking for a time certain for testimony of three of its experts, namely Dr. James Hansen, Dr. George Seielstad, and Dr. Robert Oglesby. On April 27, 2015, Keystone filed Keystone's Objection to Coup's Request for a Time Certain and Motion to Preclude Witnesses. Keystone opposed Intertribal COUP's motion on the grounds that Intertribal COUP had not submitted pre-filed testimony for these experts and their proposed testimony was not rebuttal testimony. On

May 18, 2015, Intertribal COUP filed Intertribal COUP's Response to Keystone's Objection to COUP's Request for a Time Certain and Motion to Preclude Witnesses. On May 18, 2015, Staff filed Staff's Brief in Response to Keystone's Objection to COUP's Request for a Time Certain and Motion to Preclude Witness. In its brief, Staff argued that denial of a time certain and preclusion were appropriate, but for the reasons that the hearing dates have changed so the time certain is no longer at issue and that the testimony of Intertribal COUP's three witnesses is not relevant to the issues before the Commission in this proceeding. On May 19, 2015, Intertribal COUP filed Intertribal COUP's Amended Response to Keystone's Objection to COUP's Request for a Time Certain and Motion to Preclude Witnesses. On May 28, 2015, the Commission issued an Order Granting TransCanada's Motion to Preclude Witnesses on the grounds that the testimony of COUP's proposed witnesses was beyond the scope of the certification proceeding and took no action on COUP's Request for a Time Certain for an Expert Witness, finding that such issue was moot given the Commission's April 27, 2015 Order Granting Joint Motion for Continuance and Relief from Scheduling Order.

On May 26, 2015, the Commission received Yankton Sioux Tribe's and Indigenous Environmental Network's Motion to Preclude Improper Relief or, in the Alternative, to Amend Findings of Fact seeking to have certain findings of fact contained in the Amended Final Decision amended. Alternatively, the motion asked that the Commission amend Findings of Fact numbers 113 and 114. On May 26, 2015, Staff filed Staff's Brief in Response to Motion to Preclude Improper Relief or, in the Alternative, to Amend Findings of Fact. On June 2, 2015, DRA filed Dakota Rural Action's Joinder of Yankton Sioux Tribe's Motion to Preclude Improper Relief. On June 2, 2015, Keystone filed Keystone's Opposition to Joint Motion to Preclude Improper Relief. On June 6, 2015, the Commission received Yankton Sioux Tribe's And Indigenous Environmental Network's Reply in Support of Motion to Preclude Improper Relief or, in the Alternative, to Amend Findings of Fact. Finding that TransCanada did not seek to amend the Findings of Fact in the Amended Final Decision and that there exists no legal authority for the Commission to amend the Amended Final Decision at this time, on June 15, 2015, the Commission issued an Order Denying Yankton Sioux Tribe's and Indigenous Environmental Network's Motion to Preclude Improper Relief or, in the Alternative, to Amend Findings Of Fact.

On May 26, 2015, Keystone filed Keystone's Motion to Exclude Testimony of Richard Kuprewicz requesting that the Commission exclude all of Kuprewicz's testimony except for his opinion on pages 2-3 of Exhibit 9 that the Project will not pose a substantial risk to the Rosebud Sioux Tribe's water supply. On June 2, 2015, Staff filed a Corrected Staff's Brief in Response to Applicant's Motion to Exclude Testimony of Richard Kuprewicz. On June 2, 2015, the Commission received Rosebud Sioux Tribe's Response to Keystone's Motion to Exclude Testimony of Richard Kuprewicz. On June 2, 2015, DRA filed Dakota Rural Action's Joinder of Rosebud Sioux Tribe's Response to TransCanada's Motion to Exclude Testimony of Richard Kuprewicz, and Cheyenne River Sioux Tribe filed Cheyenne River Sioux Tribe's Response to Keystone's Motion to Exclude the Testimony of Richard Kuprewicz. On June 10, 2015, the Commission received Rosebud Sioux Tribe's Supplemental Response to Motion to Exclude Testimony of Richard Kuprewicz. On June 8, 2015, Keystone filed Applicant's Reply in Support of Motion to Limit Testimony of Richard Kuprewicz. On June 15, 2015 the Commission issued an Order Granting in Part and Denying in Part Keystone's Motion to Exclude Testimony of Richard Kuprewicz, in which the Commission ordered the exclusion of that portion of the testimony dealing with re-routing the Project as beyond the Commission's jurisdiction pursuant to SDCL 49-41B-36 and denying the motion with respect to the rest of Mr. Kuprewicz's testimony.

On May 26, 2015, Keystone filed a Motion to Preclude Testimony Regarding Mni Wiconi Pipeline Easements, on the grounds that Keystone has already entered into easement agreements for such crossings from the U.S. Bureau of Reclamation and the affected landowners. On June 2, 2015, Intervenor Gary Dorr filed Gary Dorr's Response to Motion by TransCanada to Preclude Testimony Regarding Mni Wiconi Pipeline Easements. On June 9, 2015, Keystone filed a Reply Brief in Support of Transcanada's Motion to Preclude Testimony Regarding Mni Wiconi Pipeline Easements and up-dated supporting documentation. On June 15, 2015, the Commission issued an Order Granting Motion to Preclude Testimony Regarding Mni Wiconi Pipeline Easements, finding that tribal consent to the proposed Keystone XL Pipeline's crossing of the Mni Wiconi pipeline(s) is not relevant to this proceeding, because the Commission does not have jurisdiction over property rights.

On May 26, 2015, Keystone filed Applicant's Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights as beyond the Commission's jurisdiction and the scope of this proceeding. On June 2, 2015, the Commission received Standing Rock Sioux Tribe Opposition to Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights, Yankton Sioux Tribe's Response to Applicant's Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights, and Cheyenne River Sioux Tribe's Response to Keystone's Motion to Preclude Considertion of Aboriginal Title or Usufructuary Rights. On June 8, 2015, Keystone filed Applicant's Reply Brief - Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights. Finding that the Commission does not have jurisdiction over aboriginal title or usufructuary rights, on June 15, 2015, the Commission issued an Order Granting Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights.

On or before July 7, 2015, exhibit and/or witness lists were filed by Keystone, Staff, and Intervenors Cindy Myers, Cheyenne River Sioux Tribe, Dakota Rural Action, Standing Rock Sioux Tribe, Yankton Sioux Tribe, Chastity Jewett, and Rosebud Sioux Tribe.

On July 9, 2015, Staff filed a Motion for Judicial Notice requesting that the Commission take judicial notice of: the evidentiary record in Docket No. HP09-001; the Department of State's Final Environmental Impact Statement involving the Project; the Final Supplemental Environmental Impact Statement; and SDCL Chapter 49-41B in its entirety. On July 22, 2015, the Commission issued an Order Granting Judicial Notice of these documents.

On July 10, 2015, the Rosebud Sioux Tribe filed Rosebud Sioux Tribe's Motion *in Limine* asking that certain rebuttal testimony filed by Keystone in response to Rosebud's expert witnesses Richard Kuprewicz, Ian Goodman, and Brigid Rowan be excluded because it had elected not to call these persons as witnesses. At the hearing on the motion on July 21, 2015, Keystone and Rosebud agreed that the issue was moot because Kuprewicz, Goodman, and Rowan would not be called as witnesses at the hearing. On July 22, 2015, the Commission accordingly issued an Order Denying Rosebud Sioux Tribe's Motion to Exclude Testimony.

On July 10, 2015, Staff filed a Motion for Time Certain for Witness Testimony requesting that August 3, 2015, or such time as necessary on such date be set aside for the testimony of at least one of Staff's witnesses, Dan Flo, and witnesses for Standing Rock Sioux Tribe who will be traveling some distance from out of town. On July 22, 2015, the Commission issued an Order Granting Motion for Time Certain for Witness Testimony. On July 16, Diana Steskal filed a request for time certain for her testimony on either July 29 or 30, 2015. On July 22, 2015, the Commission issued an Order Granting Motion for Time Certain for Witness Testimony as requested by Ms. Steskal.

On July 10, 2015, Keystone filed the following motions *in limine*: (1) to strike the proposed testimony of Linda Black Elk, consisting of an article on Native American plants; (2) to strike Paula Antoine's rebuttal testimony; (3) to exclude the testimony of Kevin E. Cahill, Ph.D.; (4) to restrict the testimony of Leonard Crow Dog; (5) to preclude the testimony of Dr. Hansen and Dr. Oglesby; (6) to restrict the testimony of Faith Spotted Eagle and an unnamed member of the Yankton Sioux Tribe Business and Claims Committee; (7) to preclude the testimony of Chris Sauncosi; (8) to preclude the rebuttal testimony of Jennifer Galindo and Waste Win Young; and (9) to preclude the rebuttal testimony of Ian Goodman and Brigid Rowan. Staff and Intervenors filed responses With respect to these motions, the Commission by separate orders dated July 22, 2015, granted the motions concerning Linda Black Elk, Kevin Cahill, Leonard Crow Dog, Dr. Hansen and Dr. Oglesby, Faith Spotted Eagle and an unnamed member of the Business and Claims Committee, Chris Sauncosi, and Jennifer Galindo and Waste Win Young. The Commission granted in part the motion to strike Paula Antoine's testimony as it related to the Spirit Camp located in Tripp County, but otherwise denied the motion in its July 22, 2015 Order Granting In Part and Denying In Part Motion *in Limine* to Strike Paula Antoine's Rebuttal Testimony. Also on July 22, 2015, the Commission issued an Order Denying Motion *in Limine* to Preclude Rebuttal Testimony of Ian Goodman and Brigid Rowan finding the issue to be moot.

On July 24, 2015, Standing Rock Sioux Tribe filed motions for reconsideration of the orders excluding the testimony of Kevin E. Cahill and Jennifer Galindo and Waste Win Young. On August 31, 2015, the Commission issued an Order Denying Motion for Reconsideration of Order Granting Motion *in Limine* to Preclude Rebuttal Testimony of Jennifer Galindo and Waste Win Young. On September 1, 2015, the Commission issued an Order Granting in Part Motion for Reconsideration of Order Granting Motion to Exclude Testimony of Kevin E. Cahill, Ph.D. allowing that part of Cahill's testimony responsive to the testimony of Staff witness Brian Walsh.

On July 10, 2015, Keystone filed Keystone's Protective Motion *in Limine* Regarding Dakota Rural Action's Exhibit List Dated July 7, 2015, seeking to preclude those documents or portions of documents on DRA's Exhibit List that were not timely disclosed to Keystone in DRA's responses to Keystone's discovery requests. After considering Keystone's motion at an ad hoc meeting, on July 17, 2015, the Commission issued an Order Granting in Part and Denying in Part Motion *in Limine* (DRA Exhibits) precluding exhibits 29-37, 39-65, 67-128, 397-409, 1058-1062, and 1063-1073. On July 21, 2015, DRA filed Dakota Rural Action's Motion and Memorandum for Reconsideration of Partial Granting of Motion *in Limine* to Exclude Exhibits. On July 23, 2015, the Commission issued an Order Granting in Part Motion for Reconsideration of Partial Granting of Motion *in Limine* to Exclude Exhibits, allowing exhibits 29-37, 39-65, and 1058-1062 to be offered in evidence.

On July 10, 2015, Yankton Sioux Tribe, Cheyenne River Sioux Tribe, BOLD Nebraska, Rosebud Sioux Tribe, Indigenous Environmental Network, and Dakota Rural Action filed a Joint Motion *in Limine* to Exclude Evidence Pertaining to Keystone's Proposed Changes to Findings of Fact requesting that Keystone be prohibited from submitting any evidence related to changes in facts as reflected in the Tracking Table of Changes attached as Appendix C to its Certification Petition. On July 17, 2015, Keystone filed Applicant's Response to Joint Motion *in Limine* arguing that the Tracking Table of Changes is merely a reference to minor changes in facts that have occurred since the issuance of the Amended Final Decision in 2010. Finding that the testimony at issue is relevant to the proceeding and that amending the findings of fact in Docket HP09-001 is not requested, on July 23, 2015, the Commission issued an Order Denying Joint Motion *in Limine* to Exclude Evidence Pertaining to Keystone's Proposed Changes to Findings of Fact.

On July 10, 2015, Keystone filed Applicant's Motion Concerning Procedural Issues at the Evidentiary Hearing (Procedural Motion) requesting that the Commission issue several directives to expedite the evidentiary hearing and ensure that it operates efficiently given the number of parties and witnesses involved, namely: (1) limiting Intervenors with a common interest to one lawyer conducting cross-examination; (2) requiring written rather than oral opening statements; (3) precluding friendly cross examination; (4) limiting cross-examination to counsel if a party was represented by counsel; (5) limiting cross examination to the scope of direct examination; and (6) precluding argument on evidentiary objections unless requested by the Hearing Examiner. Responses to the Procedural Motion were filed by Staff and several Intervenors. On July 22, 2015, the Commission issued Order Denying in Part and Granting in Part Applicant's Motion Concerning Procedural Issues at the Evidentiary Hearing denying all of Keystone's requests except for limiting cross examination to the scope of direct examination and matters affecting the credibility of a witness and limiting cross-examination to counsel if a party was represented by counsel.

On July 6, 2015, a public input hearing was held before the Commission beginning at 5:30 p.m. in Room 414 of the State Capitol Building. The Commission heard public comment from 52 persons. The Commission also received written comments from a number of persons, which are included in the docket.

An evidentiary hearing was held beginning on Monday, July 27, 2015, in Room 414 of the State Capitol Building. On July 30, 2015, the Commission issued a Notice of Additional Hearing dates extending the hearing to include Saturday, August 1, 2015, and then continuing from August 3-5 and 6-7, 2015, if necessary. The hearing concluded near the end of the business day on August 5, 2015. The evidentiary hearing was conducted by Commission General Counsel John J. Smith, who acted as Hearing Examiner. Commissioners Chris Nelson and Gary Hanson attended the hearing in person. Due to medical treatment, Commissioner Kristie Fiegen elected to participate by reviewing the hearing transcript as allowed under SDCL § 1-26-24. TR 46-50.[3] On October 5, 2015, Commissioner Fiegen filed a Certification attesting to the fact that she had read the entirety of the hearing transcripts.

At the conclusion of the hearing, the Commission established a briefing schedule. TR 2502-2503. On August 12, 2015, the Commission issued an Order Establishing Post-Hearing Briefing Schedule in conformity with the action taken at the hearing with simultaneous initial post-hearing briefs due October 1, 2015, and simultaneous reply briefs due October 31, 2015, with reply briefs limited to parties who submitted initial briefs.

At the evidentiary hearing, non-attorney Intervenor Cindy Myers testified on her own behalf. Keystone objected to much of Ms. Myers's testimony and exhibits; however, in the interest of time, it was agreed at the hearing that Keystone would submit its objections in writing to be ruled on at a later date. On September 21, 2015, Keystone filed Applicant's Motion to Strike Testimony and Exhibits of Cindy Myers requesting that the Commission issue an order striking certain portions of Intervenor Cindy Myers's hearing testimony and exhibits. The motion was heard on October 29, 2015. During the discussion on the motion, the following clarifications were made involving Keystone's references to specific items identified in the motion: 1) TransCanada's request to strike transcript testimony 1659:6-1660:13 should be 1659:6-

[3] References to the June 10-11, 2014, Hearing Transcript are in the format "TR" followed by the Hearing Transcript page number(s) referenced, and references to Hearing Exhibits are in the format Ex followed by the exhibit number and, where applicable, the page number(s) referenced or other identifying reference and, where applicable, the appendix, attachment or sub-exhibit identifier and page number(s) referenced.

1660:15; 2) TransCanada's request to strike the first paragraph under "Aquifers" applies to the entire paragraph; the request to strike the second paragraph under "Aquifers" excludes the first sentence of the second paragraph; 3) the request to strike the third paragraph under "Aquifers" refers to the entire paragraph; and 4) the request to strike the third paragraph under "Waterways" should be the second paragraph. Chairman Chris Nelson moved to grant TransCanada's Motion to Strike, subject to the clarifications made during the hearing. Commissioner Gary Hanson moved to amend the motion to exclude Exhibit 6001 from the Motion to Strike, which motion failed. The Commission then voted unanimously to grant Keystone's motion subject to the clarifications made at the hearing. On November 4, 2015, Commissioner Hanson filed a request for reconsideration of the Commission action taken on October 29, 2015, in order to separately address Exhibit 6001. On November 6, 2015, the Commission issued an Order Granting Keystone's Motion to Strike Testimony and Exhibits of Cindy Myers. In response to Commissioner Hanson's request for reconsideration, on November 19, 2015, the Commission issued an Order Granting Reconsideration of Order Granting Keystone's Motion to Strike Testimony and Exhibits of Cindy Myers in which the Commission bifurcated the Motion to Strike in order to consider Exhibit 6001 separately. With Commissioner Hanson dissenting, a majority of the Commission voted to exclude Exhibit 6001. The Commission then voted unanimously to exclude the remaining testimony and exhibits addressed in the October 29 Commission action.

On November 4, 2015, Yankton Sioux Tribe, Rosebud Sioux Tribe, Cheyenne River Sioux Tribe, Standing Rock Sioux Tribe, Indigenous Environmental Network, Dakota Rural Action, Intertribal Council on Utility Policy, and BOLD Nebraska submitted a Joint Motion to Strike Proposed Findings of Fact and Conclusions of Law requesting that the Commission strike Keystone's Proposed Findings of Fact and Conclusions of law submitted as an attachment to Applicant's Post-Hearing Brief on the grounds that ARSD 20:10:01:25 states that "[i]f requested by the commission, the parties shall file proposed findings of fact." Finding that nothing in the statutes or rules precludes a party from filing proposed findings of fact and conclusions of law, on November 18, 2015, the Commission issued an Order Denying Joint Motion to Strike Proposed Findings of Fact and Conclusions of Law.

On November 9, 2015, John H. Harter, Elizabeth Lone Eagle, Paul F. Seamans, Cindy Myers, Diana L. Steskal, Byron T. Steskal, Arthur R. Tanderup, Lewis GrassRope, Carolyn P. Smith, Nancy Hilding, Gary F. Dorr, Wrexie L. Bardaglio, Joye Braun, Chastity Jewett, Dallas Goldtooth, Bonny J. Kilmurry, Viola Waln, Louis T. Genung, Terry Frisch, Cheryl Frisch, Dakota Rural Action, Indigenous Environmental Network, Intertribal Council on Utility Policy, BOLD Nebraska, Rosebud Sioux Tribe, Yankton Sioux Tribe, Cheyenne River Sioux Tribe, and Standing Rock Sioux Tribe filed Intervenors' Joint Motion to Dismiss requesting that the Commission enter an order (a) dismissing the petition for certification filed by TransCanada Keystone Pipeline, LP, and (b) revoking the permit for construction of the proposed Keystone XL Pipeline through South Dakota which was granted by the Commission on June 29, 2010, in the Amended Final Decision. On December 29, 2015, the Commission issued an Order Denying Motion to Dismiss denying both of these requests.

On December 9, 2015, Yankton Sioux Tribe filed Yankton Sioux Tribe's Proposed Findings of Fact and Conclusions of Law and Objections to Applicant's Proposed Findings of Fact and Conclusions of Law. On December 21, 2015, Keystone filed Applicant's Objections to Yankton Sioux Tribe's Proposed Findings of Fact and Conclusions of Law.

On December 18, 2015, the Commission received Dakota Rural Action's Motion to Supplement Administrative Record. In its motion, DRA asks the Commission to take

administrative notice of a Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order filed by the United States Pipeline and Hazardous Materials Safety Administration (PHMSA) on November 20, 2015, and supplement the administrative record with the same. On December 21, 2015, Keystone filed Applicant's Response to DRA's Motion to Supplement the Record in which Keystone requests that the Commission also supplement the record with Keystone's response to the Notice of Probable Violation. On December 29, 2015, the Commission issued an Order Granting Motion for Administrative Notice and Supplementing the Administrative Record taking administrative notice of the Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order as official documents of PHMSA, an agency of the government of the United States, and supplementing the record with these documents, but denying Keystone's request to supplement the record with its response on the grounds that such response is not an official record of a governmental agency and would therefore be hearsay without an opportunity for adjudicatory challenge by other parties.

At its regular meeting on January 5, 2016, the Commission took this matter up for decision. Commissioner Fiegen moved to accept Keystone's Certification in accordance with SDCL 49-41B-27 and find that the Certification is valid. After discussion by the Commissioners, the Commission voted unanimously in favor of the motion.

Having considered the evidence of record, applicable law, and the briefs and arguments of the parties, the Commission makes the following Findings of Fact, Conclusions of Law, and Decision.

FINDINGS OF FACT

Parties

1. The permit holder and Applicant in this docket is TransCanada Keystone Pipeline, LP, a limited partnership organized under the laws of the State of Delaware and owned by affiliates of TransCanada Corporation, a Canadian public company organized under the laws of Canada. Amended Final Decision, Finding of Fact 1.

2. On November 4, 2014, the Commission issued an Order Granting Intervention and Party Status granting intervention and party status to all persons who had requested party status, namely: John H. Harter, Rosebud Sioux Tribe-Tribal Utility Commission, Elizabeth Lone Eagle, Paul F. Seamans, Viola Waln, Cindy Myers, RN, BOLD Nebraska, Diana L. Steskal, Cheryl Frisch, Terry Frisch, Standing Rock Sioux Indian Tribe, Byron T. Steskal, Arthur R. Tanderup, Lewis GrassRope, Carolyn P. Smith, Robert G. Allpress, Jeff Jensen, Amy Schaffer, Louis T. Genung, Nancy Hilding, Gary F. Dorr, Bruce Boettcher, Rosebud Sioux Tribe, Wrexie Lainson Bardaglio, South Dakota Wildlife Federation, Cheyenne River Sioux Tribe, Jerry D. Jones, Cody Jones, Debbie J. Trapp, Gena M. Parkhurst, Sierra Club, Joye Braun, 350.org, Yankton Sioux Tribe, Dakota Rural Action, Chastity Jewett, Indigenous Environmental Network, Dallas Goldtooth, RoxAnn Boettcher, Bonny Kilmurry, Ronald Fees, and Intertribal Council on Utility Policy. On March 4, 2015, the Commission issued an Order Granting Request to Withdraw Party Status allowing the South Dakota Wildlife Federation and the Sierra Club to withdraw as parties, and on April 21, 2015, the Commission entered an Order Granting Request to Withdraw Party Status allowing Jeff Jensen to withdraw as a party.

3. Staff participated fully as a party, represented by Kristen Edwards and Karen Cremer.

Procedural Findings

4. The Procedural History set forth above is hereby incorporated by reference in its entirety in these Procedural Findings. The procedural findings set forth in the Procedural History are a substantially complete and accurate description of the material documents filed in this docket and the proceedings conducted and orders issued by the Commission in this matter. In addition to the procedural findings set forth in the Procedural History, the following Procedural Findings deal with the hearing process itself.

5. The following testimony was pre-filed on April 2, 2015, April 23, 2015, April 24, 2015, June 25, 2015, June 26, 2015, and August 4, 2015 in advance of the formal evidentiary hearing held July 27 through August 1, and August 3-5, 2015, in Room 414 of the State Capitol Building in Pierre, South Dakota:

Pre-filed Direct Testimony and Exhibits

Keystone

Heidi Tillquist's Testimony and Exhibit A - Resume
Corey Goulet's Testimony and Exhibit A - Resume
Jon Schmidt, Ph.D.'s Testimony and Exhibit A - Resume
Meera Kothari, P.E.'s Testimony and Exhibits A and B – Resume and Media Advisory (August 5, 2010)
David Diakow's Testimony and Exhibit A - Resume

Staff

Brian Walsh's Testimony and Exhibit____BW-1
Derric Iles' Testimony and Exhibit____DI-1
Kimberly McIntosh's Testimony and Exhibit____KM-1
Tom Kirschenmann's Testimony and Exhibit____TK-1
Daniel Flo's Testimony and Exhibit____DF-1, Exhibit____DF-2, and Exhibit____DF-2 Revised
David Schramm's Testimony and Exhibit____DS-1
Jenny Hudson's Testimony and Exhibit____JH-1
Christopher Hughes' Testimony and Exhibit____CH-1
Supplemental Pre-filed Testimony of Christopher Hughes
Paige Olson's Testimony and Exhibit____PO-1
Darren Kearney's Testimony and Exhibit____DK-1
Darren Kearney's Testimony (Amended July 23, 2015)

Intervenors

Gary F. Dorr's Testimony and Exhibit
Wayne Frederick's Testimony and Exhibit A - Resume
Cindy Myers' Testimony
Diana Steskal's Testimony (will file exhibits later)
Paul F. Seamans' Testimony
Dakota Rural Action's Testimony
Evan Vokes' Testimony

Dr. Arden D. Davis, Ph.D, P.E.'s Testimony and Attachment (Figures 1, 2, 3, 4, 5, 6, 7, 8, and 9)

Sue Sibson's Testimony

Cheyenne River Sioux Tribe's Testimony

Carlyle Ducheneaux's Testimony

Steve Vance's Testimony

Yankton Sioux Tribe's Testimony

Faith Spotted Eagle's Testimony

Supplement to Faith Spotted Eagle Pre-filed Testimony and Attachment – International Treaty to Protect the Sacred From Tar Sands Projects

Standing Rock Sioux Tribe's Testimony

Waste Win Young's Testimony

Phyllis Young's Testimony

Doug Crow Ghost's Testimony

Linda Black Elk's Testimony

Rosebud Sioux Tribe's Testimony

Richard Kuprewicz's Testimony Confidential (removed at the request of the party)

RST Exhibit 8 - Richard B. Kuprewicz's Resume Confidential (removed at the request of the party)

RST Exhibit 9 - Accufacts Inc.'s Letter to Rosebud Sioux Tribe Confidential (removed at the request of the party)

RST Exhibit 10 - Figure 1 - South Dakota Elevation Profile with Valves and Additional Information Confidential (removed at the request of the party)

Ian Goodman's Testimony Confidential (removed at the request of the party)

RST Exhibit 1 – Ian Goodman's Resume Confidential (removed at the request of the party)

RST Exhibit 3 – Changes to the Economic Costs and Benefits of the Keystone XL Pipeline for South Dakota Confidential (removed at the request of the party)

Brigid Rowan's Testimony Confidential (removed at the request of the party)

RST Exhibit 2 – Brigid Rowan's Resume (removed at the request of the party)

RST Exhibit 3 – Changes to the Economic Costs and Benefits of the Keystone XL Pipeline for South Dakota (removed at the request of the party)

RST Exhibit 4 – Landslide Hazard Areas Confidential (removed at the request of the party)

RST Exhibit 5 – Spill Costs Per Barrel from Comparable Crude Pipelines Confidentia l(removed at the request of the party)

RST Exhibit 6 – Range of Worst-Case Scenario Costs for Keystone XL Using Spill Costs for Comparable Crude Oil Pipelines (with 15-minute valve shutoff) Confidential (removed at the request of the party)

RST Exhibit 7 - Range of Worst-Case Scenario Costs for Keystone XL Using Spill Costs for Comparable Crude Oil Pipelines (with 30-minute valve shutoff) Confidential (removed at the request of the party)

Pre-Filed Rebuttal Testimony and Exhibits

Staff

Darren Kearney's Rebuttal Testimony

Standing Rock Sioux Tribe

Kevin E. Cahill, Ph.D.'s Rebuttal Testimony and Rebuttal Expert Report of Economist Kevin E. Cahill, PH.D. on Behalf of the Standing Rock Sioux Tribe

Rosebud Sioux Tribe

Jennifer Galindo's Rebuttal Testimony
- Exhibit 11 - Curriculum Vitae Jennifer Galindo Archeologist
- Exhibit 12 - Map from Programmatic Agreement
- Exhibit 13 - RST Email and Letter to Paige Olson
- Exhibit 14 - TransCanada's Policy regarding Native American Relations

Ian Goodman and Brigid Rowan's Rebuttal Testimony Confidential (removed at the request of the party)
- Exhibit 15 - Changes to the Economic Costs and Benefits of the Keystone XL Pipeline for South Dakota Confidential (removed at the request of the party)

Paula Antoine's Rebuttal Testimony
- Exhibit 16 - Rosebud Sioux Tribe's Resolution No. 2014-42 - Amended: Petition
- Exhibit 17 - South Dakota Codified Laws 49-41B-1, 49-41B-11 and 49-41B-22

Amended Rebuttal Testimony of Paula Antoine
Chief Leonard Crow Dog's Rebuttal Testimony

Keystone

Corey Goulet's Rebuttal Testimony
Dan King's Rebuttal Testimony and Resume
F.J. (Rick) Perkins' Rebuttal Testimony and Resume
Meera Kothari's Rebuttal Testimony
Jon Schmidt's Rebuttal Testimony
Heidi Tillquist's Rebuttal Testimony
- Exhibit List
- Exhibit 1: Diluted Bitumen-Derived Crude Oil: Relative Pipeline Impacts (Battelle 2012)
- Exhibit 2: Comparison of the Corrosivity to Dilbit and Conventional Crude (Been 2011) Confidential (not available to the public)
- Exhibit 3: Effects of Diluted Bitumen on Crude Oil Pipelines (National Academy of Sciences 2013)
- Exhibit 4: Crude Oil at the Bemidji Site: 25 Years of Monitoring, Modeling, and Understanding (Essaid et al. 2011)
- Exhibit 5: Use of Long-Term Monitoring Data to Evaluate Benzene, MTBE and TBA Plume Behavior in Groundwater at Retail Gasoline Sites (Kamath et al. 2012)

Exhibit 6: Review of Quantitative Surveys of the Length and Stability of MTBE, TBA, and Benzene Plumes in Groundwater at UST Sites (Connor et al. 2015)
Exhibit 7: Characteristics of Dissolved Petroleum Hydrocarbon Plumes: Results from Four Studies (Newell and Connor 1998)
Exhibit 8: A Comparison of Benzene and Toluene Plume Lengths for Sites Contaminated with Regular vs. Ethanol-Amended Gasoline (Ruiz-Aguilar et al. 2003)
Exhibit 9: Evaluation of the Impact of Fuel Hydrocarbons and Oxygenates on Groundwater Resources (Shih et al. 2004)
Exhibit 10: Leukemia Risk Associated With Low-Level Benzene Exposure (Glass et al. 2003)
Exhibit 11: United States Department of State 12.1: Keystone XL Project, Risk Analysis (Kothari, Bajnok, Tillquist)

Jeff Mackenzie's Rebuttal Testimony
Appendix A - Jeff Mackenzie's Resume
Appendix B - Final EIS 3.13.5.3 and 3.13.5.4

Amended Rebuttal Testimony of Heidi Tillquist
Exhibit List
Exhibit 1: Comparison of the Corrosivity of Dilbit and Conventional Crude
Exhibit 2: Effects of Diluted Bitumen on Crude Oil Pipelines
Exhibit 3: Leukemia Risk Associated With Low-Level Benzene Exposure
Exhibit 4: Characteristics of Dissolved Petroleum Hydrocarbon Plumes
Exhibit 5: Use of Long-Term Monitoring Data to Evaluate Benzene, MTBE, and TBA Plume Behavior in Groundwater at Retail Gasoline Sites
Exhibit 6: Review of Quantitative Surveys of the Length and Stability of MTBE, TBA, and Benzene Plumes in Groundwater at UST Sites
Exhibit 7: A Comparison of Benzene and Toluene Plume Lengths for Sites Contaminated with Regular vs. Ethanol-Amended Gasoline
Exhibit 8: Evaluation of the Impact of Fuel Hydrocarbons and Oxygenates on Groundwater Resources
Exhibit 9: United States Department of State 12.1 -Keystone XL Project Risk Analysis

Amended Rebuttal Testimony of Meera Kothari

Dakota Rural Action

Evan Vokes' Rebuttal Testimony
John Harter's Rebuttal Testimony

Yankton Sioux Tribe

Member of the Yankton Sioux Tribe Business & Claims Committee Consisting of Elected Members: Robert Flying Hawk, Quentin JB Brugier, Jr., Mona Wright, Justin Songhawk, Leo O'Conner, Jean Archambeau, Glenford Sam Sully, Jason Cooke, and Everdale Song Hawk's Rebuttal Testimony
Exhibit A - Keystone's Responses to Yankton Sioux Tribe's First Interrogatories and Request for Production of Documents
Exhibit B - Appendix S - Programmatic Agreement and Record of Tribal Contact

Exhibit C - Appendix E - Amended Programmatic Agreement and Record of Consultation
Faith Spotted Eagle's Rebuttal Testimony
Exhibit A - Appendix S - Programmatic Agreement and Record of Tribal Contact
Exhibit B - Appendix E - Amended Programmatic Agreement and Record of Consultation
Chris Sauncosi's Rebuttal Testimony

Intertribal Council On Utility Policy

Prefiled Testimony of Dr. Robert Oglesby
Comments of Dr. James E. Hansen
Appendix: James E. Hansen Comments Charts
Exhibit 1 - James E. Hansen's Resume
Exhibit 2 - Assessing "Dangerous Climate Change": Required Reduction of Carbon Emissions to Protect Young People, Future Generations and Nature

Surrebuttal Testimony

Cindy Myers' Surrebuttal Testimony

Keystone

Surrebuttal Testimony of Corey Goulet
Surrebuttal Testimony of Dan King and Certificate of Service

6. A nine-day evidentiary hearing was held on July 27 through August 1 and August 3 through August 5, 2015. In addition to Keystone and Staff, the following Intervenors attended and participated in the hearing: Dakota Rural Action, BOLD Nebraska, Standing Rock Sioux Tribe, Rosebud Sioux Tribe, Yankton Sioux Tribe, Intertribal COUP, Cheyenne River Sioux Tribe, Indigenous Environmental Network, Paul Seamans, Cindy Myers, Elizabeth Lone Eagle, John Harter, Gary Dorr, Joye Braun, Louis GrassRope, Diana Steskal, Carolyn Smith, Dallas Goldtooth, Chastity Jewett, Wrexie Lainson Bardaglio, and Bonny Kilmurry. Dakota Rural Action, BOLD Nebraska, Intertribal COUP, Indigenous Environmental Network, and the Tribes were all represented by counsel.

7. The following witnesses testified at the hearing and were subject to cross examination: Corey Goulet, Meera Kothari, Rick Perkins, Jon Schmidt, Heidi Tillquist, Dan King, Diana Steskal, Carlyle Ducheneaux, David Schramm, Steve Vance, Evan Vokes, Cindy Myers, Kevin Cahill, Phyllis Young, Arden Davis, Faith Spotted Eagle, Jon Schmidt, Christopher Hughes, Jenny Hudson, Sue Sibson, Doug Crow Ghost, Daniel Flo, Wayne Frederick, Paula Antoine, Brian Walsh, and John Harter.

Applicable Statute

8. The governing statute is SDCL § 49-41B-27, which requires that if construction has not started within four years of the permit being granted, then the permittee must "certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued."

9. There are no other statutes, regulations, or South Dakota cases directly addressing SDCL § 49-41B-27 and its application in this docket.

Updates to the Project since June 29, 2010

10. On March 12, 2009, Keystone filed an application for a permit pursuant to SDCL Chapter 49-41B to construct the South Dakota portion of the Project. The application was docketed as HP09-001. On June 29, 2010, after a three-day hearing, the Commission entered an Amended Final Decision and Order; Notice of Entry granting Keystone a permit to construct and operate the project subject to 50 conditions attached to the Decision as Exhibit A.

11. The Project, as proposed in Keystone's application for a permit in Docket HP09-001, was delayed. A Presidential Permit required by Executive Order 11423 of August 18, 1968, and Executive Order 13337 of April 30, 2004, allowing the pipeline to cross the border between Canada and the United States, was still under review by the United States Department of State at the time of the hearing. On November 6, 2015, the Presidential Permit was denied.

12. As originally proposed, the Project was to be developed in three segments: the Steele City Segment from Hardisty, Alberta, to Steele City, Nebraska; the Gulf Coast Segment from Cushing, Oklahoma, to Liberty County, Texas; and the Houston Lateral Segment from Liberty County, Texas, to refinery markets near Houston, Texas.

13. The Gulf Coast Segment has been constructed and was placed into operation as a stand-alone project on January 22, 2014. The Houston Lateral Segment has also been constructed as a stand-alone project. Ex 2001, ¶ 15. The Project therefore currently consists of only the Steele City segment. The Steele City Segment extends from Hardisty, Alberta, Canada, southeast to Steele City, Nebraska. It will interconnect with the previously-approved and constructed Keystone Cushing Extension segment of the Keystone Pipeline. The route in South Dakota has not changed in any material respect. Ex 2001, ¶ 7; Ex 2013.

14. The maximum capacity of the Project is 830,000 barrels per day. TR 186; Ex 2001, ¶ 6.

15. The Bakken Marketlink project was developed after Keystone's permit application in HP09-001. Ex 2001, ¶ 5. It includes a five-mile pipeline, pumps, meters, and storage tanks near Baker, Montana, to deliver light sweet crude oil from the Williston Basin in Montana and North Dakota for transportation through the Project. Bakken Marketlink will deliver up to 100,000 bpd of domestically-produced crude oil into the Keystone XL Pipeline. TR 184-187; 241-248.

16. Because the Project is only the Steele City segment, the mileage has decreased from approximately 1,707 miles to 1,202 miles with about 876 miles in the United States. Ex 2001, ¶ 7. The South Dakota portion of the Project will be approximately 315 miles in length and

crosses the South Dakota counties of Harding, Butte, Perkins, Meade, Pennington, Haakon, Jones, Lyman, and Tripp. TR 291; Ex. 2005, ¶ 9; Petition, App. C, Finding 16.

17. There is no current construction schedule for the Project, pending issuance of a Presidential Permit. Ex 2001, ¶ 8.

18. The Pipeline will be constructed using API 5L X70M high-strength steel. This was one of the design options presented in the original permit application. Petition, App. C, ¶ 18; Ex. 2003, ¶ 5. Keystone withdrew its application to PHMSA for a special permit and adopted 59 special conditions developed by PHMSA as set forth in Appendix Z to the Department of State Final Supplemental Environmental Impact Statement (FSEIS). Petition ¶¶ 60, 90; TR 215, 302. As a result of this change, Keystone will construct the Pipeline using the as-proposed stronger steel, but will operate the Pipeline at a lower maximum pressure, 1,307 psig. Ex. 2003, ¶ 8; Petition, App. C, ¶¶ 18, 19, 63.

19. As part of the 59 special conditions, valves on the Pipeline must be located based on the worst-case discharge as calculated by 49 CFR 195.260 and by taking into consideration elevation, population, and environmentally-sensitive locations, or no more than 20 miles apart, whichever is less. As a result of this change, the number of mainline valves in South Dakota will be 20 instead of 16. Petition, App. C, ¶ 20; Ex. 2001, ¶ 9, 10, 11; FSEIS, App. Z, Condition 32; TR 215.

20. Keystone has committed to meet the 59 special conditions proposed by PHMSA as set forth in Appendix Z to the FSEIS. TR 215; Ex. 2001, ¶ 12.

21. The estimated cost of the Project in South Dakota has increased from $921.4 million to $1.974 billion due to new technical requirements, inflation, and additional costs due to the delay in receipt of federal approval and commencing construction. Ex. 2001, ¶ 13.

22. Keystone has continued to update its Construction, Mitigation, and Reclamation Plan (CMR Plan). A current, redlined version of the CMR Plan is attached to the Petition as Appendix C, Attachment A. Ex. 2005, ¶ 5; Petition, App. C, Attachment A.

23. In Docket HP09-001, Keystone submitted soil type maps as Exhibit TC-14. The maps are still generally consistent with the Project, but Keystone has committed to submit updated maps before construction begins as required by Condition No. 6. TR 575-640; Ex 2005, ¶ 6; Petition, App. C, ¶ 33.

24. Keystone will use horizontal directional drilling (HDD) to cross two additional rivers or streams—Bridger Creek and the Bad River. TR 335-336, 531, 537-538, 545, 547, 588-589, 633-634, 870, 1205, 1286-1287, 1886; Ex 2003 ¶ 10; Ex. 2005, ¶ 7; Ex. 2009 ¶ 6; Petition, App. C., ¶¶ 41, 83. The preliminary site-specific crossing plans for these additional HDD crossings are included with the Petition as Attachment B to Appendix C.

25. The projected total length of Project pipe with the potential to affect a High Consequence Area (HCA) is 15.8 miles, which is less than the 34.3 miles stated in the Amended Final Decision's findings of fact. TR 670, 1119; Ex. 2005 ¶ 4; Petition, App. C, ¶ 50. As a result of the change in mileage, it is estimated that a spill that could affect an HCA would occur no more than once in 460 years, rather than once in 250 years. TR 670.

26. Due to minor route refinements, all but 27.9 miles of the Project route in South Dakota are privately owned, an increase from 21.5 miles in the original application. Ex. 2005, ¶ 9; Petition, App. C, ¶ 54.

27. No Indian reservation or trust lands are crossed by the Project route. TR 394; Petition, App. C, ¶ 54.

28. TransCanada has thousands of miles of the same grade of pipeline steel, which has been coated with fusion bonded epoxy (FBE) installed and in operation. There has been no evidence of external corrosion except for one instance in Missouri in which an adjacent foreign utility interfered with the active cathodic protection system. Ex. 2003, ¶ 9; Petition, App. C, ¶ 68. The corrosion incident in Missouri was detected by Keystone during an in-line inspection of the pipe. TR 293-94, 2315-16. Keystone has since then started installing passive anodes to protect the pipeline during construction, which goes beyond what is required by federal regulation. TR 285, 309-310.

29. Since the Amended Final Decision was issued in 2010, Keystone has completed the process of consulting with the National Resource Conservation Service to create construction/reclamation units for the different soils along the pipeline route. TR 617; Petition, App. C, ¶ 80.

30. Other than these updates stated in Appendix C to the Petition, the parties did not present evidence of any other factual changes to the Project.

Keystone's Ability to Meet the Permit Conditions

31. None of the updates identified in Appendix C to Keystone's Certification Petition affects Keystone's ability to meet the conditions on which the permit was issued. As identified in Petition Appendix C, Conditions 1-3, 5, 6.a-6.f, 11-14, 16.a-16.p, 17, 18, 19.a, 20-34.a, 35-40, 41.b, and 42-48 are prospective. No evidence was presented that Keystone cannot satisfy any of these conditions in the future.

32. Condition 4 provides that the permit is not transferable without the consent of the Commission. No evidence was presented that Keystone cannot continue to comply with this condition.

33. Conditions 7-9 require that Keystone appoint a public liaison officer, which has been done, and submit quarterly reports to the Commission, which has also been done and is ongoing. No evidence was introduced that Keystone cannot continue to meet these conditions.

34. Condition 10 requires that not later than six months before construction, Keystone, must commence a program of contacts with local emergency responders. Keystone presented evidence that it has already started making such contacts and will continue. TR 317-318. No evidence was introduced that Keystone cannot continue to meet this condition.

35. Condition 10 does not specifically refer to Tribal governments or officials. To the extent that Tribes may be affected by construction and operation of the Project, Keystone presented evidence that it will contact Tribal emergency responders as well. TR 317-318.

36. Condition 15 requires consultation with the NRCS to develop the con/rec units, which Keystone established has been done. TR 617; Petition, App. C, ¶ 80; FSEIS, App. R.

37. Condition 19 requires that landowners be compensated for tree removal, which Keystone indicated is done as part of the process of acquiring easements. Petition, App. B, Condition 19. No evidence was presented that Keystone cannot continue to meet this condition.

38. Condition 34 requires that Keystone continue to evaluate and perform assessment activities regarding high consequence areas. Keystone presented evidence that this process is ongoing. TR 662-663. No witness testified to the contrary.

39. Condition 41 requires that Keystone follow all protection and mitigation efforts recommended by the U.S. Fish and Wildlife Service and the South Dakota Department of Game, Fish, and Parks (SDGFP). Keystone presented evidence that this process is ongoing. TR 630, 636-637; Petition, App. B, Condition 19. No witness testified to the contrary.

40. Condition 41 requires that Keystone consult with SDGFP to identify greater prairie chicken and greater sage and sharp-tailed grouse leks. In support of its Certification, Keystone submitted its Quarterly Report stating that this process is ongoing. Petition, App. B, Condition 41.a. No witness testified to the contrary.

41. Condition 16(m) requires that Keystone must re-seed all lands with comparable crops to be approved by the landowner, or with comparable grass or native species mix to be approved by the landowner for pasture, and that Keystone must actively monitor revegetation on all disturbed areas for at least two years. Condition 49 provides that Keystone must pay commercially reasonable costs and indemnify and hold harmless landowners for any loss or damage resulting from Keystone's use of the easement. The only evidence related to these conditions came from Sue Sibson, who testified that reclamation on her property after construction of the Keystone Pipeline has not been satisfactory. TR 1966. Sibson's testimony does not, however, establish that Keystone cannot meet these conditions with Keystone XL. She testified that it takes "quite a while" for native grasses to re-establish, and that her property has been reseeded at her request four or five times since 2009. TR 1977. She also testified that she has been paid damages for loss of use of the easement area, and she did not state that Keystone has failed to pay reasonable damages. The process of reclaiming her property is ongoing, and it is undisputed that Keystone has continued to work with Sibson. TR 1975, 1978, 306-307. Corey Goulet testified that Keystone was committed to continue reclamation efforts on the Sibson property until the Sibsons were satisfied. He also testified that out of 535 tracts on the Keystone Pipeline, all but 9 had been reclaimed to the satisfaction of the landowner. TR 306.

42. Condition 50 provides that the Commission's complaint process be available to landowners threatened with damage or the consequences of Keystone's failure to comply with any of the conditions. No evidence was presented that Keystone cannot comply with this condition.

43. Multiple Intervenors testified to their concerns about the possible adverse effects of the pipeline on groundwater resources, shallow aquifers, rivers, and streams. None of this testimony related to Keystone's ability to meet any permit condition. Rather, this testimony related to Keystone's burden of proof under SDCL § 49-41B-22.

44. Dr. Arden Davis testified to concerns that the Project right of way crosses the recharge areas of several shallow aquifers, including the Ogallala aquifer, Sand Hills-type material, gravel aquifers, eolian and alluvial aquifers, and the Fox Hills aquifer. Ex. 1003, p. 1.

Dr. Davis also testified that the Project right of way would cross the Little Missouri River, the Grand River and its tributaries, the Moreau River, the Cheyenne River, the Bad River, and the White River, and that dissolved hydrocarbon contaminants could be transported downgradient in surface water, in groundwater within the aquifers, or both. Dr. Davis also testified that the Cheyenne River, which drains much of the Black Hills, flows into the Missouri River and has exposed Pierre Shale along steep sides that are prone to slope failures. Ex. 1003, p. 2. These concerns do not specifically address any permit condition.

45. Heidi Tillquist testified on behalf of Keystone that adverse impacts to all of these areas are highly unlikely. Ex. 2017, ¶¶ 4-8. Dr. Davis did not respond to Tillquist, address the likelihood of adverse impacts, or conduct an independent risk assessment related to the Project. TR 1808-1809. The Commission addressed the likelihood of such adverse impacts in the Amended Final Decision in Findings of Fact 43-45 and 52. Dr. Davis's testimony is insufficient to warrant any change to those findings.

46. With respect to Dr. Davis's testimony about the Ogallala aquifer in Tripp County and the wind-blown Sand Hills type material crossed by the Project right of way, the Commission has required Keystone to treat that area as a hydrologically sensitive area. Amended Final Decision, Finding of Fact 53 and Condition 35; Ex. 2017, ¶ 9. Dr. Davis did not testify that such treatment was inappropriate or insufficient or that Keystone could not meet the condition.

47. Dr. Davis testified to his concern about possible benzene exposures from a leak or spill, especially since benzene is soluble in water and can be transported downstream, potentially affecting water intakes. Ex. 1003, pp. 3-4. Tillquist testified, however, that benzene exposures at a level that would cause health concerns would not be expected following a crude oil spill due to the low persistence of benzene and expected emergency response measures, and that a potential release would likely not threaten groundwater sources or public water intakes. Ex. 2017, ¶¶ 11-12. This testimony was undisputed.

48. Dr. Davis relied in his testimony on the Stansbury report from 2011 that was considered by the Department of State in connection with the FSEIS. Ex. 1003, p. 5. In her rebuttal testimony, Heidi Tillquist addressed flaws in Stansbury's analysis. Ex. 2017, ¶¶ 13-14. Dr. Davis did not address the Stansbury report in his hearing testimony, and Tillquist was not cross-examined about the Stansbury report.

49. John Harter testified to his concerns about the location of the Project right of way in relation to the City of Colome's water wells. TR 2209-2210. The proximity of the Project to the City of Colome's wells was addressed in Docket HP09-001. The Commission found that the risk of a spill affecting public or private water wells is low because the components of crude oil are unlikely to travel more than 300 feet from the spill site and there are no private or public wells within 200 or 400 feet, respectively, of the right of way and that the route was refined near Colome to avoid a groundwater protection area. Amended Final Decision, Findings 49 and 105. In this proceeding, Brian Walsh from the South Dakota Department of Environment and Natural Resources (DENR) testified that the route had been moved at DENR's request before the Amended Final Decision, and that the current route had been determined in consultation with DENR. TR 2155-2156. The route was moved 175 feet from the edge of the surface water protection area and 1,000 feet from the wellhead itself. TR 1323. Keystone also met at the time the route was changed with the mayor and an engineer for the City of Colome. TR 1384. This is not an issue that affects Keystone's ability to meet any permit condition.

50. Doug Crow Ghost, the Director of the Department of Water Resources for the Standing Rock Sioux Tribe, testified about the Winters Doctrine, tribal water rights, and his concern that the Keystone XL Pipeline presented a threat to tribal water supplies given long-term drought. TR 2015-2020. He testified that the Tribe is working with the State to quantify the Tribe's water rights. TR 2016-2017. His testimony was rebutted by Dr. Jon Schmidt, who explained in his rebuttal testimony that Keystone cannot use water if the use would adversely affect prior appropriations or vested rights, and that SDCL 46-5-40.1, which governs temporary water use permits for construction purposes, protects the Tribe, even in cases of long-term drought. Ex. 2009, ¶¶ 4-5, 7. Crow Ghost's testimony did not establish that Keystone is unable to meet any permit conditions.

51. Carlyle Ducheneaux is the Section 106 Coordinator for the Cheyenne River Sioux Tribe. TR 990. He testified that construction of the pipeline would disturb contaminated sediments in the Cheyenne River and its tributaries and that pipeline failure was likely to occur because of the sloughing of river banks and the movement of highly erodible soils. Ex. 7001, ¶¶ 8-14. Jon Schmidt testified that construction would not cause any disturbance of contaminated sediments in the Cheyenne River because Keystone will use HDD for the crossing. Schmidt also testified that sloughing of river banks is not an issue for the same reason and because Keystone can take other mitigation measures during construction. Ex. 2009, ¶¶ 8-9. Ducheneaux's testimony did not establish that Keystone is unable to meet any permit condition.

52. Cindy Myers testified to her concerns: (1) that emergency responders may not have adequate information about the chemical composition of the crude oil in case of a spill, TR 1658-1660; (2) the dangers of exposure to benzene, TR 1661-1663; (3) her opinion that benzene can permeate polyethelene and polyvinyl cloride water pipe and waterlines like the Mni Wiconi water pipeline, TR 1663-1664; (4) that, according to her, 62% of South Dakotans get their drinking water from the Missouri River, which is at risk from a spill, TR 1666-1667; and (5) because of the threat to drinking water resources, the Project "could substantially impair the health, safety, and welfare of South Dakotans." TR 1673. Tillquist's testimony established that the risks posed by possible benzene exposure due to a spill are low, and the Commission previously determined that the risk of any significant pipeline release was low. Amended Final Decision, Findings 43-45 and 52; Ex. 2017, ¶¶ 4, 6, 7, 8, 11, 12. Corey Goulet testified that studies have established that the amount of benzene present in crude oil is not a threat to PVC pipe. TR 950-951. Myers' testimony does not establish that Keystone is unable to meet any permit condition and essentially addresses SDCL 49-41B-22, the permitting statute, not SDCL 49-41B-27.

53. Faith Spotted Eagle testified to concerns about safe drinking water and the availability of water from the Missouri River for spiritual ceremonies. Ex. 9011, ¶¶ 21-23; TR 1855-1857. Spotted Eagle's testimony does not contain any factual basis for the Commission to find either that the Project poses a threat to the Tribe's drinking water or that water will not be available from the Missouri River for the Tribe's spiritual ceremonies.

54. Two Intervenors testified about their concerns that Keystone had not consulted with Tribal officials about the Project. Phyllis Young testified on behalf of the Standing Rock Sioux Tribe as an at-large Tribal Council Member that Keystone did not consult with the Tribe and, similarly, that the Department of State failed to consult with the Tribe in preparing the FSEIS. Ex. 8001, last page; TR 1722, 1732-1733. The Honorable Wayne Frederick testified on behalf of the Rosebud Sioux Tribe as a member of the Council that the Rosebud Sioux Tribe was not consulted by TransCanada. TR 2088. This testimony does not establish that Keystone

cannot meet any permit conditions because, as stated in the conclusions of law, it is not Keystone's legal obligation to consult with the Tribes in connection with the FSEIS.

55. No permit condition requires that Keystone consult with the Tribes about the Project. Condition 6 refers to "local governmental units," but does not specify Tribes. Condition 34 requires that Keystone must "consider local knowledge" in assessing and evaluating environmentally sensitive and high consequence areas. In support of its Certification, Keystone submitted its Quarterly Report in which Keystone's public liaison officer stated that Keystone has sought out local knowledge. Petition, App. B, Condition 34(b).

56. None of the Tribes who intervened in this proceeding were parties to Docket HP09-001, although all could have been.

57. Appendix E to the FSEIS, which is a matter of public record of which the Commission has taken judicial notice, contains the record of consultation between the Department of State and various Tribes under Section 106 of the National Historic Preservation Act. On page 11 of the record of consultation, all of the meetings, e-mails, telephone calls, and letters between the Department of State and the Standing Rock Sioux Tribe are listed. The record of consultation establishes that the Standing Rock Sioux Tribe was consulted by the Department of State.

58. Multiple witnesses testified that the Tribes in South Dakota passed resolutions opposing the Project and that Keystone representatives were not welcome on Tribal land. TR 1745-1746, 1873, 2084, 2096-2097, 2104-2105.

59. John Harter testified that Keystone acquired an easement on his property through the use of eminent domain. TR 2199. The court file in *TransCanada v. Harter*, Civ. 11-62 (6th Jud. Cir.), of which the Commission takes judicial notice, demonstrates that Keystone acquired an easement pursuant to a judgment entered by the court that enforces a settlement agreement between Keystone and Harter. TR 2214. Even if Keystone had acquired an easement on Harter's property by eminent domain, that would not establish that Keystone is unable to meet any permit condition.

60. Kevin E. Cahill, Ph.D., is an economist with ECONorthwest from Portland, Oregon. TR 1681-1682. Cahill testified that in his opinion the socio-economic analysis that was done as part of the FSEIS was "seriously flawed" because it was supposed to be a cost-benefit analysis, but it failed to consider any costs or potential indirect costs of the Project. TR 1685-1688. He testified that any benefits of the Project had not been measured against the costs as part of the analysis done in the FSEIS. TR 1690. The socioeconomic analysis in the FSEIS was conducted by the Department of State, not Keystone. No permit condition relates to the socioeconomic analysis in the FSEIS. Dr. Cahill's testimony does not establish that Keystone does not, or is unable to, meet any permit condition.

61. Paula Antoine testified about socioeconomic issues as a rebuttal witness on behalf of the Rosebud Sioux Tribe. Ex. 11000. Ms. Antoine is the Director of the Sicangu Oyate Land Office. TR 2131. She testified that in her opinion Keystone failed to present sufficient evidence related to Amended Final Decision Findings of Fact 107, 108, 109, and 110. Ex. 11000, pp. 2-4; TR 2133. Antoine's testimony is not based on her personal knowledge and does not relate to any permit condition.

62. Faith Spotted Eagle testified on behalf of the Yankton Sioux Tribe. Ex. 9011; TR 1848. She is a counselor and a PTSD therapist. TR 1848-1849. She testified as to her concerns about the proposed work camps in South Dakota and the effect they might have on the safety of Native American communities and tribal members. Ex. 9011, ¶¶ 14, 18, 19; TR 1850-1852. Spotted Eagle testified that the Commission should "anticipate a surge in crime, especially violent crime, in the communities near the man camps" and that because the camps are inhabited by young and single men who have financial means and are away from their families, "[t]he result is easy to predict and does not require any scientific analysis." Ex. 9011, ¶¶ 14, 18. Spotted Eagle cited no studies of crime associated with work camps, no crime statistics from work camps, and no personal experience with either work camps like those proposed for the Keystone XL Pipeline or with Target Logistics, Keystone's contractor.

63. Rick Perkins testified on behalf of Keystone about the work camps, and testified that Target Logistics, the contractor that will operate the camps, does not have a documented history of behavior problems associated with the camps. Ex. 2007, ¶¶ 5-6, 12-13; TR 2400. Perkins testified that Keystone expects no increase in crime associated with the camps. TR 2409. Workers who live in the camps must sign a code of conduct and may be expelled if they violate the code. TR 2413.

64. There are three proposed work camps in South Dakota - one in Harding County near Buffalo, one in Meade County near Howes, and one in Tripp County near Colome. Ex. 2007, ¶4. Keystone has talked to local law enforcement about the camps and is willing to supplement local law enforcement officers at Keystone's expense. Ex. 2007, ¶ 14; TR 2406. Keystone has obtained a conditional use permit from Harding County for the Buffalo camp. No such permit is required in Meade County or Tripp County, although Keystone will obtain an occupancy permit for the camp in Meade County. Ex. 2007, ¶ 15.

65. There is no permit condition related to the work camps. The testimony of Faith Spotted Eagle does not establish either that the work camps pose any particular threat to any South Dakota citizens, or that Keystone cannot meet any permit condition.

66. The Keystone XL pipeline route does not cross any reservation land or land held in trust for Indians. TR 254.

67. Steve Vance testified on behalf of the Cheyenne River Sioux Tribe. He is the Tribal Historic Preservation Officer. Ex. 7002, ¶ 2; TR 1524. Vance testified to his concern that the Project falls within the view shed of several cultural sites, like the Slim Buttes; that during construction, access to cultural and historic sites could be hindered; that operation and maintenance of the pipeline could disrupt spiritual practitioners requiring solitude; and that the Project will have long term negative effects emotionally and spiritually on many Tribal members. Ex. 7002, ¶¶ 7-10.

68. Vance's testimony is insufficient to establish that Keystone cannot meet any permit condition. Permit Condition 43 addresses the protection of cultural resources and provides that Keystone must follow the Unanticipated Discoveries Plan as approved by the Department of State. If Keystone finds any cultural resources during construction, Keystone must notify the Department of State and the State Historic Preservation Office, and, if appropriate, develop a plan to address the resource. Vance offered no testimony that Keystone cannot or will not comply with this condition.

69. Dakota Rural Action called Evan Vokes, a former TransCanada employee, to testify about welding and other safety issues that he perceived from his tenure. TR 1768; Ex. 1003-A. Vokes, who is no longer a licensed professional engineer, was employed by TransCanada from 2007 until May, 2012, although he did not actively work at TransCanada after October 26, 2011. TR 1544-1554. He started in the welding group as an engineer in training, and became a professional engineer in 2009. His rank from 2009 until October, 2011, was junior engineer. TR 1549-1552. When he started at TransCanada, he had no previous experience with pipeline welding. TR 1572.

70. Vokes testified that TransCanada inspects 100% of the welds in its mainline pipe, even though applicable federal regulations require that only 15% of the welds be inspected. TR 1578.

71. Vokes testified that he thought that TransCanada had problems with automated ultrasonic testing (AUT) of welds on the Cutbank Project in Canada. Vokes testified that he found defects in welding procedures used by TransCanada and that he notified his superiors. TR 1594-1597. He testified that the National Energy Board in Canada (NEB) sent a letter related to nine welding procedures not meeting minimum qualifications. TR 1594. Vokes testified that he thought that a pipeline rupture that occurred near Otterburne, Manitoba, was an example of a problem caused by a defective weld. TR 1598-9159. Dan King, TransCanada's Chief Engineer and Vice President for Asset Reliability, testified that the concerns that the NEB raised about AUT on the Cutbank Project were administrative in nature, not technical. He testified that they did not affect the safety of any welds. TR 2264-2265. He testified that the rupture on a natural gas pipeline near Otterburne was caused by a failure on a weld that was completed in 1960 under different procedures and standards. TR 2265-2266. In addition, he testified that TransCanada worked with the NEB to look at the other welds on the same pipeline and found no issues. TR at 2266-2267.

72. Vokes testified that he was aware of pipe intended for the Keystone Pipeline that had manufacturing defects. TR 1602-1603. Dan King testified that there was pipe manufactured for the Canadian portion of the project that had problems, and it was rejected by TransCanada and never shipped or installed. TR 2267-2268.

73. Vokes testified that he was involved in testing the integrity of the welds along a segment of the Keystone Pipeline. TR at 1600-1601. There were issues with peaked pipe, which is the result of a manufacturing problem. TR 1610-1611. Vokes thought that the pipe should not have been used because it could fatigue over time. TR 1611-1614. He thought, however, that "[w]e did a very good job, actually very good pipe, other than the fact of the peaking." TR 1613. Dan King testified that there was no pipe installed on the Keystone Pipeline that was inspected in a manner that did not come within the tolerances permitted by code, and that the pipe met TransCanada's tolerances, which are stricter than code. TR 2269-2270.

74. Vokes testified that he thought there were problems with gas metal arc welding causing lack-of-fusion defects. TR 1603-1605. Dan King testified that lack-of-fusion defects can occur with gas metal arc welding, which is typically used with larger diameter pipe, but that the defects are generally found during the inspection process, and then removed or repaired. TR 2271-2272.

75. Vokes testified that he worked on the Bison Project, that there were problems with the welding, and that while TransCanada wanted to use AUT for the welds, it was technically a problem. TR 1614-1619. As a result of the problems, Vokes testified that there

were 1,200 or 1,300 welds on the project that went into the ground that never had a code inspection. TR 1621. Vokes also testified that there were dents associated with welds on the Bison project. TR 1623-1624. Dan King testified that there was an in-service failure on the Bison Pipeline, which is a natural gas line. The failure was caused by some external force, but the source of the external force, which appeared to be some sort of heavy equipment strike, could not be determined. TR 2273-2274. PHMSA was involved in the investigation and, after investigation and a corrective action order, allowed the project back into service and cleared the corrective action order. TR 2274. As a result of the failure, TransCanada increased the number of inspectors on projects and improved inspector training. TR 2274-2275. King also testified that he disagreed with Vokes's testimony that there could be 1,200 to 1,300 welds in the ground that have not been subject to an inspection that meets code on the Bison project. He testified that PHMSA's involvement and inspection of 100% of the welds was thorough and complete. TR 2275-2276.

76. Vokes testified that in connection with the Keystone XL Pipeline, he worked on one section in Canada and maybe the Gulf Coast Project in the United States. TR 1754. He testified that he was concerned that TransCanada was using Weldsonix, a nondestructive examination company to inspect welds, because there had been issues with Weldsonix in the past. TR 1754-1756. He testified that he was told to qualify Weldsonix. TR 1756. Dan King testified that TransCanada was dissatisfied with the performance of Weldsonix on a project in 2004, but that Weldsonix U.S.A., which did work on the Keystone Pipeline, passed a qualification process and performed very well on that project. TR 2276-2277. After an anonymous person raised issues about inspection on the Keystone Pipeline, TransCanada did a 100% audit and found no issues with the work that Weldsonix had done. TR 2277.

77. Vokes's testimony is insufficient to establish that Keystone cannot meet any permit condition. His testimony did not directly relate to any permit condition. Moreover, it is undisputed that Vokes has no first-hand knowledge of any welding or inspection defects on the Keystone Pipeline, the Gulf Coast Project, or the Houston Lateral Project. It is also undisputed that he has no knowledge of any welding or inspection defects in South Dakota. TR 1773, 1775, 1777-1778.

Conclusion

78. At its regularly scheduled meeting on January 5, 2016, the Commission considered this matter. The Commission unanimously voted to approve the Company's request for an order accepting its certification. The Commission finds that the Company certified that it remains eligible to construct the project under the terms of 2010 permit, subject to the provisions of 49-41B. The Commission finds that the Company certified that the Project continues to meet the conditions upon which the 2010 permit was issued.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and parties to this proceeding under SDCL Chapter 49-41B and ARSD Chapter 20:10:22. The Commission has the legal authority to decide whether to accept Keystone's Certification under SDCL § 49-41B-27.

2. The Amended Final Decision and Order dated June 30, 2010, in Docket HP09-001 was not appealed and constitutes a final order of the Commission.

3. Even though more than four years have elapsed since the permit was issued in Docket HP09-001, the permit has not lapsed or expired. Keystone therefore has no legal obligation to again prove that it meets the requirements of SDCL § 49-41B-22, which the Commission concluded in the Amended Final Decision entered in Docket HP09-001 it had met. Keystone's burden of proof under SDCL § 49-41B-27 is distinct from its burden under SDCL § 49-41B-22.

4. Under SDCL § 49-41B-27, Keystone has the burden of proof to show that its certification is valid.

5. "Conditions" as used in SDCL § 49-41B-27 means the 50 Conditions attached as Exhibit A to the Decision.

6. The Commission has no authority over condemnation or eminent domain. SDCL 21-35-1 requires that these issues be brought before the circuit court.

7. The Keystone XL pipeline route does not cross any reservation land or land held in trust for Indian Tribes. The Commission has no jurisdiction to adjudicate aboriginal or usufructory rights with respect to lands that were formerly Indian country under the Treaties of 1851 or 1868 prior to diminishment.

8. Keystone met its burden of proof through the Certification signed by Corey Goulet, the documents filed with its Certification Petition, and the direct testimony of its witnesses establishing that despite some updates related to the Project since June 30, 2010, none of these updates affects Keystone's ability to meet the conditions on which the permit was granted.

9. With respect to prospective conditions that are unaffected by the updates since June 29, 2010, Keystone is as able today to meet the conditions as it was when the permit was issued as certified to in the Certification signed by Corey Goulet. No evidence was offered demonstrating that Keystone will be unable to meet the conditions in the future. Keystone offered sufficient evidence to establish that Keystone can continue to meet the conditions.

10. The Intervenors failed to establish any reason why Keystone cannot continue to meet the conditions on which the permit was issued.

11. Under Section 106 of the National Historic Preservation Act, it is the legal obligation of the Department of State to consult with the Tribes in South Dakota. 16 U.S.C. § 470f; 36 C.F.R. Part 800.

12. The Commission granted party status to every person or entity who sought it. The Intervenors were afforded a full and fair opportunity to be heard. The proceedings in this docket were substantially longer, more in-depth, and more involved than in HP09-001, even though Keystone's burden of proof was more limited in scope. The Commission needs no additional information to determine whether to accept Keystone's Certification under SDCL § 49-41B-27.

13. The Commission concludes that the Certification and all required filings have been filed with the Commission in conformity with South Dakota law and that all procedural

requirements under South Dakota law, including public hearing requirements, notice, and an opportunity to be heard, have been met.

It is therefore

ORDERED that Keystone's Certification under SDCL § 49-41B-27 is accepted by the Commission and found to be valid and Keystone is authorized to proceed with the construction and operation of the Keystone XL Pipeline subject to the conditions attached as Exhibit A to the Amended Final Decision and Order dated June 30, 2010.

NOTICE OF ENTRY AND OF RIGHT TO APPEAL

PLEASE TAKE NOTICE that this Final Decision and Order was duly issued and entered on the 21st day of January, 2016. Pursuant to SDCL 1-26-32, this Final Decision and Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties. Pursuant to ARSD 20:10:01:30.01, an application for a rehearing or reconsideration may be made by filing a written petition with the Commission within 30 days from the date of issuance of this Final Decision and Order; Notice of Entry. Pursuant to SDCL 1-26-31, the parties have the right to appeal this Final Decision and Order to the appropriate Circuit Court by serving notice of appeal of this decision to the circuit court within thirty (30) days after the date of service of this Notice of Decision.

Dated at Pierre, South Dakota, this 21st day of January, 2016.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, electronically or by mail.

By: Karen E. Cremer

Date: 1-21-16

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

CHRIS NELSON, Chairman

KRISTIE FIEGEN, Commissioner

GARY HANSON, Commissioner

1-26-36. Weight given to agency findings--Disposition of case--Grounds for reversal or modification--Findings and conclusions--Costs. The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional or statutory provisions;
(2) In excess of the statutory authority of the agency;
(3) Made upon unlawful procedure;
(4) Affected by other error of law;
(5) Clearly erroneous in light of the entire evidence in the record; or
(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment. The circuit court may award costs in the amount and manner specified in chapter 15-17.

Source: SL 1966, ch 159, § 15 (7); SL 1972, ch 8, § 29; SL 1977, ch 13, § 16; SL 1978, ch 13, § 10; SL 1978, ch 17; SL 1983, ch 6, § 2.

49-41B-24. Permit for energy conversion facilities, AC/DC conversion facilities, or transmission facilities--Complete findings by commission required within year of application. Within twelve months of receipt of the initial application for a permit for the construction of energy conversion facilities, AC/DC conversion facilities, or transmission facilities, the commission shall make complete findings in rendering a decision regarding whether a permit should be granted, denied, or granted upon such terms, conditions or modifications of the construction, operation, or maintenance as the commission deems appropriate.

Source: SL 1977, ch 390, § 18; SL 1980, ch 328, § 2; SL 1981, ch 341; SL 2006, ch 242, § 5; SL 2009, ch 243, § 3; SL 2015, ch 235, § 2.

49-41B-27. Construction, expansion, and improvement of facilities. Utilities which have acquired a permit in accordance with the provisions of this chapter may proceed to improve, expand, or construct the facility for the intended purposes at any time, subject to the provisions of this chapter; provided, however, that if such construction, expansion and improvement commences more than four years after a permit has been issued, then the utility must certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued.

Source: SL 1977, ch 390, § 29.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28332

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

APPELLEE'S BRIEF

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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 Yankton Sioux Tribe timely filed a notice of appeal on July 19, 2017.

Statement of the Issues

1. Under SDCL § 49-41B-27, if construction has not begun four years after the Commission grants a permit, then the permittee must certify that the project continues to meet the conditions on which the permit was granted. This statute presumes that some changes in circumstance related to the project may have occurred over four years, and in this case, some of the Commission's conditions expressly contemplated change between the date of the permit and completion of the project. Do the changes in circumstance identified by Keystone make the project so different from what was permitted that the Commission erred in refusing to dismiss Keystone's certification?

   The circuit court held that the Commission correctly denied the Yankton Sioux Tribe's motions based on its argument that changes in circumstances created a new project.

   SDCL § 49-41B-27

2. It was apparent at the outset of the case that many intervenors viewed the new docket as an opportunity to relitigate the permit that the Commission granted in docket HP09-001. There are no administrative rules and no cases addressing SDCL § 49-41B-27, which required Keystone to certify

that it continued to meet the permit conditions imposed by the Commission when it granted the permit. Did the Commission err in entering a procedural order at the outset of the case to prevent a retrial of the proceedings in docket HP09-001?

The circuit court held that the Commission did not abuse its discretion in entering the discovery order.

SDCL § 49-41B-27
SDCL § 15-6-26(b)(1)
Bertelson v. Allstate Ins. Co., 2011 S.D. 13, 796 N.W.2d 685

3. 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, 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)

4. SDCL § 49-41B-27 required that Keystone certify that it continue to meet the conditions on which the permit was granted. The Yankton Sioux Tribe claims that the Public Utilities Commission erred when it concluded Keystone *was able* to meet the prospective permit conditions. Did the Commission apply an incorrect standard?

   The circuit court found no legal error in the Commission's determination that Keystone could comply with the prospective permit conditions.

   SDCL § 49-41B-27

5. The Yankton Sioux Tribe claims that it has usufructuary and aboriginal rights, in part based on the Fort Laramie Treaties of 1851 and 1868, that would be affected by the Keystone XL Pipeline even though the project does not cross any tribal land. Keystone disputes Yankton's claims and

their legal significance, which do not bear on any permit condition. Did the Commission err in refusing to consider the dispute about tribal rights?

The circuit court held that the Commission did not err in granting Keystone's motion to preclude consideration of these issues.

Yankton Sioux Tribe v. United States, 24 Ind. Cl. Comm. 208 (1970)

6. The Yankton Sioux Tribe argues that under SDCL § 49-41B-22(4), the Commission was required to consider the views of "affected local units of government," and that Keystone was required by a permit condition to consult with the Tribe as a local government. In its application for party status, the Tribe designated itself as a sovereign nation, which is consistent with federal law, while a local governmental entity is commonly understood to be a political subdivision of the state. Is the Tribe a local unit of government?

The circuit court held that the Tribe was not a local unit of government under either SDCL § 49-41B-22(4) or the permit conditions.

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla., 498 U.S. 505 (1991)
Pennington County v. State, 2002 S.D. 31, 641 N.W.2d 127

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. (YST App. at 2.)

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 29-43.) The Commission has the authority to revoke or suspend any permit for failure to comply with the terms and conditions of the permit. SDCL § 49-41B-33. Although the Commission's final decision and order granting the permit was appealable under SDCL § 1-26-32, no party appealed.

2. Keystone's certification

Under SDCL § 49-41B-27, if construction of a permitted project begins more than four years after the permit was issued, "then the utility must certify to

the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued." Construction of the Keystone XL Pipeline was proposed to begin in May 2011 and to be completed in 2012. (Keystone's App. at 4.) Because of delays in receipt of a Presidential Permit, which was required by Executive Order, Keystone did not commence construction within four years following the Commission's 2010 order granting the permit.

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. (YST App. at 44-45.) 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. (YST App. at 44.)

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.

Statement of Facts

1. The Keystone XL Pipeline project

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. (YST App. at 11, ¶ 15; 60, ¶ 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,

[1] The Settled Record references are to the index prepared by the Clerk of Courts for Civ. 16-33.

which do not involve an international border crossing, 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 Hardisty-Steele City Segment. (*Id*. at 60, ¶ 13.) 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 60, ¶ 16.) The Keystone XL Pipeline route in South Dakota does not pass through Indian Country or cross any tribally-owned lands. (*Id*. at 62, ¶ 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 from the originally-proposed 900,000 barrels per day to 830,000 bpd. 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.) Nevertheless, 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 is likely to result in increased tax revenue to counties that host the pipeline. (*Id.* at 43.)

In its certification, Keystone attested that nothing about these factual changes altered either its compliance with conditions that applied in the pre-construction phase of the project or its ability to comply in the future with all applicable prospective permit conditions during construction, operation, and

maintenance of the project. As stated in Keystone's certification petition, "to the extent that there have been changes in the underlying facts, those changes are either neutral or positive to the Commission's concerns. In sum, the need, impacts, efficacy, and safety of the Project have not changed since the Amended Final Decision and Order." (Keystone's App. at 8.)

3. Appendix B

The latest quarterly report submitted to the Commission, dated July 29, 2014, was attached to Keystone's petition as Exhibit B. (*Id.* at 19-38.) As part of the report, Keystone included a narrative about the project's status, a table showing recent consultations with the South Dakota Department of Environment and Natural Resources, and Table 2, entitled "Status of Implementation of South Dakota PUC Conditions," addressing the status of the permit conditions. Comprising 20 pages of the report, it recites each condition and then describes the "status of other measures required by" each condition. (*Id.*)

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. (YST App. at 62, ¶ 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 29, ¶ 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." (YST App. at 62, ¶ 31.) With respect to the prospective conditions, the Commission found that "[n]o evidence was presented that Keystone cannot satisfy any of these conditions in the future." (*Id.*)

4. The Commission's specific findings on the non-prospective permit conditions

In its findings, the Commission addressed the conditions that it found were not prospective. Condition 4 provided that the permit is not transferrable without the Commission's approval. (*Id.* ¶ 32.) Conditions 7-9 required the appointment of a public liaison officer and the submission of quarterly reports, both of which the Commission found had been done. (*Id.* ¶ 33.) Condition 10 requires a program of contact with local emergency responders no later than six months before construction; the Commission found that Keystone had already started making such contacts and that it would continue. (*Id.* ¶ 34.) The Commission further found that even though this condition does not refer to Tribal governments or officials, Keystone presented evidence that it would contact Tribal emergency responders. (*Id.*)

Condition 15 requires consultation with the NRCS to develop con/rec units, which the Commission found had been done. (*Id.* ¶ 36.) Condition 19 requires that landowners be compensated for tree removal, and that Keystone

address that issue when acquiring easements. (*Id.* ¶ 37.) The Commission found no evidence that Keystone cannot continue to meet the condition. Condition 34 requires that Keystone continue to evaluate and perform assessment activities regarding HCAs. (*Id.* ¶ 38.) The Commission found that the process was ongoing. Condition 41 requires that Keystone follow all protective and mitigation efforts recommended by the U.S. Fish and Wildlife Service and the South Dakota Department of Game, Fish, and Parks, as well as consult with SDGFP to identify greater prairie chicken and greater sage and sharp-tailed grouse leks, which 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 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.* ¶ 50.)

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 conducted a risk analysis for the project. Her pre-filed testimony covered spill scenarios and potential impact to groundwater resources.

Jon Schmidt, Ph.D., the project's contract 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. (YST App. at 63-69, ¶¶ 43-77.) 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 63-69, ¶¶ 43, 44, 46, 49, 50, 51, 52, 54, 55, 60, 61, 65, 68, 77.)

6. The circuit court's decision on appeal

The circuit court issued a 36-page memorandum decision dated June 16, 2017, affirming the decision of the Commission. (YST App. at 72.) 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 Yankton Sioux Tribe's appeal is authorized by SDCL § 49-41B-30, subject to the provisions of SDCL § 1-26-36. The circuit court must "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 Peterson v. Evangelical Lutheran Good Samaritan Society*, 2012 S.D. 52, ¶ 12, 816 N.W.2d 843, 846. The Supreme 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. This Court's review of agency findings is the same

as the circuit court's 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 without making any new findings of fact.

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.

Discovery orders are reviewed under an abuse-of-discretion standard. *Dakota, Minn. & Eastern R.R. Corp. v. Acuity*, 2009 S.D. 69, ¶ 47, 771 N.W.2d 623, 636. Motions to dismiss are viewed with disfavor and are rarely granted. *Nygaard v. Sioux Valley Hospital & Health System*, 2007 S.D. 34, ¶ 9, 731 N.W.2d 184, 190.

1. The Commission did not err in denying Yankton's initial motion to dismiss.

On December 1, 2014 the Yankton Sioux Tribe filed a motion to dismiss (AR 1362-1365), arguing in effect that the pipeline project considered in the certification proceeding was inherently different than the pipeline permitted in docket HP 09-001. The motion was denied, the Commission noting that Keystone's Petition for Certification "does not on its face demonstrate that the Project no longer meets the permit conditions . . . [A] decision on the merits should only be made after discovery and a thorough opportunity to investigate the facts and proceed to evidentiary hearing." (Administrative Record at 1697-98.)

Finally, on July 10, 2015, Yankton filed a Motion In Limine (*Id.* at 9481-9620) seeking to prevent testimony at the hearing relating to items contained in

the Tracking Table of Changes, asserting again that the Tracking Table was a veiled attempt to modify the 2010 permit. The Commission denied the motion because "amending the findings of fact in [the 2010 permit docket] is not requested." (*Id.* at 20312-20313.)

Both pre-trial motions and Yankton's argument here advance the same theory, that Keystone's Tracking Table (Appendix C) demonstrates that it is a different project. With the changes, the certification proceeding was nothing more than a veiled attempt to amend the 2010 order to allow a new project, according to Yankton. Yankton now modifies the argument slightly, asserting that by denying the motions, its due process rights were infringed. No matter how couched, the outcome is the same – Yankton's theory was incorrect.

The Tracking Table, the focus of Yankton's motions, was described in Keystone's Petition as presenting "those finding of fact from the Commission's Amended Final Decision and Order that have changed since 2010 and describes the nature of those changes. As Appendix C makes clear, to the extent there have been changes in the underlying facts, those changes are either neutral or positive to the Commission's concerns." (Administrative Record at 45.)

The Commission made 115 Findings of Fact in its 2010 decision. Appendix C identifies changed circumstances in the intervening four years that affected 30 of the findings. Most changes are minor or technical, none change the fundamentals of the project, or, as Yankton contends, create a new project requiring a new permit.

SDCL § 49-41B-27, the statute that requires certification four years after a permit is granted, presumes that there can be changes to a project between granting a permit and starting construction. The logic of the statute is that because some things might have changed in four years, a permit holder must certify that despite those changes, the project can still be constructed in conformity with the conditions on in the permit. If *any* change related to the project were sufficient to require a new permit, then the only circumstance in which SDCL § 49-41B-27 would apply would be if there had been *no* change of any kind related to the project. That is not consistent with the plain language of the statute. Rather, the statute anticipates changes to the project, but is meant to ensure that changes do not prevent the project from complying with the original permit conditions.

Many of the permit conditions themselves presume there will be changes after the permit is granted but before construction commences. For instance:

- Condition No. 6 recognizes that "Keystone will continue to develop route adjustments throughout the pre-construction design phase" and requires filing "new aerial route maps that incorporate any such route adjustments prior to construction."
- Condition No. 8 requires periodic reporting of "design changes of a substantive nature."
- Condition No. 12 requires reporting "the date construction will commence," recognizing that starting construction in 2010 was not a condition of the permit.
- Condition No. 13 recognizes that Keystone may modify its Construction Mitigation and Reclamation Plan, and that the modified Plan "shall be filed with the Commission."
- Condition No. 15 requires that "[p]rior to construction," Keystone develop construction/reclamation units.

Condition No. 16(e) requires that "Keystone shall draft specific crop monitoring protocols for agricultural lands."

- Condition No. No. 28 requires that Keystone, prior to construction, file "a list identifying private and new access roads" and a "description of methods used by Keystone to reclaim those access roads."

- Condition No. 34 requires that Keystone continue to evaluate high consequence areas (HCAs) and before commencing operation, identify and add to the Emergency Response Plan and Integrity Management Plan HCAs "whether currently marked on DOT's HCA maps or not."

- Condition No. 36 requires that before beginning operation Keystone prepare and file with PHMSA an emergency response plan and an integrity management program.

These permit conditions acknowledge that there will be changes and that there are things that Keystone must do in compliance with the permit that were not specified when the permit was issued. Compliance with these conditions does not create a new project.

Conspicuously absent from the Tribe's argument is a discussion of the changes identified in the Tracking Table. The Petition and Tracking Table note that portions of the greater 2009 project were constructed after the 2010 permit issued.[2] (Keystone's App. at 5-6; *id.* at 39 ¶¶ 15-16.) In South Dakota the project remained essentially unchanged, except (1) the South Dakota portion of the pipeline was reduced from 315 to 314 miles, and (2) the operating pressure will be reduced from 1,440 to 1,307. (*Id.* at 39 ¶¶ 16, 18.) The pipeline passes through the same counties and has the same number of pump stations. Four valve

[2] The Cushing, Oklahoma-Gulf Coast segment of the original project and an extension to Houston area refineries, the Houston Lateral, were finished as stand-alone projects. (YST App. at 58, ¶¶ 12-13.)

sites were added, an increase from 16 to 20 and five pumps will be installed at each pump station, instead of three as originally proposed. (*Id.* at 40, ¶ 20.)

The Tracking Table notes that Keystone is no longer seeking a federal Pipeline and Hazardous Materials Safety Administration (PHMSA) Special Permit to operate the pipeline at 1400 psig. Keystone withdrew its request to PHMSA for a Special Permit, opting instead to operate at lower pressure and comply with the special conditions developed by PHMSA set out in the 2014 Final Supplemental Environmental Impact Statement, Appendix Z. (*Id.* at 40, ¶ 22; 42, ¶¶ 60-62; 43, ¶¶ 90, 107.)

The Tracking Table notes global changes in demand for crude oil since 2009, but market demand for the project remained strong, and the changes in demand do not affect Keystone's ability to meet the permit conditions. (*Id.* at 30-31, ¶¶ 24-29.)

The Tracking Table notes that Keystone updated its CMR Plan per Condition No. 13 and will update the soil type maps and aerial photograph maps as required by Condition No. 6. The Bad River and Bridger Creek would be crossed utilizing horizontal directional drilling rather than an open-cut crossing. Potentially affected High Consequence Area decreased from 34.3 miles to 19.9 miles. (*Id.* at 42, ¶ 50.) None of these changes establish a different project than the one that was permitted.

Yankton does not explain what changes enumerated in the Tracking Table establish that Keystone is substituting a different project for the 2010 project. Yankton tried to convince the Commission that the certification hearing was a

ruse for a new project, that Keystone was trying to amend the 2010 findings to conceal a new project, and failed. Yankton makes the same argument in its brief, now couched as a denial of due process. The plain facts are that the certification statute and the 2010 permit anticipate some change, requiring certification that the project can still be built in accord with the permit conditions. That is exactly what Keystone proved, essentially unchallenged, in the certification proceeding.

2. The Commission's Order to Define Issues and Setting a Procedural Schedule was not an abuse of discretion.

Yankton challenges the Commission's December 17, 2014 order limiting discovery to (1) whether the proposed Keystone XL Pipeline continues to meet the 50 permit conditions; and (2) the changes to the project identified in Keystone's permit application. (YST Br. at 10-13; Administrative Record at 1528-1529.) The order was based on SDCL § 49-41B-27 and the Commission's determination that the certification docket was not an opportunity to re-litigate whether the permit should have been granted in 2010. Yankton does not directly challenge this conclusion, instead arguing that the order was procedurally improper under SDCL § 15-6-26(c).

As Yankton acknowledges, Keystone did not file a motion for a protective order under SDCL § 15-6-26(c). (YST Br. at 10.) Yankton argues that the scope of discovery under SDCL § 15-6-26(b) is broad and cannot be limited any other way, so that Keystone had to show good cause for the order and certify its good-faith consultation with opposing parties before filing the motion. (*Id.* at 10-11.) Yankton's argument fails for three reasons.

First, the Commission had the legal authority to limit the scope of discovery on its own motion. Even under SDCL § 15-6-26(b)(1), a court "may act upon its own initiative after reasonable notice." Keystone filed a motion, so notice was not an issue.

Second, it is significant that Yankton failed to address in this context the distinction between a permit proceeding under SDCL § 49-41B-22 and a certification proceeding under SDCL § 49-41B-27. As an administrative agency charged with implementing the statute, the Commission properly considered and decided what the scope of the proceeding was and how that would affect discovery. There are no administrative rules addressing SDCL § 49-41B-22, no case law on the scope of the statute, and no other statutes addressing procedure. Thus, the Commission held that the certification proceeding was more limited than a permit proceeding and that the scope of discovery would necessarily be different.

The Commission did so after a conference among all of the parties, led by John Smith, General Counsel for the Commission, made it clear that many of the intervenors wanted to relitigate the permit. (Administrative Record at 1013-14, 1125-26.) The overbroad issues presented included the effects of the proposed pipeline on the Nebraska Sandhills; whether the project is in the national interest; whether Keystone is entitled to exercise the right of eminent domain; and whether development of the Canadian oil sands harms the environment and contributes to levels of CO2 in the atmosphere. (*Id.* at 278-342.) Having granted liberal intervention and seeing the broad construction that some of the intervenors placed

on the certification statute, the Commission acted reasonably to restrict the proceedings to issues relevant to the narrow scope of SDCL § 49-41B-27—Keystone's continued compliance with the permit conditions. Yankton's argument is silent on this point.

Third, while the Yankton contends that the Commission arbitrarily limited the broad scope of discovery contemplated by SDCL § 15-6-26(b)(1) (YST Br. at 11-12), Yankton does not identify the relevant issues that it could not explore. Yankton served 44 interrogatories and 7 initial requests for production of documents on Keystone. (Administrative Record at 3160-3353.) Keystone objected to some of the discovery requests, Yankton moved to compel discovery, and the Commission granted in part Yankton's motion and compelled discovery. (*Id.* at 4712-13.) Neither Yankton nor Keystone challenges any part of that ruling on appeal. Beyond the extensive discovery that the parties allowed and that the Commission compelled against Keystone, the evidentiary hearing lasted nine days. The administrative record is over 31,000 pages long. The proceedings started in October, 2014, and ended in January, 2016.

In the face of this extensive and in-depth proceeding, Yankton's argument about the scope of discovery is at best not persuasive. At worst, it is fatally flawed for failure to show prejudice. *Cf., e.g., Milstead v. Johnson*, 2016 S.D. 56, ¶¶ 22-25, 883 N.W.2d 725, 734-35 (records are discoverable only if the party seeking production establishes "a factual predicate showing that it is reasonably likely that the requested file will bear information both relevant and material").

To prove an abuse of discretion on appeal, Yankton should bear the burden of proving what difference the Commission's order made to its case.

This Court reviews the Commission's order for abuse of discretion. *See, e.g., Bertelsen v. Allstate Ins. Co.*, 2011 S.D. 13, ¶ 57, 796 N.W.2d 685, 703-04. The Commission's order was an appropriate exercise of its discretionary authority to determine the scope of the certification proceeding and to manage the docket in a manner fair to all parties.

3. The Commission did not erroneously shift Keystone's burden of proof to the Appellants.

a. Keystone's burden under SDCL § 49-41B-27 was to certify that it continued to meet the permit conditions.

The Commission expressly found in its final order that Keystone "has the burden of proof to show that its certification is valid." (YST App. at 64, ¶ 4.) Keystone does not and did not dispute this.

As the Commission correctly concluded, the Permit granted by the Amended Final Decision and Order dated June 30, 2010, in Docket HP09-001 was not appealed and constitutes a final order. (*Id.* at 63, ¶ 2.) The Commission also correctly concluded under SDCL § 49-41B-27 that the 2010 permit 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 establishing what Keystone needed to prove to obtain the initial permit. (*Id*. at 64, ¶ 3.)

SDCL § 49-41B-27 requires that Keystone "certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued." 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. As stated by the Commission, Keystone's burden was to prove "that its certification is valid." (YST App. at 70, ¶ 4.)

b. The Commission's findings and conclusions are consistent with established case law addressing the burden of going forward with the evidence.

Much of the dispute about the burden of proof hinges on the fact that most of the 50 permit conditions are prospective—they require Keystone to do something in the future. Yankton argues, for instance, that "TransCanada did not produce any evidence on several key issues, yet it asserted that it should prevail on those issues because, it contends incorrectly, the intervenors also did not produce evidence on those issues." (YST Br. at 16.) Yankton's argument makes clear that this criticism is related to Keystone's alleged failure to present evidence on prospective conditions. Yankton cites to paragraph 31 of the Commission's findings of fact, which addressed prospective conditions, and the Commission's finding that "[n]o evidence was presented that Keystone cannot satisfy any of these conditions in the future." (YST App. at 62, ¶ 31.) Yankton argues that this finding is in "direct conflict" with the burden of proof by absolving Keystone "from its duty to prove it can satisfy the conditions, and requiring the Tribe and other intervenors to prove that TransCanada *cannot* satisfy the conditions." (YST Br. at 18-19.)

Yankton's argument ignores the logic of Keystone's presentation. 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 could be met only in the future. Thus, Keystone did not have to prove in docket HP09-001 that it did or could meet *all* 50 permit conditions. The Commission required that Keystone meet the

conditions, concluding that it had authority to impose the conditions under SDCL § 49-41B-24, that they were reasonable, and that they would help ensure that the project met the standards under SDCL § 49-41B-22.

By contrast, in this certification proceeding Keystone had to certify that it "continues to meet the conditions upon which the permit was issued." SDCL § 49-41B-27. The Commission construed "conditions" as used in the statute to mean the permit conditions. (YST App. at 70, ¶ 5.) Yankton does not challenge that conclusion.

Given that many of the conditions are prospective, Keystone complied with this statute by offering evidence of changes related to the project since 2010 and then addressing whether anything about those changes would prevent it from meeting the permit conditions. Keystone supported its certification with Appendix C, a table of changes related to the Commission's findings of fact in Docket HP09-001, and Appendix B, a table addressing the status of each condition. Keystone's pre-filed testimony similarly addressed the matters covered by the permit conditions and stated that nothing had changed that would prevent Keystone's compliance.

Yankton misconstrues the Commission's statements that there was no evidence that Keystone could not in the future meet a particular condition as evidence that the burden of proof was shifted. (YST Br. at 18-19.) 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 and testimony per SDCL § 49-41B-27, the Appellants wishing to challenge Keystone's certification, bore the burden of production. That is, they had to convince the Commission that Keystone's certification was invalid because Keystone could not in fact meet some of the permit conditions.

The concept that the burden of going forward with the evidence can shift is hardly novel. It exists in all cases in which a presumption arises. *See* SDCL § 19-11-1. It exists in cases involving allegations of a confidential relationship and undue influence. *See, e.g., In re Estate of Duebendorfer*, ¶ 32, 721 N.W.2d at 446-47. It exists in retaliatory discharge cases. *Johnson v. Kreiser's, Inc.*, 433 N.W.2d 225, 227-28 (S.D. 1988). It exists in family-law cases involving a defense of inability to pay alimony. *Rousseau v. Gesinger*, 330 N.W.2d 522, 524 (S.D. 1983). It exists in workers compensation cases involving the odd-lot doctrine. *McClaflin v. John Morrell & Co.*, 2001 S.D. 86, ¶ 7, 631 N.W.2d 180, 183. And it exists in every civil case when a party seeking summary judgment

meets its initial burden, shifting the burden to the non-moving party to identify facts disputing the moving party's allegations. *Dakota Indus. v. Cabela's.com, Inc.*, 2009 S.D. 39, ¶ 14, 766 N.W.2d 510, 514.

Given this authority, there was nothing extraordinary or legally incorrect about the Commission's conclusions: (1) that Keystone met its burden of proof through the sworn certification 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." (YST App. at 64, ¶¶ 8-9.)

Yankton argues that the Commission's findings are contrary to ARSD 20:10:01:15.01, which says that the applicant "has the burden of going forward with presentation of evidence unless otherwise ordered by the commission." (YST Br. at 14.) The Commission's final decision does not indicate that it shifted the burden of production to the intervenors other than correctly concluding that because Keystone met its burden of proof, the intervenors failed to establish any reason why Keystone cannot continue to meet the permit conditions. (YST App. at 70, ¶ 10.) This argument favors form over substance.

Yankton's argument, that the burden of production could not have shifted because the Commission did not enter a written order, is overbroad. The Commission's conclusion of law, ¶ 10, is consistent with SDCL § 49-41B-27, which places the burden of proof on Keystone to certify that it continues to meet the permit conditions. As argued below, Keystone met its burden through its certification, Appendix B, and the direct testimony of its witnesses. For the

intervenors to prevail, they had to make a contrary showing, regardless of whether an order was entered.

South Dakota law is clear that an agency cannot adopt a rule that contravenes a statute. *Paul Nelson Farm v. SD Department of Revenue*, 2014 S.D. 31, ¶ 24, 847 N.W.2d 550, 558. SDCL § 49-41B-27 placed the burden of proof on Keystone, and that did not change. Case law on the burden of production establishes that the burden can shift based on the presentation of evidence. Based on Keystone's evidence, which the Commission found sufficient, the intervenors could prevail only by proving that Keystone's evidence should not be believed. The administrative rule cited by Yankton does not alter or restrict any of these points. The rule does not establish error in the process or the result.

4. The Commission's conclusion that Keystone was able to meet the prospective conditions in the 2010 permit was correct.

Yankton contends that the Commission established an improper standard in Conclusion of Law 9: "Keystone is *as able* today to meet the conditions as it was when the permit issued." (YST Br. at 29). Yankton argues that SDCL § 49-41B-27 requires Keystone to prove that it *continues* to meet the conditions, not that it was *able* to meet the conditions. (*Id.*) Yankton ignores that Conclusion 9 begins with the phrase "with respect to prospective conditions." (YST App. at 70, ¶ 9.) Conclusion 9, by its terms, applies to prospective conditions. The record and this briefing is replete with examples of conditions that are prospective in nature, meaning that they cannot be met or satisfied until sometime in the future. If those prospective conditions cannot be met until the future, it is impossible to

prove that they *continue to be met.* Yankton simply ignores the phrase "with respect to prospective conditions" and argues that the conclusion sets a new burden of proof.

In Finding of Fact 31 (*Id.* at 62, ¶ 31), the Commission identified forty-two conditions that are prospective in nature. Conclusion of Law 9 is nothing more than recognition that Keystone continues to work towards compliance with the prospective conditions and that nothing in the record demonstrated anything other than Keystone's ability to comply with those prospective conditions in the future. Yankton's parsing of Conclusion 9 as support for an argument that the Commission somehow approved Keystone's certification petition based on an incorrect standard ignores the reality of the record.

5. The Commission was correct in holding that it lacked jurisdiction to consider aboriginal land claims, claims based on treaty and usufructuary rights.

Even though the Keystone XL Pipeline nowhere crosses Indian Country, tribally-owned land, or land held in trust for any tribe, Yankton contends that it has historical interests in land along the route deserving Commission consideration. Yankton, interestingly, can assert no claim to land west of the Missouri River. In *Yankton Sioux Tribe v. United States,* 24 Ind. Cl. Comm. 208 (1970) the Indian Claims Commission decided that the Yankton Sioux aboriginal territory was entirely *east* of the Missouri River. The Keystone XL Pipeline route is entirely *west* of the river.

Even so, Yankton argues that the Commission has the authority to *consider* Indian usufructuary and aboriginal land claims in its certification

process. Yankton's argument misses the mark at several levels. First, Docket HP14-001 was a proceeding to determine whether Keystone could still construct the pipeline in compliance with the conditions imposed in the 2010 permit. It was not a retrial of the underlying permit proceeding, a notion that was thoroughly debunked in Commission proceedings and again on appeal.

Second, despite Yankton's contentions otherwise, the route of the pipeline is not an issue within the PUC's jurisdiction. SDCL § 49-41B-36 directs that SDCL Chapter 49-41B "shall not be construed as a delegation to the Public Utilities Commission of the authority to route a facility." The Commission recognized that direction in the 2010 decision and order, holding in Conclusion of Law 13 that it "lacks the authority (i) to compel the Applicant to select an alternative route or (ii) to base its decision . . . on whether the selected route is the route the Commission might itself select." (YST App. at 25-26, ¶ 13.) Even if the PUC could have rejected the 2009 permit application because it found fault with the route, given the limits of the certification statute, there is no basis for contending that the original permit conditions cannot be fulfilled based on a route approved by the PUC four years earlier.

Yankton contends that *Application of Nebraska Public Power Dist.*, 354 N.W.2d 713 (S.D. 1984) stands for the proposition that "the PUC [has] the authority to disapprove permit applications, <u>including the proposed route</u>." (YST Br. at 32.) The decision considered an application for a permit to construct the Mandan power line, which SDCL § 49-41B-2 (11) defines as *a trans-state transmission facility*. A pipeline is a *transmission facility*, defined by SDCL § 49-

41B-2.1, which is an entirely different creature. SDCL § 49-41B-36 forbids construing the Act as "a delegation to the Commission of the authority to route *a transmission facility*." The Act authorizes the PUC to route certain power lines, trans-state transmission facilities, but not pipelines, which are transmission facilities. *Application of Nebraska Public Power Dist.* is inapplicable because the Mandan power line and a pipeline are treated differently in the Act. It simply does not stand for what Yankton claims.

Yankton contends that aboriginal title is grounded in the idea that western South Dakota was occupied by Indian tribes before the United States asserted dominion in the 1800's and usufructuary rights are remnants of the abrogated Fort Laramie Treaties of 1851 and 1868. No court has ever declared that Yankton, or for that matter any other South Dakota tribe, has usufructuary rights or aboriginal title to South Dakota west of the Missouri River.

In *Tee-Hit-Ton Indians v. United States,* 348 U.S. 272 (1955), the Supreme Court considered so-called Indian or aboriginal title to lands over which the United States had taken dominion and control. Noting that aboriginal title is a concept grounded in Indian occupancy of land prior to the United States asserting dominion over the territory, the Court held that aboriginal title "is not a property right, but amounts to a right of occupancy which the sovereign grants . . . but which right . . . may be terminated and such lands fully disposed of by the sovereign itself." *Tee-Hit-Ton Indians,* 348 U.S. at 279 (citing *Johnson v. McIntosh,* 21 U.S. 543 (1823) and *Beecher v. Weatherby,* 95 U.S. 17 (1941)). Extinguishment of Indian title based on aboriginal possession is subject to the will

of the United States. "The power of Congress in that regard is supreme." *Id.* at 281. In *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 344 (7th Cir. 1983) the court held that "[t]he United States could extinguish aboriginal title at any time and by any means."

Usufructuary rights are defined in BLACK'S LAW DICTIONARY at 1778 (10th Ed. 2014) as "[a] right for a certain period to use and enjoy the fruits of another's property." Yankton asserts usufructuary rights granted by the Fort Laramie Treaty of 1851. The Fort Laramie Treaty of September 17, 1851, 11 Stat. 252, and the Treaty of April 29, 1868, 15 Stat. 635, defined the boundaries of the Sioux Nation's territory. The 1851 Treaty affirmed the signatory tribes the right to occupy all of South Dakota, but did not create a reservation. The 1868 Treaty shrank the 1851 treaty territory in South Dakota to an area west of the Missouri River and created the Great Sioux Reservation.

In the Act of March 2, 1889, ch. 405, 25 Stat. 888, Congress divided the Great Sioux Reservation into individual reservations. Per the Congressional act, each tribe gave up its interest in lands formerly part of the Great Sioux Reservation. The statute provides, at section 21, "That all the lands in the Great Sioux Reservation outside of the separate reservations herein described are hereby restored to the public domain." *See also Oglala Sioux Tribe v. United States*, 21 Cl. Ct. 176 (1990). Subsequent acts of Congress reduced the west river South

Dakota reservations to today's boundaries.[3] In *Lone Wolf v. Hitchcock,* 187 U.S. 553, 566 (1903) the Supreme Court held:

> The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians, it was never doubted that the power to abrogate existed in Congress.

Per *Tee-Hit-Ton, La Courte* and *Lone Wolf,* Congress had the legal right to enact statutes modifying the reservations and extinguishing tribal interests in ceded lands, whether the interests were aboriginal or usufructuary. Congress terminated aboriginal and usufructuary interests with respect to the lands outside the boundaries of the current west river South Dakota reservations in the Act of March 2, 1889. When Congress restored the lands outside of the reservations to the public domain, it obviously intended that all tribal interests, including aboriginal title and usufructuary rights be extinguished. See *Oregon Fish and Wildlife Dept. v Klamath Tribe,* 473 U.S. 753 (1983).

No one seriously contends the Public Utilities Commission is the forum to decide tribal aboriginal and usufructuary interests. The Commission is an agency with limited jurisdiction. This Court has held that "[t]he PUC is not a court, and cannot exercise purely judicial functions. Defining and interpreting the law is a

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[3] The various treaties and Congressional Acts resulting in west river modern reservation boundaries are described in *USA v. Sioux Nation of Indians, supra.* and *Montana v. United States,* 450 U.S. 544 (1981). See also *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977), *South Dakota v. Bourland,* 508 U.S. 679 (1993), and *Oglala Sioux Tribe v. United States,* 21 Cl. Ct. 176 (1990).

judicial function." *Petition of West River Electric*, 2004 S.D. 11, ¶ 25, 675 N.W.2d 222, 230.

The Indian Claims Commission decided in 1970 that Yankton's historical tribal territory was entirely east of the Missouri River. Yankton's contention that the Commission committed reversible error for not considering unrecognized and perhaps non-existent tribal land claims to west river South Dakota property ceded to the public domain more than a century ago is untenable. The route is outside of Yankton's traditional territory, the Commission does not have routing authority over pipelines, issues with the route were not raised in the 2009 permit proceedings, and they are not at issue in this certification proceeding.

6. The Yankton Sioux Tribe is not an "affected unit of local government."

Yankton contends that the Commission should have considered its views as a unit of local government affected by the pipeline proposal, citing SDCL § 49-41B-22(4), the statute that requires the Public Utilities Commission to consider, before issuing a pipeline permit, whether the pipeline will "unduly interfere with the development of the region with due consideration having been given the views of governing bodies of affected local units of government."[4] (YST Br. at 34-36.) Yankton does not differentiate between the original 2009 proceeding and this

[4] Yankton also argues that Condition 34 of the 2010 permit requires consultation with the Tribe. (YST Br. at 34). Condition 34, by its terms applies only to the Emergency Response Plan and Integrity Management Plan, and then only with respect to determining the location of high consequence areas. Condition 34 is prospective in nature, directing that local inquiry be made "[p]rior to commencing operation." Obviously operation is distant, given the pipeline has yet to be constructed. Even so, in Finding of Fact 55 in this certification proceeding, the Commission found that Keystone had appropriately "sought out local knowledge" with respect to high consequence areas. (YST App. at 62, ¶ 34.)

2015 certification proceeding, or note that SDCL § 49-41B-22(4) applies to the original permit proceedings, instead somehow contending that Keystone had an obligation to consult with Yankton as part of the *certification proceedings*.

First, whether Yankton even qualifies geographically as "affected" is questionable. Yankton is headquartered at Marty in Charles Mix County, east of the Missouri River. The entire Yankton Sioux Reservation is east of the river. The closest point on the Reservation to the right of way is more than 45 miles and on the west side of the Missouri River. No Yankton land is crossed by the pipeline or is even close to the proposed route. It is hard to imagine that the Legislature intended the Commission consider the views of Yankton on orderly development of a region on the other side of the Missouri, 45 miles from the reservation.

In its original October 2014 application to be a party to the certification proceedings, Yankton describes itself as a "sovereign government." (Administrative Record at 320-323.) Throughout the proceedings it referred to itself as a "sovereign nation." Indian tribes are "'domestic dependent nations'" that exercise inherent sovereign authority. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.,* 498 U.S. 505, 509 (1991) (quoting *Cherokee Nation v. Georgia,* 30 U.S. 1 (1831)). As dependent nations, Indian tribes are subject to plenary control by Congress, *United States v. Lara,* 541 U.S. 193, 200 (2004), but remain "separate sovereigns pre-existing the Constitution." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56 (1978). Under the circumstances, it is hard to envision Yankton now claiming to be a "unit of local government."

Yankton clearly does not view itself as a political subdivision of the state, which is the common understanding of local government. *See, e.g., Pennington County v. State*, 2002 S.D. 31, ¶ 10, 641 N.W.2d 127, 130 ("The states have created local government entities, such as counties, townships and cities to do the states' work at the local level. These subordinate arms of the state have only the authority specifically given by the state legislature."). Yankton's argument that it is an affected "local government," despite being 45 miles and a county-and-a-half distant from the closest point on the pipeline and despite contending it is a sovereign nation, is clearly inconsistent with the intent of the Act and South Dakota case law defining local governments.

Every tribe that was a party to the certification proceedings, including Yankton, adopted resolutions opposing the Keystone project. Multiple witnesses testified that the tribes in South Dakota passed resolutions opposing the Project, and that Keystone representatives were not welcome on tribal land. (Tr. at 1745-46, 1873, 2084, 1096-97, 2104-05.) Faith Spotted Eagle testified the Yankton Sioux Tribe had adopted several resolutions opposed to the Keystone XL Pipeline. (Tr. at 1873 and 1875.) In the face of resolutions banning Keystone personnel from being on the reservations and resolutions opposing the project, it is unlikely that even if meaningful contacts between Keystone and Yankton were required by the permit that the contacts would be of any value.

Finally, Yankton cites two principles of statutory construction for the proposition that the circuit court was wrong when it decided that the Tribe was not a unit of local government within the concept of SDCL § 49-41B-22(4).

(YST Br. at 35-36.) However, neither rule of construction overcomes the fact that Yankton simply is not politically or geographically a unit of local government within the meaning of the statute.

Conclusion

The Yankton Sioux Tribe does not challenge any of the Commission's findings as clearly erroneous. Its arguments about tribal rights -- whether based on treaties or aboriginal -- are not within the scope of the Commission's jurisdiction. Its remaining arguments about the burden of proof and the Commission's management of the proceedings do not prove an abuse of discretion or legal error. Keystone respectfully requests that the decision be affirmed.

Dated this ___ day of December, 2017.

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Certificate of Compliance

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 2010, Times New Roman (12 point) and contains 9,923 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues and certificate of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Dated this ___ day of December, 2017.

WOODS, FULLER, SHULTZ & SMITH P.C.

By

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Certificate of Service

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Appendix

Appendix

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE APPLICATION BY TRANSCANADA KEYSTONE PIPELINE, LP FOR A PERMIT UNDER THE SOUTH DAKOTA ENERGY CONVERSION AND TRANSMISSION FACILITIES ACT TO CONSTRUCT THE KEYSTONE XL PROJECT	:	DOCKET NUMBER HP _____
	:	CERTIFICATION

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City of Calgary)
) ss
Alberta, Canada)

TransCanada Keystone Pipeline, LP ("Keystone") hereby certifies that the conditions upon which the South Dakota Public Utilities Commission granted the facility permit in Docket HP09-001 for the Keystone XL hydrocarbon pipeline (the "Project") under the Energy Conversion and Transmission Facilities Act continue to be satisfied. The basis for this certification is set forth in the accompanying Petition for Order Accepting Certification under SDCL 49-41B-27. Keystone is in compliance with the conditions attached to the June 29, 2010 Amended Final Decision and Order in this docket, to the extent that those conditions have applicability in the current pre-construction phase of the Project. Keystone certifies that it will meet and comply with all of the applicable permit conditions during construction, operation, and maintenance of the Project.

Case Number: HP ____

STATUTORY DECLARATION

[redacted], of [redacted], in the Province of Alberta, Canada, do solemnly declare as follows:

[redacted]

And I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as is made under oath.

DECLARED before me at the City of CALGARY in the Province of Alberta, this 12th day of September, A.D. 20 14.

COREY GOULET

A Commissioner for Oaths/Notary Public

[redacted]

(PRINT OF STAMP NAME HERE)

(Must be legibly printed or stamped in legible printing if appointed under section 1 of the act)

MY APPOINTMENT EXPIRES

SHANNON R. ONOOK
A Notary Public in and for the Province of Alberta. My Commission expires at the pleasure of the Lieutenant Governor-in-Council

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE APPLICATION BY TRANSCANADA KEYSTONE PIPELINE, LP FOR A PERMIT UNDER THE SOUTH DAKOTA ENERGY CONVERSION AND TRANSMISSION FACILITIES ACT TO CONSTRUCT THE KEYSTONE XL PROJECT	:	DOCKET NUMBER HP ____ PETITION FOR ORDER ACCEPTING CERTIFICATION UNDER SDCL § 49-41B-27

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Petitioner TransCanada Keystone Pipeline, LP (Keystone) sought and obtained a permit from the South Dakota Public Utilities Commission (Commission) in 2010 to construct and operate the Keystone XL hydrocarbon pipeline project (Project) through western South Dakota. The Commission granted a final permit in Docket No. HP09-001 on June 29, 2010. More than four years have passed since that time. State law provides that permits are perpetual but if construction has not commenced within four years of issuance, the applicant must certify to the Commission, prior to commencing construction, that the Project continues to meet the conditions upon which the permit was issued (SDCL 49-41B-27). By this filing, Keystone makes the required certification and requests that the Commission issue an order accepting Keystone's certification and finding that the Project continues to meet the conditions upon which the permit was issued.

I.
BACKGROUND

On March 12, 2009, Keystone filed an application in Docket HP 09-001 seeking a permit to construct and operate the Project in South Dakota. A hearing was held before the Commission from November 2-4, 2009. Keystone, Commission staff, and Dakota Rural Action were parties to the proceeding and participated in the hearing. The Commission issued a Final Decision and Order dated March 12, 2010. The Commission issued an Amended Final Decision and Order dated June 29, 2010, to which 50 conditions are attached.

As stated in the Amended Final Decision and Order, the Project originally was proposed to be developed in three segments: the Steele City Segment from Hardisty, Alberta, to Steele City, Nebraska; the Gulf Coast Segment from Cushing, Oklahoma, to Liberty County, Texas; and the Houston Lateral Segment from Liberty County, Texas to refinery markets near Houston, Texas. The Project was conceived to transport incremental crude oil production from the Western Canadian Sedimentary Basin to refineries and markets in the United States. Construction of the Project was proposed to begin in May 2011 and to be completed in 2012.

The Project, as proposed, has been delayed. A Presidential Permit required by Executive Order 11423 of August 16, 1968, and Executive Order 13337 of April 30, 2004, allowing the pipeline to cross the border between Canada and the United States, is still under review before the United States Department of State (DOS), Keystone submitted a Presidential Permit application to the DOS on September 19, 2008. After that application was denied without prejudice due to the Administration's inability to complete its review by a Congressionally imposed deadline, Keystone submitted a revised application on May 4, 2012. Drawing upon an

extensive public record and multiple draft and final Environmental Impact Statements, DOS issued a Final Supplemental Environmental Impact Statement (Final SEIS) on January 31, 2014.[1] In the Final SEIS, the DOS concluded, among other things, that:

- Keystone has long-term commitments to ship both Canadian and Bakken oil to Gulf Coast refineries, production of Canadian and Bakken oil is projected to increase, and there is existing demand by Gulf Coast area refiners for stable sources of crude oil. (Final SEIS §§ 1.3.1, 1.4.)

- The analyses of potential impacts associated with construction and normal operation of the pipeline "suggest that significant impacts to most resources are not expected along the proposed Project route" assuming that the Project complies with applicable laws, regulations, and permit conditions. (Final SEIS § 4.16.)

- Due to market developments, the transportation of Canadian crude by rail is already occurring in substantial volumes (an estimated 180,000 bpd), with a greater risk of leaks and spills, as well as injuries and fatalities, than if the oil were transported by pipeline. (Final EIS, §§ E.S. 3.1, E.S.5.4.3.)

On April 18, 2014, the Administration announced an indefinite delay in the current Presidential Permit review process, referencing on-going litigation related to the approval of a revised pipeline route in Nebraska.[2]

During the pendency of the current Presidential Permit application, Keystone proceeded with the Gulf Coast Segment as a stand-alone project based on its independent utility. Construction is complete and that pipeline from Cushing, OK to Liberty County, Texas was placed in service on January 22, 2014. Construction of the Houston Lateral segment is currently

[1] http://keystonepipeline-xl.state.gov/finalseis/index.htm.

[2] In 2012, the Nebraska Legislature approved legislation giving the Governor authority to approve a revised route for the pipeline in that State. After an extensive public review process led by the Department of Environmental Quality, the Governor approved Keystone's proposed re-route in Nebraska. In February 2014, a Nebraska lower court declared the legislation unconstitutional. That case is currently on appeal to the Nebraska Supreme Court and the effect of the lower court's decision is stayed pending the outcome of that appeal.

under way. The currently pending Presidential Permit application involves consideration of the former Steele City segment only (see Appendix A; map of the current proposed Project).

Since the Amended Final Decision and Order, the Bakken Marketlink Project has been made part of the Project. Bakken Marketlink includes a five-mile pipeline, pumps, meters, and storage tanks near Baker, Montana, to deliver light sweet crude oil from the Bakken formation in Montana and North Dakota for transportation through the Project. Bakken Marketlink became commercial after the Amended Final Decision and Order in this case, as the result of a successful open season that closed on November 19, 2010. Bakken Marketlink will deliver up to 100,000 bpd of domestically-produced crude oil into the Keystone XL Pipeline. Approximately 700,000 bpd of Bakken formation production is currently being shipped by rail. Bakken Marketlink may relieve the need for some of that rail transportation while providing improved ratability and lower transportation costs for American producers.

The material aspects of the proposed construction and operation of the Project in South Dakota remain essentially unchanged since the Commission granted its approval in 2010. The Project will extend 315 miles, use 36-inch nominal diameter pipe made of high-strength steel, and be protected by an external fusion bonded epoxy coating and cathodic protection by impressed current. The route corridor through South Dakota is largely unchanged from the route analyzed by the Commission as part of the permitting process.[3] The pipeline will have batching capabilities and will be able to transport products ranging from light crude oil to heavy crude oil.

[3] Keystone has implemented minor route variations designed to accommodate landowner concerns and improve constructability. As required by Condition No. 6 of the Amended Final Decision and Order, any material route changes will be provided to the Commission for review prior to construction.

Since the Amended Final Decision and Order, Keystone has filed seventeen quarterly reports with the Commission as required by Condition No. 8 of the Amended Final Decision and Order. Each report is submitted by Keystone's public liaison officer and addresses the status of land acquisition, construction, permitting, and other items. The most recent quarterly report was submitted on July 29, 2014, and a copy of this report is attached hereto as Appendix B.

II.
THE PROJECT CONTINUES TO MEET THE CONDITIONS UPON WHICH THE PERMIT WAS ISSUED

Accompanying this petition is a Certification, signed by the President of the Keystone Pipeline business unit, attesting that: (i) the conditions upon which the Commission issued the facility permit in this docket continue to be satisfied; (ii) Keystone is in compliance with the conditions attached to the June 29, 2010 order, to the extent that those conditions have applicability in the current pre-construction phase of the Project; and (iii) Keystone will meet and comply with all of the applicable permit conditions during construction, operation, and maintenance of the Project. Compliance with those conditions is further reflected in Keystone's July 29, 2014 Quarterly Report (Appendix B). Thus, Keystone has satisfied the statutory requirement to certify that the Project continues to meet the conditions upon which the Commission's approval was issued.

In addition, Keystone submits that the circumstances and factual underpinnings of the Project that led the Commission to issue the facility permit remain valid. The factual findings underlying the Commission's decision are set forth in the June 29, 2010 Amended Final Decision and Order. In support of this petition, Appendix C hereto presents those findings of fact from the

Commission's Amended Final Decision and Order that have changed since 2010 and describes the nature of those changes. As Appendix C makes clear, to the extent that there have been changes in the underlying facts, those changes are either neutral or positive to the Commission's concerns. In sum, the need, impacts, efficacy, and safety of the Project have not changed since the Amended Final Decision and Order.

III.
CONCLUSION

The attached Certification, together with this petition and the supporting appendices, provides the necessary basis for the Commission to find that the Project continues to meet the conditions upon which the June 2010 permit was issued. Accordingly, Keystone respectfully requests that the Commission accept its certification under SDCL § 49-41B-27.

Dated this 15th day of September, 2014.

WOODS, FULLER, SHULTZ & SMITH P.C.

By _____

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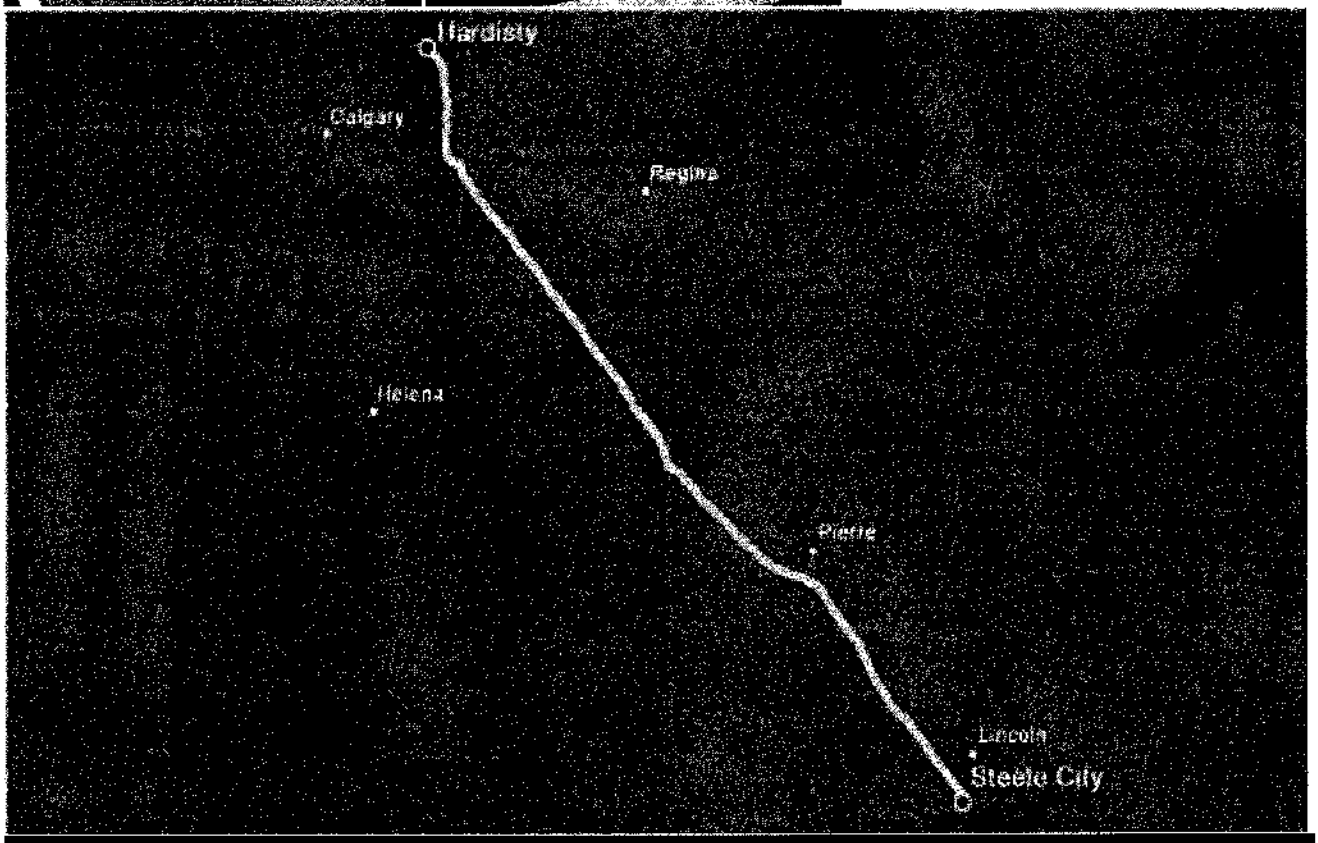

KEYSTONE XL PIPELINE PROJECT

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION QUARTERLY REPORT

For the Quarter Ending: **June 30, 2014**

APP. 009

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1.0 EXECUTIVE SUMMARY

TransCanada filed a new a Presidential Permit application with the Department of State on May 4, 2012 and on January 31, 2014 the Department of State issued a Final Supplemental Environmental Impact Statement (FSEIS). The project is currently in the National Interest Determination period of the Presidential Permit process. Construction activities have not taken place, or will take place, in South Dakota until the required permits and regulatory approvals are obtained for any proposed construction site. Project personnel are continuing to review the proposed pipeline route to identify any potential construction issues before construction. The construction plan for the portion of the Keystone XL Pipeline Project through South Dakota is dependent on the timing of final regulatory approvals and may include three or four spreads.

Keystone will implement the conditions of federal and state permits at the times specified by those permits. (See Appendix A for a table of the Summary of Consultations with the South Dakota Department of Environmental and Natural Resources.)

2.0 PROJECT DESCRIPTION

The project will include approximately 1,204 miles of 36 inch diameter pipeline from Hardisty, Alberta to Steel City, Nebraska, including approximately 313 miles in South Dakota.

3.0 LAND ACQUISITION STATUS (South Dakota)

3.1 Pipeline Right-of-Way Acquisition

The pipeline centerline crosses property owned by 301 landowners. Keystone has acquired easements from over 99% of the landowners. Easements have been acquired from the vast majority of all private landowners. Acquisition of tracts owned by the State of South Dakota is in process.

3.2 Pump Stations

The pump stations will be located in Harding, Meade, Haakon, Jones, and Tripp County, South Dakota. Keystone has purchased all seven pump station sites. The size of each pump station site is approximately 10 acres.

3.3 Pipe and Contractor Yards

Keystone has leased 11 pipe yards and six contractor yards in South Dakota. The leases were originally for 36 months, commencing on October 10, 2010. The leases have been extended an additional 24 months, expiring on October 1, 2015. The yards are in Harding, Butte, Meade, Haakon, Jones, Lyman and Tripp Counties. Each yard is approximately 30 acres in size.

3.4 Contractor Housing Camps

As outlined in the Keystone XL FSEIS, in Section 2.1.5.4 - Construction Camps, some remote areas in South Dakota do not have sufficient temporary housing near the proposed route to house all construction personnel working on spreads in those areas. In those remote areas, temporary work camps would be constructed to meet the housing needs of the construction workforce. Details of the construction camp configuration will depend on the final construction spread configuration and construction schedule, which is dependent on receipt of the final federal approval.

4.0 Non-Environmental Permitting Status (South Dakota)

4.1 County Roads

102 crossing permit applications have been filed for the pipeline to cross under all county road rights-of-way. Of the 102 applications filed, 101 have been acquired as of September 30, 2013.

4.2 State Roads

Thirteen (13) crossing permits and twenty-four (24) temporary approach permit applications have been filed with the state of South Dakota Department of Transportation (SD DOT) for the pipeline to cross under the state road rights-of-way. All crossing and temporary approach permits have been received from the SD DOT.

4.3 Railroads

Two crossing easement permits are being negotiated for the pipeline to cross under existing railroad rights-of-way. The South Dakota State Railroad application was received November 23, 2012. Canadian Pacific Railway was sold to the Genesee & Wyoming Railway; All permitting was transferred and is pending a signed license agreement.

4.4 Pump Stations

The special use permits required for the two Harding County pump stations were approved on September 28, 2010. Of the remaining five pump stations, four do not require a special use permit, leaving only one special use permit needed for the pump station in Jones County.

4.5 Contractor Camps

All construction camps will be permitted, constructed and operated consistent with applicable county, state, and federal regulations. (See Table 2.1-11 of the FSEIS for relevant regulations and permits required for the construction.)

5.0 ENVIRONMENTAL PERMITTING STATUS (South Dakota)

Keystone is awaiting or will be preparing and submitting all remaining applications for required federal and state environmental permits for work in South Dakota and will obtain the required permits in advance of pipeline construction activities.

6.0 FEDERAL PERMITS

TransCanada filed a Presidential Permit application with the U.S. Department of State on May 4, 2012 to authorize the international border crossing for the Keystone XL Project. On January 31, 2014 the US Department of State issued a Final Supplemental Environmental Impact Statement addressing Keystone's May 2012 Presidential Permit application. The project is currently in the National Interest Determination phase. The route through South Dakota is largely unchanged from the route analyzed for the SDPUC permit.

The former "Gulf Coast Segment" of the Keystone XL Project (a pipeline from Cushing Oklahoma to the Gulf Coast in Texas) was determined to have independent utility and was constructed as the stand-alone Gulf Coast pipeline separate from the Keystone XL Project.

Keystone XL pipeline will also file permit applications with the US Army Corps of Engineers for the necessary authorizations under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act.

6.1 Permit Compliance

Keystone will implement the conditions of federal and state permits at the times specified by those permits. (See Appendix A for a table of the Summary of Consultations with the South Dakota Department of Environmental and Natural Resources.)

7.0 CONSTRUCTION STATUS

No construction activities have taken place, or will take place, in South Dakota until the required permits and regulatory approvals are obtained for any proposed construction site. Project personnel are continuing to review the proposed pipeline route to identify any potential construction issues before construction.

8.0 ENVIRONMENTAL CONTROL ACTIVITIES

Environmental control activities, as required by applicable permit conditions, will be implemented when construction activities start in South Dakota.

9.0 STATUS OF EMERGENCY RESPONSE AND INTEGRITY MANAGEMENT PLANS

9.1 Emergency Response Plan

Development of the Keystone Pipeline Project operational Emergency Response Plan for the U.S. is ongoing and will be submitted to Pipeline and Hazardous Materials Safety Administration (PHMSA) six months before pipeline in-service. New TransCanada-owned emergency response equipment trailers are planned for storage in South Dakota.

Through its public awareness program, TransCanada continues to provide various types of information related to Keystone emergency response and pipeline safety awareness.

9.2 Integrity Management Plan for High Consequence Areas

Development of the Integrity Management Plan for the high consequence areas is ongoing. Progress in identifying high consequence areas and creating their subsequent tactical plans is about 70% complete. These tactical plans will be included in the Emergency Response Plan. After further discussions and coordination with PHMSA, the Integrity Management Plan will be formally submitted to PHMSA.

10.0 OTHER COMPLIANCE MEASURES

See Appendix B for the status of implementation of South Dakota Public Utilities Commission (PUC) conditions.

APPENDIX A

Table 1: Recent Consultations with South Dakota Department of Environment and Natural Resources

Date of Contact	Agency / Individual	Purpose of Consultation	Results of Consultation	Follow-up Required
8-3-10	SD DENR Kelli Buscher, John Miller, Albert Spangler, Brian Walsh, Mike DeFea SDGFP Leslie Murphy, John Lott SD DAG Raymond Sowers, Bill Smith	Discuss both state and federal permitting for the Keystone XL Pipeline project in South Dakota as well as to review the current project status and schedule in South Dakota.	Laid out a blue print for State permitting.	Determine if a construction stormwater discharge permit is required for the camps as it is not required for pipeline related construction
10-23-12	SDGFP Silka Kempana, Travis Runia	Coordination with FWS, DOS, SD GFP regarding Keystone Sage Grouse Protection Plan and mitigation plans	Keystone will modify Sage Grouse Protection Plan to account for SD GFP additional input, conduct ambient noise studies and additional modeling, and revise mitigation plans for SD GFP review.	Updating Sage Grouse Protection Plan, mitigation plans and noise modeling
10-25-12	SD DENR Al Spangler	Verification of permit application process	Discussed water withdrawal and discharge permit application and format required	Keystone will prepare permit applications
12-3-12	SD DENR Ashley Brakke	Followed up with SD DENR with the submitted air permit applications for the contractor camps [for emergency generators].	DENR needs a notarized statement from the applicant saying these were the generators that would be used for emergency electric power. Ms. Brakke was about ½ way through with the applications and none yet required the permit.	Prepare statement for SD Camp Contractor(s) to sign, notarize and send to the DENR Air Quality representative when they are on board.
12-5-12	SD DENR Ashley Brakke	Followed up with SD DENR with the submitted air permit applications for the contractor camps [for emergency generators].	DENR stated that they were OK with the notarized letter not being submitted until the camp contractor had been identified and on board.	Prepare statement for SD Camp Contractor(s) to sign, notarize and send to the DENR Air Quality representative when they are on board.

Date of Contact	Agency / Individual	Purpose of Consultation	Results of Consultation	Follow-up Required
4-10-13	SD DENR Al Spangler	Confirm/discuss whether there would be any issues associated with hydrotest water obtained in SD being used to test pipe in Nebraska as long as the water was pushed back and released in SD near the location where the water was withdrawn.	Al Spangler confirmed that he did not see any issue with this approach. He would double-check with the water people and confirm.	Keystone will follow up with SD DENR on the feasibility of using SD test water in NE.
4-15-13	SD GFP Paul Coughlin	Discuss the potential for water withdrawal from Lake Gardner, which is a SD Game Protection Area.	SD GFP was receptive to the potential water withdrawal from Lake Gardner. SD GFP requested a formal written request.	Keystone will prepare a formal written request for the withdrawal of water from Lake Gardner
5-7-13	SD DENR Genny McMat, Marc Rush SDGFP Leslie Murphy, Gene Galinat, John Lott	Discuss the feasibility of the Keystone utilizing Lake Gardner as a source for hydrostatic test water and dust control water	SDGFP conditionally approved of the water withdrawal from Lake Gardner as long as there was adequate water present. SD GFP also stated that they would have to determine of there would be any other conditions that would need to be met to allow for the water withdrawal.	Follow-up with SDGFP on their progress developing a list of conditions that would permit the use of water from Lake Gardner for the proposed use [no further conditions were proposed] Work with SD GFP to fund restoration or conservation project in exchange for water use.
5-9-13	SDGFP Leslie Murphy	Emailed a pdf map of the proposed water withdrawal location for Lake Gardner	Provided the map following May 7, 2013 meeting	None
11-14-13	SD DENR William Marcouiller	Discuss the renewal process for the temporary discharge permit that had been issued to Keystone in April 2013.	SD DENR confirmed that the permit was good through December 31, 2015.	Keystone would need to renew the permit if discharge activities would occur after December 2015.
04-03-14	SD Natural Heritage Program Casey Heimerl	Request for most recent observation records for northern long –eared bat	Being processed	No
04-16-14	SD Natural Heritage Program Casey Heimerl	Request for most recent observation records for northern long –eared bat	Received via email: tabular and GIS (shapefiles) of the observation records of the northern long-eared bat for the counties that the Project crosses.	No

Date of Contact	Agency / Individual	Purpose of Consultation	Results of Consultation	Follow-up Required
05-28-14	SD Natural Heritage Program Casey Heimerl SD Game, Fish and Parks Tom Kirschenmann	Voluntary Informal Conference with US Fish and Wildlife Service to discuss the potential impacts to northern long-eared bat and red knot resulting from the Project. Both species are proposed for listing under the Endangered Species Act.	Keystone to revise habitat assessment report for the northern long-eared bat and red knot based on the comments and guidance provided during the meeting.	Keystone will submit a revised report to USFWS

APPENDIX B

Table 2: Status of Implementation of South Dakota PUC Conditions

NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
1	Keystone shall comply with all applicable laws and regulations in its construction and operation of the Project. These laws and regulations include, but are not necessarily limited to: the federal Hazardous Liquid Pipeline Safety Act of 1979 and Pipeline Safety Improvement Act of 2002, as amended by the Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006, and the various other pipeline safety statutes currently codified at 49 U .S.C. § 601 01 et seq. (collectively, the "PSA"); the regulations of the United States Department of Transportation implementing the PSA, particularly 49 C.F.R Parts 194 and 195; temporary permits for use of public water for construction, testing or drilling purposes, SDCL 46-5-40.1 and ARSD 74:02:01 :32 through 74:02:01 :34.02 and temporary discharges to waters of the state, SDCL 34A-2-36 and ARSD Chapters 74:52:01 through 74:52:11, specifically, ARSD § 74:52:02:46 and the General Permit issued thereunder covering temporary discharges of water from construction dewatering and hydrostatic testing.	Construction of the project has not been initiated. Keystone will comply with all applicable laws and regulations during construction and operation of the Project.
2	Keystone shall obtain and shall thereafter comply with all applicable federal, state and local permits, including but not limited to: Presidential Permit from the United States Department of State, Executive Order 11423 of August 16, 1968 (33 Fed. Reg. 11741) and Executive 'Order 13337 of April 30, 2004 (69 Fed. Reg. 25229), for the construction, connection, operation, or maintenance, at the border of the United States, of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels to or from a foreign country; Clean Water Act § 404 and Rivers and Harbors Act Section 10 Permits; Special Permit if issued by the Pipeline and Hazardous Materials Safety Administration; Temporary Water Use Permit, General Permit for Temporary Discharges and federal, state and local highway and road encroachment permits. Any of such permits not previously filed with the Commission shall be filed with the Commission upon their issuance. To the extent that any condition, requirement or standard of the Presidential Permit, including the Final EIS Recommendations, or any other law, regulation or permit applicable to the portion of the pipeline in this state differs from the requirements of these Conditions, the more stringent shall apply.	Construction of the project has not been initiated. Keystone is in the process of obtaining all applicable permits from Federal, State and Local entities. Upon commencement of construction Keystone will follow all applicable laws and conditions related to these permits.

NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
3	Keystone shall comply with and implement the Recommendations set forth in the Final Environmental Impact Statement when issued by the United States Department of State pursuant to its Amended Department of State Notice of Intent To Prepare an Environmental Impact Statement and To Conduct Scoping Meetings and Notice of Floodplain and Wetland Involvement and To Initiate Consultation Under Section 106 of the National Historic Preservation Act for the Proposed TransCanada Keystone XL Pipeline; Notice of Intent--Rescheduled Public Scoping Meetings in South Dakota and extension of comment period (FR vol. 74, no. 54, Mar. 23, 2009). The Amended Notice and other Department of State and Project Documents are available on-line at: http://www.keystonepipeline-xl.state.gov/clientsite/keystonexl.nsf?Open.	The Department of State re-initiated its NEPA review upon receipt of Keystone's May 4, 2012 application for a Presidential Permit. The Department is in the process of preparing a Supplement to the August 2011 Final Environmental Impact Statement for the project. Construction of the project has not been initiated. Keystone will comply with and implement the Recommendations set forth in the Final Environmental Impact Statement, and the Supplemental Environmental Impact Statement, as reflected in the Record of Decision, when issued by the Department of State.
4	The permit granted by this Order shall not be transferable without the approval of the Commission pursuant to SDCL 49-418-29.	N/A at this time.
5	Keystone shall undertake and complete all of the actions that it and its affiliated entities committed to undertake and complete in its Application as amended, in its testimony and exhibits received in evidence at the hearing, and in its responses to data requests received in evidence at the hearing.	Construction of the project has not been initiated. When construction is initiated, Keystone will undertake the actions committed to during the SDPUC hearings.
6.a	The most recent and accurate depiction of the Project route and facility locations is found on the maps in Exhibit TC-14. The Application indicates in Section 4.2.3 that Keystone will continue to develop route adjustments throughout the pre-construction design phase. These route adjustments will accommodate environmental features identified during surveys, property-specific issues, and civil survey information. The Application states that Keystone will file new aerial route maps that incorporate any such route adjustments prior to construction. Ex TC-1.4.2.3, p. 27.	Keystone will file new aerial route maps reflecting route adjustments prior to construction.
6.b	Keystone shall notify the Commission and all affected landowners, utilities and local governmental units as soon as practicable if material deviations are proposed to the route.	Keystone will continue to work with all landowners, utilities, local government and other affected parties as the final route is being developed and will notify the Commission and all affected parties of any material deviations to the proposed route.
6.c	Keystone shall notify affected landowners of any change in the route on their land.	This is a continuing occurrence during engineering review. Keystone will continue to notify landowners of route changes on their land as well as inform them of associated activities, such as civil and environmental surveys.
6.d	At such time as Keystone has finalized the pre-construction route, Keystone shall file maps with the Commission depicting the final preconstruction route	Construction of the project has not been initiated. Keystone will finalize the route and submit to the Commission new maps depicting the final preconstruction route prior to construction.

NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
6.e	If material deviations are proposed from the route depicted on Exhibit TC-14 and accordingly approved by this Order, Keystone shall advise the Commission and all affected landowners, utilities and local governmental units prior to implementing such changes and afford the Commission the opportunity to review and approve such modifications.	Keystone has advised the Commission of all material route changes to date and has afforded the commission the opportunity to review and approve such modifications.
6.f	At the conclusion of construction, Keystone shall file detail maps with the Commission depicting the final as-built location of the Project facilities.	Keystone will submit final route maps to the Commission at the conclusion of construction.
7	Keystone shall provide a public liaison officer, approved by the Commission, to facilitate the exchange of information between Keystone, including its contractors, and landowners, local communities and residents and to promptly resolve complaints and problems that may develop for landowners, local communities and residents as a result of the Project. Keystone shall file with the Commission its proposed public liaison officer's credentials for approval by the Commission prior to the commencement of construction. After the public liaison officer has been approved by the Commission, the public liaison officer may not be removed by Keystone without the approval of the Commission. The public liaison officer shall be afforded immediate access to Keystone's on-site project manager, its executive project manager and to contractors' on-site managers and shall be available at all times to the Staff via mobile phone to respond to complaints and concerns communicated to the Staff by concerned landowners and others. Keystone shall also implement and keep an up-dated web site covering the planning and implementation of construction and commencement of operations in this state as an informational medium for the public. As soon as the Keystone's public liaison officer has been appointed and approved, Keystone shall provide contact information for him/her to all landowners crossed by the Project and to law enforcement agencies and local governments in the vicinity of the Project. The public liaison officer's contact information shall be provided to landowners in each subsequent written communication with them. If the Commission determines that the public liaison officer has not been adequately performing the duties set forth for the position in this Order, the Commission may, upon notice to Keystone and the public liaison officer, take action to remove the public liaison officer.	The Commission has approved Sarah Metcalf as the public liaison officer for the Keystone XL project. The liaison can be reached at: Mailing Address: South Dakota Pipeline Liaison Officer PO Box 491 Aberdeen, South Dakota 57402 Phone: (888) 375-1370 Email: smetcalf12@gmail.com Contact information for the South Dakota liaison was sent out in December 2010 to landowners. Notification to law enforcement agencies and local governments in the vicinity of the Project was completed in 1st quarter 2011 in conjunction with notice required by other conditions for these groups. The liaison continues to contact affected counties, townships and other groups as the permit process takes place. The TransCanada Keystone Pipeline website at: http://www.transcanada.com/keystone.html provides general information about planning for construction of the project. When construction commences, more detailed construction information will be posted.

NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
8	Until construction of the Project, including reclamation, is completed, Keystone shall submit quarterly progress reports to the Commission that summarize the status of land acquisition and route finalization, the status of construction, the status of environmental control activities, including permitting status and Emergency Response Plan and Integrity Management Plan development, the implementation of the other measures required by these conditions, and the overall percent of physical completion of the project and design changes of a substantive nature. Each report shall include a summary of consultations with the South Dakota Department of Environment and Natural Resources and other agencies concerning the issuance of permits. The reports shall list dates, names, and the results of each contact and the company's progress in implementing prescribed construction, land restoration, environmental protection, emergency response and integrity management regulations, plans and standards. The first report shall be due for the period ending June 30, 2010. The reports shall be filed within 31 days after the end of each quarterly period and shall continue until the project is fully operational.	Keystone will continue to submit quarterly reports until the construction and reclamation of the Keystone XL pipeline is complete and the pipeline is operational.
9	Until one year following completion of construction of the Project, including reclamation, Keystone's public liaison officer shall report quarterly to the Commission on the status of the Project from his/her independent vantage point. The report shall detail problems encountered and complaints received. For the period of three years following completion of construction, Keystone's public liaison officer shall report to the Commission annually regarding post-construction landowner and other complaints, the status of road repair and reconstruction and land and crop restoration and any problems or issues occurring during the course of the year	The public liaison officer will comply with this condition and is currently available to affected landowners and parties in the State. Quarterly reporting will begin with active construction activities.
10	Not later than six months prior to commencement of construction, Keystone shall commence a program of contacts with state, county and municipal emergency response, law enforcement and highway, road and other infrastructure management agencies serving the Project area in order to educate such agencies concerning the planned construction schedule and the measures that such agencies should begin taking to prepare for construction impacts and the commencement of project operations.	Keystone has commenced and will continue a program of contacts to inform and coordinate with county and municipal emergency response, law enforcement and highway, road and other infrastructure management agencies regarding planned construction and eventual operation of the Keystone XL Pipeline.
11	Keystone shall conduct a preconstruction conference prior to the commencement of construction to ensure that Keystone fully understands the conditions set forth in this order. At a minimum, the conference shall include a Keystone representative, Keystone's construction supervisor and Staff.	Prior to the start of construction a Keystone representative, the Keystone construction supervisor, and staff will arrange a preconstruction conference with the Commission to ensure a full understanding of the conditions set forth in this order.
12	Once known, Keystone shall inform the Commission of the date construction will commence, report to the Commission on the date construction is started and keep the Commission updated on construction activities as provided in Condition 8.	Keystone will inform the Commission accordingly during the preconstruction conference.
13	Except as otherwise provided in the conditions of this Order and Permit, Keystone shall comply with all mitigation measures set forth in the Construction Mitigation and Reclamation Plan (CMR Plan)	Construction of the project has not been initiated. Keystone will comply with the requirements set forth in the CMR Plan during construction.

NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
13.a	If modifications to the CMR Plan are made by Keystone as it refines its construction plans or are required by the Department of State in its Final EIS Record of Decision or the Presidential Permit, the CMR Plan as so modified shall be filed with the Commission and shall be complied with by Keystone.	Keystone will submit any modifications to the CMR Plan to the Commission and comply with any modifications to the CMR Plan.
14	Keystone shall incorporate environmental inspectors into its CMR Plan and obtain follow-up information reports from such inspections upon the completion of each construction spread to help ensure compliance with this Order and Permit and all other applicable permits, laws, and rules	Construction of the project has not been initiated. Keystone will utilize environmental inspectors and comply with this condition during the construction of the project.
15	Prior to construction, Keystone shall, in consultation with area NRCS staff, develop specific construction/reclamation units (Con/Rec Units) that are applicable to particular soil and subsoil classifications, land uses and environmental settings. The Con/Rec Units shall contain information of the sort described in response to Staff Data Request 3-25 found in Exhibit TC-16.	Keystone has completed the consultation with NRCS and has received the concurrence of the NRCS for Con/Rec Units to be utilized in South Dakota. Keystone will consult further with the NRCS should alterations to the Con/Rec Units be required.
15.a	In the development of the Con/Rec Units in areas where NRCS recommends, Keystone shall conduct analytical soil probing and/or soil boring and analysis in areas of particularly sensitive soils where reclamation potential is low. Records regarding this process shall be available to the Commission and to the specific land owner affected by such soils upon request	Keystone has completed analytical soil probing and/or soil boring and analysis in areas of particularly sensitive soils where reclamation potential is low. Records regarding the process are available to the Commission and to the specific land owner affected by such soil upon request.
15.b	Through development of the Con/Rec Units and consultation with NRCS, Keystone shall identify soils for which alternative handling methods are recommended.	Keystone has completed the analytical soil probing and/or boring in areas of sensitive soils following the NRCS recommendations.
15.b.1	Keystone shall thoroughly inform the landowner regarding the options applicable to their property, including their respective benefits and negatives, and implement whatever reasonable option for soil handling is selected by the landowner. Records regarding this process shall be available to the Commission upon request.	This is discussed with the landowners and itemized in the "Binding Agreement". These agreements are available to the Commission upon request.
15.c	Keystone shall, in consultation with NCRS, ensure that its construction planning and execution process, including Con/Rec Units, CMR Plan and its other construction documents and planning shall adequately identify and plan for areas susceptible to erosion, areas where sand dunes are present, areas with high concentrations of sodium bentonite, areas with sodic, saline and sodic-saline soils and any other areas with low reclamation potential	Keystone's construction planning and execution process consisted of consultation with the NRCS for identified areas susceptible to erosion, areas where sand dunes are present, areas with high concentration of sodium bentonite, areas with sodic, saline and sodic-saline soils and any other areas with low reclamation potential. The identified areas were addressed in the CON/REC Units, CMR Plan, and will be listed on construction alignment sheets.
15.d	The Con/Rec Units shall be available upon request to the Commission and affected landowners. Con/Rec Units may be evaluated by the Commission upon complaint or otherwise, regarding whether proper soil handling, damage mitigation or reclamation procedures are being followed.	Con/Rec Units will be available upon request to the Commission and affected landowners.

NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
15.e	Areas of specific concern or of low reclamation potential shall be recorded in a separate database. Action taken at such locations and the results thereof shall also be recorded and made available to the Commission and the affected property owner upon request.	Areas of specific concern or of low reclamation potential will be recorded in a separate database. Action taken at such locations and the results thereof will be recorded and made available to the Commission and the affected property owner upon request.
16	Keystone shall provide each landowner with an explanation regarding trenching and topsoil and subsoil/rock removal, segregation and restoration method options for his/her property consistent with the applicable Con/Rec Unit and shall follow the landowner's selected preference as documented on its written construction agreement with the landowner, as modified by any subsequent amendments, or by other written agreement(s).	This is discussed with the landowners and itemized in the "Binding Agreement".
16.a	Keystone shall separate and segregate topsoil from subsoil in agricultural areas, including grasslands and shelter belts, as provided in the CMR Plan and the applicable Con/Rec Unit.	Keystone will separate and segregate topsoil from subsoil in agricultural areas, including grasslands and shelter belts, as provided in the CMR Plan and the applicable Con/Rec Unit.
16.b	Keystone shall repair any damage to property that results from construction activities	Keystone will address this during or following construction activities.
16.c	Keystone shall restore all areas disturbed by construction to their preconstruction condition, including their original preconstruction topsoil, vegetation, elevation, and contour, or as close thereto as is feasible, except as is otherwise agreed to by the landowner.	Keystone will address this during or following construction activities and will restore disturbed areas as close as feasible to their preconstruction conditions or as otherwise agreed to by the landowner.
16.d	Except where practicably infeasible, final grading and topsoil replacement and installation of permanent erosion control structures shall be completed in non-residential areas within 20 days after backfilling the trench.	Keystone will address this during construction.
16.d.1	In the event that seasonal or other weather conditions, extenuating circumstances, or unforeseen developments beyond Keystone's control prevent compliance with this time frame, temporary erosion controls shall be maintained until conditions allow completion of cleanup and reclamation.	Keystone will address this during construction.
16.d.2	In the event Keystone cannot comply with the 20-day time frame as provided in this Condition, it shall give notice of such fact to all affected landowners, and such notice shall include an estimate of when such restoration is expected to be completed.	Keystone will address this during construction.
16.e	Keystone shall draft specific crop monitoring protocols for agricultural lands.	Keystone is in the process of developing specific crop monitoring protocols for agricultural lands. These protocols will be finalized prior to the start of construction and implemented following construction.

NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
16.e.1	If requested by the landowner, Keystone shall provide an independent crop monitor to conduct yield testing and/or such other measurements of productivity as he shall deem appropriate. The independent monitor shall be a qualified agronomist, rangeland specialist or otherwise qualified with respect to the species to be restored. The protocols shall be available to the Commission upon request and may be evaluated for adequacy in response to a complaint or otherwise.	If requested by the landowner, Keystone will provide an independent crop monitor and develop appropriate protocols, which will be available to the Commission upon request
16.f	Keystone shall work closely with landowners or land management agencies to determine a plan to control noxious weeds. Landowner permission shall be obtained before the application of herbicides.	Keystone has prepared a noxious weed control plan and provided a draft to the County Weed Boards for review and approval.
16.g	Keystone's adverse weather plan shall apply to improved hay land and pasture lands in addition to crop lands.	Keystone is in the process of developing an adverse weather plan and will include both improved hay lands and pasture lands in addition to crop lands.
16.h	The size, density and distribution of rock within the construction right-of-way following reclamation shall be similar to adjacent undisturbed areas.	Keystone will require the Contractor to remove excess rocks so that the size density and distribution of rock within the construction right-of-way is similar to the adjacent undisturbed areas.
16.h.1	Keystone shall treat rock that cannot be backfilled within or below the level of the natural rock profile as construction debris and remove it for disposal offsite except when the landowner agrees to the placement of the rock on his property. In such case, the rock shall be placed in accordance with the landowner's directions.	Keystone will require the Contractor to treat rock that cannot be backfilled within or below the level of the natural rock profile as construction debris and remove it for disposal offsite except when the landowner agrees to the placement of the rock on his property. In such case, the rock shall be placed in accordance with the landowner's directions and all Federal and State permits.
16.i	Keystone shall utilize the proposed trench line for its pipe stringing trucks where conditions allow and shall employ adequate measures to de-compact subsoil as provided in its CMR Plan. Topsoil shall be de-compacted if requested by the landowner.	Keystone will utilize the trench line for its pipe stringing trucks when site conditions allow and will employ adequate measures to de-compact subsoil as provided in its CMR Plan and in the specified CON/REC unit.
16.i.1	Topsoil shall be de-compacted if requested by the landowner.	Keystone will employ adequate measures to de-compact subsoil as provided in its CMR Plan and in the specified CON/REC unit, and will de-compact topsoil if requested by the landowner.
16.j	Keystone shall monitor and take appropriate mitigative actions as necessary to address salinity issues when dewatering the trench, and field conductivity and/or other appropriate constituent analyses shall be performed prior to disposal of trench water in areas where salinity may be expected.	Keystone will monitor and take appropriate actions as necessary to address salinity issues when dewatering the trench. Field conductivity and/or other appropriate constituent analyses will be performed prior to disposal of trench water in areas where salinity is expected.

NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
16.j.1	Keystone shall notify landowners prior to any discharge of saline water on their lands or of any spills of hazardous materials on their lands of one pint or more or of any lesser volume which is required by any federal, state, or local law or regulation or product license or label to be reported to a state or federal agency, manufacturer, or manufacturer's representative.	Keystone will notify landowners prior to any discharge of saline water on private lands or of any spills of hazardous materials on private lands of one pint or more or of any lesser volume which is required by any federal, state, or local law or regulation or product license or label to be reported.
16.k	Keystone shall install trench and slope breakers where necessary in accordance with the CMR Plan as augmented by Staff's recommendations in Post Hearing Commission Staff Brief, pp. 26-27	Keystone will install trench and slope breakers where necessary in accordance with the CMR Plan and SDPUC recommendations.
16.l	Keystone shall apply mulch when reasonably requested by landowners and also wherever necessary following seeding to stabilize the soil surface and to reduce wind and water erosion. Keystone shall follow the other recommendations regarding mulch application in Post Hearing Commission Staff Brief, p. 27.	Keystone will apply mulch in accordance with the CMR Plan and the specific CON/REC units to stabilize the soil surface and to reduce wind and water erosion. Keystone will apply mulch at the landowners request when the request is reasonable and in accordance with site reclamation requirements. Keystone will follow the other recommendations regarding mulch application in Post Hearing Commission Staff Brief, p. 27.
16.m	Keystone shall reseed all lands with comparable crops to be approved by landowner in landowner's reasonable discretion, or in pasture, hay or native species areas with comparable grass or forage crop seed or native species mix to be approved by landowner in landowner's reasonable discretion.	Keystone has developed seed mixtures in consultation with the NRCS.
16.m.1	Keystone shall actively monitor revegetation of all disturbed areas for at least two years.	Keystone will monitor revegetation on all disturbed areas for at least two years.
16.n	Keystone shall coordinate with landowners regarding his/her desires to properly protect cattle, shall implement such protective measures as are reasonably requested by the landowner and shall adequately compensate the landowner for any loss.	Keystone will coordinate with landowners and implement reasonably requested protective measures during construction and adequately compensate landowners for any loss.
16.o	Prior to commencing construction, Keystone shall file with the Commission a confidential list of property owners crossed by the pipeline and update this list if route changes during construction result in property owner changes	Prior to commencing construction, Keystone will submit to the Commission a confidential list of property owners crossed by the pipeline and will update this list if route changes result in property owner changes during construction.
16.p	Except in areas where fire suppression resources as provided in CMR Plan 2.16 are in close proximity, to minimize fire risk, Keystone shall, and shall cause its contractor to, equip each of its vehicles used in pre-construction or construction activities, including off-road vehicles, with a hand held fire extinguisher, portable compact shovel and communication device such as a cell phone, in areas with coverage, or a radio capable of achieving prompt communication with Keystone's fire suppression resources and emergency services.	Keystone will address compliance with this condition with Contractor prior to the commencement of construction on the right-of-way. Each vehicle that is subject to this condition will be equipped with fire extinguisher, portable compact shovel, and proper communications devices.

NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
17	Keystone shall cover open-bodied dump trucks carrying sand or soil while on paved roads and cover open-bodied dump trucks carrying gravel or other materials having the potential to be expelled onto other vehicles or persons while on all public roads.	Keystone will address this with the Contractor. Contractor vehicles carrying sand, soil, or gravel while traveling on paved public roads shall be covered to avoid the potential of expelling the material onto other vehicles or persons.
18	Keystone shall use its best efforts to not locate fuel storage facilities within 200 feet of private wells and 400 feet of municipal wells and shall minimize and exercise vigilance in refueling activities in areas within 200 feet of private wells and 400 feet of municipal wells.	Keystone will address this in the pre-construction planning. Fuel storage tanks and refueling activities shall follow the requirements set forth in the CMRP and Spill Prevention and Containment Plan.
19	If trees are to be removed that have commercial or other value to affected landowners, Keystone shall compensate the landowner for the fair market value of the trees to be cleared and/or allow the landowner the right to retain ownership of the felled trees.	Keystone will comply with this condition during the easement acquisition process.
19.a	Except as the landowner shall otherwise agree in writing, the width of the clear cuts through any windbreaks and shelterbelts shall be limited to 50 feet or less, and the width of clear cuts through extended lengths of wooded areas shall be limited to 85 feet or less. The environmental inspection in Condition 14 shall include forested lands.	Keystone will comply with this condition prior to or during construction.
20.	Keystone shall implement the following sediment control practices: a) Keystone shall use floating sediment curtains to maintain sediments within the construction right of way in open water bodies with no or low flow when the depth of non-flowing water exceeds the height of straw bales or silt fence installation. In such situations the floating sediment curtains shall be installed as a substitute for straw bales or silt fence along the edge or edges of each side of the construction right-of-way that is underwater at a depth greater than the top of a straw bale or silt fence as portrayed in Keystone's construction Detail #11 included in the CMR Plan. b) Keystone shall install sediment barriers in the vicinity of delineated wetlands and water bodies as outlined in the CMR Plan regardless of the presence of flowing or standing water at the time of construction. c) The Applicant should consult with South Dakota Game, Fish and Parks (SDGFP) to avoid construction near water bodies during fish spawning periods in which in-stream construction activities should be avoided to limit impacts on specific fisheries, if any, with commercial or recreational importance.	Keystone will comply with parts (a) and (b) of this condition during construction. Keystone will consult with SDGFP regarding spawning periods. The current construction schedule will avoid impacts to streams during the spawning season.
21	Keystone shall develop frac-out plans specific to areas in South Dakota where horizontal directional drilling will occur. The plan shall be followed in the event of a frac-out.	Keystone has developed a draft frac-out plan and HDD plan in South Dakota. The plan will be finalized with the input from the Contractor. The plan will be followed in the event of a frac-out.

NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
21.a	If a frac-out event occurs, Keystone shall promptly file a report of the incident with the Commission. Keystone shall also, after execution of the plan, provide a follow-up report to the Commission regarding the results of the occurrence and any lingering concerns.	Keystone will comply with this section in the event of a frac-out.
22.	Keystone shall comply with the following conditions regarding construction across or near wetlands, water bodies and riparian areas: a) Unless a wetland is actively cultivated or rotated cropland or unless site specific conditions require utilization of Keystone's proposed 85 foot width and the landowner has agreed to such greater width, the width of the construction right-of-way shall be limited to 75 feet in non-cultivated wetlands unless a different width is approved or required by the United States Army Corps of Engineers. b) Unless a wetland is actively cultivated or rotated cropland, extra work areas shall be located at least 50 feet away from wetland boundaries except where site-specific conditions render a 50-foot setback infeasible. Extra work areas near water bodies shall be located at least 50 feet from the water's edge, except where the adjacent upland consists of actively cultivated or rotated cropland or other disturbed land or where site-specific conditions render a 50-foot setback infeasible. Clearing of vegetation between extra work space areas and the water's edge shall be limited to the construction right-of-way. c) Water body crossing spoil, including upland spoil from crossings of streams up to 30 feet in width, shall be stored in the construction right of way at least 10 feet from the water's edge or in additional extra work areas and only on a temporary basis. d) Temporary in-stream spoil storage in streams greater than 30 feet in width shall only be conducted in conformity with any required federal permit(s) and any applicable federal or state statutes, rules and standards. e) Wetland and water body boundaries and buffers shall be marked and maintained until ground disturbing activities are complete. Keystone shall maintain 15-foot buffers where practicable, which for stream crossings shall be maintained except during the period of trenching, pipe laying and backfilling the crossing point. Buffers shall not be required in the case of non-flowing streams. f) Best management practices shall be implemented to prevent heavily silt-laden trench water from reaching any wetland or water body directly or indirectly. g) Erosion control fabric shall be used on water body banks immediately following final stream bank restoration unless riprap or other bank stabilization methods are utilized in accordance with federal or state permits. h) The use of timber and slash to support equipment crossings of wetlands shall be avoided.	Keystone will comply with all ROW widths, setbacks, and BMPS as detailed by the Commission. Keystone is identifying the appropriate locations for these conditions at or near wetlands, water bodies and riparian areas during the pre-construction process and will identify the ROW widths and setbacks on the construction drawings. BMPs will be installed as detailed in the CMRP.

NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
	i) Subject to Conditions 37 and 38, vegetation restoration and maintenance adjacent to water bodies shall be conducted in such manner to allow a riparian strip at least 25 feet wide as measured from the water body's mean high water mark to permanently re-vegetate with native plant species across the entire construction right-of way.	
23.	Keystone shall comply with the following conditions regarding road protection and bonding: a. Keystone shall coordinate road closures with state and local governments and emergency responders and shall acquire all necessary permits authorizing crossing and construction use of county and township roads. b) Keystone shall implement a regular program of road maintenance and repair through the active construction period to keep paved and gravel roads in an acceptable condition for residents and the general public. c) Prior to their use for construction, Keystone shall videotape those portions of all roads which will be utilized by construction equipment or transport vehicles in order to document the pre-construction condition of such roads. d) After construction, Keystone shall repair and restore, or compensate governmental entities for the repair and restoration of, any deterioration caused by construction traffic, such that the roads are returned to at least their preconstruction condition. e) Keystone shall use appropriate preventative measures as needed to prevent damage to paved roads and to remove excess soil or mud from such roadways. f) Pursuant to SDCL 49-418-38, Keystone shall obtain and file for approval by the Commission prior to construction in such year a bond in the amount of $15.6 million for the year in which construction is to commence and a second bond in the amount of $15.6 million for the ensuing year, including any additional period until construction and repair has been completed, to ensure that any damage beyond normal wear to public roads, highways, bridges or other related facilities will be adequately restored or compensated. Such bonds shall be issued in favor of, and for the benefit of, all such townships, counties, and other governmental entities whose property is crossed by the Project. Each bond shall remain in effect until released by the Commission, which release shall not be unreasonably denied following completion of the construction and repair period. Either at the contact meetings required by Condition 10 or by mail, Keystone shall give notice of the existence and amount of these bonds to all counties, townships and other governmental entities whose property is crossed by the Project.	During the pre-construction planning period Keystone will develop and implement videotaping of road conditions prior to construction activities. Keystone, Contractor, and County Representatives will be present for evaluation and determination of road conditions. Keystone will notify state and local governments and emergency responders to coordinate and implement road closures. All necessary permits authorizing crossing and construction use of county and township roads will be obtained. Keystone will file the necessary bond prior to construction.

NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
24	Although no residential property is expected to be encountered in connection with the Project, in the event that such properties are affected and due to the nature of residential property, Keystone shall implement the following protections in addition to those set forth in its CMR Plan in areas where the Project passes within 500 feet of a residence: a) To the extent feasible, Keystone shall coordinate construction work schedules with affected residential landowners prior to the start of construction in the area of the residences. b) Keystone shall maintain access to all residences at all times, except for periods when it is infeasible to do so or except as otherwise agreed between Keystone and the occupant. Such periods shall be restricted to the minimum duration possible and shall be coordinated with affected residential landowners and occupants, to the extent possible. c) Keystone shall install temporary safety fencing, when reasonably requested by the landowner or occupant, to control access and minimize hazards associated with an open trench and heavy equipment in a residential area. d) Keystone shall notify affected residents in advance of any scheduled disruption of utilities and limit the duration of such disruption. e) Keystone shall repair any damage to property that results from construction activities. f) Keystone shall separate topsoil from subsoil and restore all areas disturbed by construction to at least their preconstruction condition. g) Except where practicably infeasible, final grading and topsoil replacement, installation of permanent erosion control structures and repair of fencing and other structures shall be completed in residential areas within 10 days after backfilling the trench. In the event that seasonal or other weather conditions, extenuating circumstances, or unforeseen developments beyond Keystone's control prevent compliance with this time frame, temporary erosion controls and appropriate mitigative measures shall be maintained until conditions allow completion of cleanup and reclamation.	In the event that Keystone constructs within 500 feet of a residence, it will implement these protective measures and those set forth in the CMR Plan.
25	Construction must be suspended when weather conditions are such that construction activities will cause irreparable damage, unless adequate protection measures approved by the Commission are taken. At least two months prior to the start of construction in South Dakota, Keystone shall file with the Commission an adverse weather land protection plan containing appropriate adverse weather land protection measures, the conditions in which such measures may be appropriately used, and conditions in which no construction is appropriate, for approval of or modification by the Commission prior to the start of construction. The Commission shall make such plan available to impacted landowners who may provide comment on such plan to the Commission	Keystone is preparing this adverse weather land protection plan and will submit it to the Commission after the plan has been completed but at least 2 months prior to start of construction in South Dakota.

NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
26	Reclamation and clean-up along the right-of-way must be continuous and coordinated with ongoing construction.	Keystone will implement this requirement during construction of the project.
27	All pre-existing roads and lanes used during construction must be restored to at least their pre-construction condition that will accommodate their previous use, and areas used as temporary roads during construction must be restored to their original condition, except as otherwise requested or agreed to by the landowner or any governmental authority having jurisdiction over such roadway	Keystone is coordinating with county and state road authorities during the pre-construction planning phase. Pre-construction conditions will be documented and pre-existing roads will be restored to pre-construction condition following construction. Keystone will comply with the condition with respect to temporary roads after construction.
28	Keystone shall, prior to any construction, file with the Commission a list identifying private and new access roads that will be used or required during construction and file a description of methods used by Keystone to reclaim those access roads.	The list of private and new access roads that are being planned for use on the Project is being developed. This list of roads, including the reclamation methods that will be implemented will be provided to the Commission prior to construction.
29	Prior to construction, Keystone shall have in place a winterization plan and shall implement the plan if winter conditions prevent reclamation completion until spring. The plan shall be provided to affected landowners and, upon request, to the Commission.	Keystone will develop and submit to the Commission a winterization plan which addresses these factors.
30	Numerous Conditions of this Order, including but not limited to 16, 19, 24, 25, 26, 27 and 51 relate to construction and its effects upon affected landowners and their property. The Applicant may encounter physical conditions along the route during construction which makes compliance with certain of these Conditions infeasible. If, after providing a copy of this order, including the Conditions, to the landowner, the Applicant and landowner agree in writing to modifications of one or more requirements specified in these conditions, such as maximum clearances or right-of-way widths, Keystone may follow the alternative procedures and specifications agreed to between it and the landowner.	Keystone will comply with this condition and through negotiations with the landowner and any such modifications shall be agreed upon in writing. Note: Through the SDPUC liaison, Keystone has validated a typo in this condition with John Smith, the SDPUC General Counsel. The typo occurs in the first sentence and is a reference Condition 51, which does not exist. This should actually reference Condition 45.
31	Keystone shall construct and operate the pipeline in the manner described in the application and at the hearing, including in Keystone's exhibits, and in accordance with the conditions of this permit, the PHMSA Special Permit, if issued, and the conditions of this Order and the construction permit granted herein	Keystone will comply with this condition during construction and operation of the pipeline. Keystone XL has withdrawn its application to PHMSA for a Special Permit, subject to its right to apply for a Special Permit at a later time.
32	Keystone shall require compliance by its shippers with its crude oil specifications in order to minimize the potential for internal corrosion.	Keystone will require compliance by its shippers with its crude oil tariff specifications.

NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
33	Keystone's obligation for reclamation and maintenance of the right-of-way shall continue throughout the life of the pipeline.	Keystone will monitor the right-of-way conditions throughout the life of the pipeline.
33.a	In its surveillance and maintenance activities, Keystone shall, and shall cause its contractor to, equip each of its vehicles, including off-road vehicles, with a hand held fire extinguisher, portable compact shovel and communication device such as a cell phone, in areas with coverage, or a radio capable of achieving prompt communication with emergency services.	Keystone will require all Operators to maintain the required equipment in all vehicles on the right-of-way during surveillance and maintenance activities.
34	In accordance with 49 C.F.R. 195, Keystone shall continue to evaluate and perform assessment activities regarding high consequence areas.	Keystone will identify and assess high consequence areas in accordance with 49 C.F.R. 195.
34.a	Prior to Keystone commencing operation, all unusually sensitive areas as defined by 49 CFR 195.6 that may exist, whether currently marked on DOT's HCA maps or not, should be identified and added to the Emergency Response Plan and Integrity Management Plan	Keystone will identify HCA's as defined at 49 CFR 195.6 and add them to the Emergency Response Plan and Integrity Management Plan.
34.b	In its continuing assessment and evaluation of environmentally sensitive and high consequence areas, Keystone shall seek out and consider local knowledge, including the knowledge of the South Dakota Geological Survey, the Department of Game Fish and Parks and local landowners and governmental officials.	Keystone has conducted numerous consultations with South Dakota state agencies, local agencies and landowners and essentially concluded the assessment and evaluation of environmentally sensitive and high consequence areas and has concurrence from stakeholders related to construction and restoration plans within these areas. If new or different information on environmentally sensitive and high consequence areas becomes available, Keystone will assess that information.
35	The evidence in the record demonstrates that in some reaches of the Project in southern Tripp County, the High Plains Aquifer is present at or very near ground surface and is overlain by highly permeable sands permitting the uninhibited infiltration of contaminants. This aquifer serves as the water source for several domestic farm wells near the pipeline as well as public water supply system wells located at some distance and upgradient from the pipeline route. Keystone shall identify the High Plains Aquifer area in southern Tripp County as a hydrologically sensitive area in its Integrity Management and Emergency Response Plans. Keystone shall similarly treat any other similarly vulnerable and beneficially useful surficial aquifers of which it becomes aware during construction and continuing route evaluation	Keystone will identify the High Plains Aquifer area in southern Tripp County and any other similarly vulnerable and beneficially useful surficial aquifers as a hydrologically sensitive area in its Integrity Management and Emergency Response Plans.

NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
36	Prior to putting the Keystone Pipeline into operation, Keystone shall prepare, file with PHMSA and implement an emergency response plan as required under 49 CFR 194 and a manual of written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies as required under 49 CFR 195.402. Keystone shall also prepare and implement a written integrity management program in the manner and at such time as required under 49 CFR 195.452. At such time as Keystone files its Emergency Response Plan and Integrity Management Plan with PHMSA or any other state or federal agency, it shall also file such documents with the Commission. The Commission's confidential filing rules found at ARSD 20:10:01:41 may be invoked by Keystone with respect to such filings to the same extent as with all other filings at the Commission. If information is filed as "confidential," any person desiring access to such materials or the Staff or the Commission may invoke the procedures of ARSD 20:10:01 :41 through 20: 10:01 :43 to determine whether such information is entitled to confidential treatment and what protective provisions are appropriate for limited release of information found to be entitled to confidential treatment.	Keystone will file its Emergency Response Plan and Integrity Management Plan with the Commission upon filing with PHMSA and will invoke the Commission's confidential filing rules.
37	To facilitate periodic pipeline leak surveys during operation of the facilities in wetland areas, a corridor centered on the pipeline and up to 15 feet wide shall be maintained in an herbaceous state. Trees within 15 feet of the pipeline greater than 15 feet in height may be selectively cut and removed from the permanent right-of-way.	Keystone will maintain a corridor centered on the pipeline and up to 15 feet wide in an herbaceous state to facilitate periodic pipeline leak surveys during operation of the facilities in wetland areas.
38	To facilitate periodic pipeline leak surveys in riparian areas, a corridor centered on the pipeline and up to 10 feet wide shall be maintained in an herbaceous state.	Keystone will maintain a corridor centered on the pipeline and up to 10 feet wide in an herbaceous state to facilitate periodic pipeline leak surveys during operation of the facilities in riparian areas.
39	Except to the extent waived by the owner or lessee in writing or to the extent the noise levels already exceed such standard, the noise levels associated with Keystone's pump stations and other noise-producing facilities will not exceed the L 1 0=55dbA standard at the nearest occupied, existing residence, office, hotel/motel or non-industrial business not owned by Keystone. The point of measurement will be within 100 feet of the residence or business in the direction of the pump station or facility. Post-construction operational noise assessments will be completed by an independent third-party noise consultant, approved by the Commission, to show compliance with the noise level at each pump station or other noise-producing facility. The noise assessments will be performed in accordance with applicable American National Standards Institute standards. The results of the assessments will be filed with the Commission. In the event that the noise level exceeds the limit set forth in this condition at any pump station or other noise producing facility, Keystone shall promptly implement noise mitigation measures to bring the facility into compliance with the limits set forth in this condition and shall report to the Commission concerning the measures taken and the results of post-mitigation assessments demonstrating that the noise limits have been met.	Keystone will design pump stations and other noise-producing facilities so that noise will not exceed the L 1 0 = 55dbA standard at the nearest occupied receptor (existing residence, office, hotel/motel or non-industrial business not owned by Keystone). Keystone will utilize a third-party noise consultant, approved by the Commission, to show post-construction compliance with the noise level at each pump station or other noise-producing facility and will file the assessments with the Commission.

NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
40	At the request of any landowner or public water supply system that offers to provide the necessary access to Keystone over his/her property or easement(s) to perform the necessary work, Keystone shall replace at no cost to such landowner or public water supply system, any polyethylene water piping located within 500 feet of the Project with piping that is resistant to permeation by BTEX.	Keystone will replace polyethylene water piping located within 500 feet of the Project with piping that is resistant to permeation by BTEX when requested and provided access by the landowner or a public water supply system.
40.a	Keystone shall publish a notice in each newspaper of general circulation in each county through which the Project will be constructed advising landowners and public water supply systems of this condition.	Keystone will publish a notice in each newspaper of general circulation in each county through which the Project will be constructed advising landowners and public water supply systems of condition 40.
41	Keystone shall follow all protection and mitigation efforts as identified by the U.S. Fish and Wildlife Service ("USFWS") and SDGFP	Keystone is currently involved in consultation with the USFWS and SDGFP and will follow protection and mitigation efforts agreed to during consultation with the agencies.
41.a	Keystone shall identify all greater prairie chicken and greater sage and sharp-tailed grouse leks within the buffer distances from the construction right of way set forth for the species in the FE IS and Biological Assessment (BA) prepared by DOS and USFWS	Keystone is involved in consultations with SDGFP to identify greater prairie chicken and greater sage and sharp-tailed grouse leks and to develop construction mitigation plans for each species.
41.b	In accordance with commitments in the FEIS and BA, Keystone shall avoid or restrict construction activities as specified by USFWS within such buffer zones between March 1 and June 15 and for other species as specified by USFW Sand SDGFP.	Keystone will address this requirement during pre-construction planning efforts.
42	Keystone shall keep a record of drain tile system information throughout planning and construction, including pre-construction location of drain tiles. Location information shall be collected using a sub-meter accuracy global positioning system where available or, where not available by accurately documenting the pipeline station numbers of each exposed drain tile.	Records will be kept of drain tile system information.
42.a	Keystone shall maintain the drain tile location information and tile specifications and incorporate it into its Emergency Response and Integrity Management Plans where drains might be expected to serve as contaminant conduits in the event of a release.	Keystone will maintain the drain tile location information and tile specifications and incorporate it into its Emergency Response and Integrity Management Plans where drains might be expected to serve as contaminant conduits in the event of a release.
42.b	If drain tile relocation is necessary, the applicant shall work directly with landowner to determine proper location.	Keystone will work directly with landowner to determine proper location should drain tile relocation be necessary.

NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
42.c	The location of permanent drain tiles shall be noted on as-built maps. Qualified drain tile contractors shall be employed to repair drain tiles.	Keystone will identify the location of permanent drain tiles on as-built maps. Keystone will employ qualified drain tile contractors to repair drain tiles impacted by the project.
43	Keystone shall follow the "Unanticipated Discoveries Plan," as reviewed by the State Historical Preservation Office ("SHPO") and approved by the DOS and provide it to the Commission upon request. Ex TC-1.6.4, pp. 94-96; Ex S-3.	Keystone will comply with the "Unanticipated Discoveries Plan," as reviewed by the State Historical Preservation Office ("SHPO") and approved by the DOS and will provide the plan to the Commission upon request.
43.a	If during construction, Keystone or its agents discover what may be an archaeological resource, cultural resource, historical resource or gravesite, Keystone or its contractors or agents shall immediately cease work at that portion of the site and notify the DOS, the affected landowner(s) and the SHPO.	Keystone will comply with this condition during construction.
43.b	If the DOS and SHPO determine that a significant resource is present, Keystone shall develop a plan that is approved by the DOS and commenting/signatory parties to the Programmatic Agreement to salvage avoid or protect the archaeological resource.	Keystone will develop a treatment plan that is approved by the DOS and commenting/signatory parties to the Programmatic Agreement to salvage, avoid, or protect an archaeological resource that DOS and SHPO determine as significant.
43.c	If such a plan will require a materially different route than that approved by the Commission, Keystone shall obtain Commission and landowner approval for the new route before proceeding with any further construction.	Keystone will obtain approval from the Commission and affected landowner(s) for any materially different route that may be required as a result of unanticipated discoveries prior to further construction.
43.d	Keystone shall be responsible for any costs that the landowner is legally obligated to incur as a consequence of the disturbance of a protected cultural resource as a result of Keystone's construction or maintenance activities.	Keystone will be responsible for costs that the landowner is legally obligated to incur as a consequence of the disturbance of a protected cultural resource as a result of Keystone's construction or maintenance activities.
44.a	Prior to commencing construction, Keystone shall conduct a literature review and records search, and consult with the BLM and Museum of Geology at the S.D. School of Mines and Technology ("SDSMT") to identify known fossil sites along the pipeline route and identify locations of surface exposures of paleontologically sensitive rock formations using the BLM's Potential Fossil Yield Classification system.	Keystone is currently completing consultations with the BLM and Museum of Geology at the S.D. School of Mines and Technology ("SDSMT") to identify known fossil sites along the pipeline route and identify locations of surface exposures of paleontologically sensitive rock formations using the BLM's Potential Fossil Yield Classification system.
44.a.1	Any area where trenching will occur into the Hell Creek Formation shall be considered a high probability area.	Keystone has identified locations along the pipeline route where trenching will occur into the Hell Creek Formation and has identified these locations as areas of high probability to yield fossils.

NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
44.b	Keystone shall at its expense conduct a pre-construction field survey of each area identified by such review and consultation as a known site or high probability area within the construction ROW. Following BLM guidelines as modified by the provisions of Condition 44, including the use of BLM permitted paleontologists, areas with exposures of high sensitivity (PFYC Class 4) and very high sensitivity (PFYC Class 5) rock formations shall be subject to a 100% pedestrial field survey, while areas with exposures of moderately sensitive rock formations (PFYC Class 3) shall be spot-checked for occurrences of scientifically or economically significant surface fossils and evidence of subsurface fossils. Scientifically or economically significant surface fossils shall be avoided by the Project or mitigated by collecting them if avoidance is not feasible. Following BLM guidelines for the assessment and mitigation of paleontological resources, scientifically significant paleontological resources are defined as rare vertebrate fossils that are identifiable to taxon and element, and common vertebrate fossils that are identifiable to taxon and element and that have scientific research value; and scientifically noteworthy occurrences of invertebrate, plant and trace fossils. Fossil localities are defined as the geographic and stratigraphic locations at which fossils are found	Keystone has conducting pre-construction field surveys of each area identified as high probability to yield fossils within the construction ROW. Keystone is conducting pedestrial field surveys of 100% of areas with exposures of high sensitivity (PFYC Class 4) and very high sensitivity (PFYC Class 5) rock formations utilizing the BLM guidelines as modified by the provisions of Condition 44, including the use of BLM permitted paleontologists. Additionally, Keystone is spot-checking areas of moderately sensitive rock formations (PFYC Class 3). Keystone will avoid scientifically or economically significant surface fossils or will mitigate by collecting them if avoidance is not feasible.
44.c	Following the completion of field surveys, Keystone shall prepare and file with the Commission a paleontological resource mitigation plan. The mitigation plan shall specify monitoring locations, and include BLM permitted monitors and proper employee and contractor training to identify any paleontological resources discovered during construction and the procedures to be followed following such discovery. Paleontological monitoring will take place in areas within the construction ROW that are underlain by rock formations with high sensitivity (PFYC Class 4) and very high sensitivity (PFYC Class 5), and in areas underlain by rock formations with moderate sensitivity (PFYC Class 3) where significant fossils were identified during field surveys.	Keystone will prepare and file with the Commission a paleontological resource mitigation plan upon completion of survey.

NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
44.d	If during construction, Keystone or its agents discover what may be a paleontological resource of economic significance, or of scientific significance, as defined in subparagraph (b) above, Keystone or its contractors or agents shall immediately cease work at that portion of the site and, if on private land, notify the affected landowner(s). Upon such a discovery, Keystone's paleontological monitor will evaluate whether the discovery is of economic significance, or of scientific significance as defined in subparagraph (b) above. If an economically or scientifically significant paleontological resource is discovered on state land, Keystone will notify SDSMT and if on federal land, Keystone will notify the BLM or other federal agency. In no case shall Keystone return any excavated fossils to the trench. If a qualified and BLM-permitted paleontologist, in consultation with the landowner, BLM, or SDSMT determines that an economically or scientifically significant paleontological resource is present, Keystone shall develop a plan that is reasonably acceptable to the landowner(s), BLM, or SDSMT, as applicable, to accommodate the salvage or avoidance of the paleontological resource to protect or mitigate damage to the resource. The responsibility for conducting such measures and paying the costs associated with such measures, whether on private, state or federal land, shall be borne by Keystone to the same extent that such responsibility and costs would be required to borne by Keystone on BLM managed lands pursuant to BLM regulations and guidelines, including the BLM Guidelines for Assessment and Mitigation of Potential Impacts to Paleontological Resources, except to the extent factually inappropriate to the situation in the case of private land (e.g. museum curation costs would not be paid by Keystone in situations where possession of the recovered fossil(s) was turned over to the landowner as opposed to curation for the public). If such a plan will require a materially different route than that approved by the Commission, Keystone shall obtain Commission approval for the new route before proceeding with any further construction. Keystone shall, upon discovery and salvage of paleontological resources either during pre-construction surveys or construction and monitoring on private land, return any fossils in its possession to the landowner of record of the land on which the fossil is found. If on state land, the fossils and all associated data and documentation will be transferred to the SDSM; if on federal land, to the BLM.	Keystone will comply with this condition during construction.
44.e	To the extent that Keystone or its contractors or agents have control over access to such information, Keystone shall, and shall require its contractors and agents to, treat the locations of sensitive and valuable resources as confidential and limit public access to this information.	To the extent that Keystone or its contractors or agents have control over access to such information, Keystone will, and will require its contractors and agents to treat the locations of sensitive and valuable resources as confidential and limit public access to this information.

NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
45	Keystone shall repair or replace all property removed or damaged during all phases of construction and operation of the proposed transmission facility, including but not limited to, all fences, gates and utility, water supply, irrigation or drainage systems.	Keystone will repair or replace all property removed or damaged during all phases of construction and operation of the proposed transmission facility.
45.a	Keystone shall compensate the owners for damages or losses that cannot be fully remedied by repair or replacement, such as lost productivity and crop and livestock losses or loss of value to a paleontological resource damaged by construction or other activities.	Keystone will compensate the owners for damages or losses that result from construction and operation of the proposed transmission facility and cannot be fully remedied by repair or replacement.
46	In the event that a person's well is contaminated as a result of construction or pipeline operation, Keystone shall pay all costs associated with finding and providing a permanent water supply that is at least of similar quality and quantity; and any other related damages, including but not limited to any consequences, medical or otherwise, related to water contamination.	Keystone will pay all costs associated with finding and providing a permanent water supply that is at least of similar quality and quantity and any other related damages related to water contamination in the event that a well is contaminated as a result of construction or pipeline operation.
47	Any damage that occurs as a result of soil disturbance on a persons' property shall be paid for by Keystone	Keystone will compensate for damage that occurs as a result of soil disturbance on a persons' property caused by construction and operation of the Project.
48	No person will be held responsible for a pipeline leak that occurs as a result of his/her normal farming practices over the top of or near the pipeline	Keystone will not hold any person responsible for a pipeline leak that occurs as a result of normal farming practices.
49	Keystone shall pay commercially reasonable costs and indemnify and hold the landowner harmless for any loss, damage, claim or action resulting from Keystone's use of the easement, including any resulting from any release of regulated substances or from abandonment of the facility, except to the extent such loss, damage claim or action results from the gross negligence or willful misconduct of the landowner or its agents.	Keystone will pay commercially reasonable costs and indemnify and hold the landowner harmless for any loss, damage, claim or action resulting from Keystone's use of the easement, including any resulting from any release of regulated substances or from abandonment of the facility, except to the extent such loss, damage claim or action results from the gross negligence or willful misconduct of the landowner or its agents.
50	The Commission's complaint process as set forth in ARSD 20:10:01 shall be available to landowners, other persons sustaining or threatened with damage or the consequences of Keystone's failure to abide by the conditions of this permit or otherwise having standing to obtain enforcement of the conditions of this Order and Permit.	The Commission's complaint process as set forth in ARSD 20:10:01 shall be available to landowners, other persons sustaining or threatened with damage or the consequences of Keystone's failure to abide by the conditions of this permit or otherwise having standing to obtain enforcement of the conditions of this Order and Permit.

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	The Project	
14	The purpose of the Project is to transport incremental crude oil production from the Western Canadian Sedimentary Basin ("WCSB") to meet growing demand by refineries and markets in the United States ("U.S."). This supply will serve to replace U.S. reliance on less stable and less reliable sources of offshore crude oil. Ex TC-1, 1.1, p. 1; Ex TC-1, 3.0 p. 23; Ex TC-1, 3.4 p. 24.	The purpose of the Project is to transport incremental crude oil production from the Western Canadian Sedimentary Basin ("WCSB") and domestic production from the Williston Basin area to meet demand by refineries and markets in the United States ("U.S."). This supply will serve to replace U.S. reliance on less stable and less reliable sources of offshore crude oil and support the growth of crude oil production in the U.S. (See updated Findings 24-29)
15	The Project will consist of three segments: the Steele City Segment, the Gulf Coast Segment, and the Houston Lateral. From north to south, the Steele City Segment extends from Hardisty, Alberta, Canada, southeast to Steele City, Nebraska. The Gulf Coast Segment extends from Cushing, Oklahoma south to Nederland, in Jefferson County, Texas. The Houston Lateral extends from the Gulf Coast Segment in Liberty County, Texas southwest to Moore Junction, Harris County, Texas. It will interconnect with the northern and southern termini of the previously approved 298-mile-long, 36-inch-diameter Keystone Cushing Extension segment of the Keystone Pipeline Project. Ex TC-1,1.2, p. 1; Initially, the pipeline would have a nominal capacity to transport 700,000 barrels per day ("bpd"). Keystone could add additional pumping capacity to expand the nominal capacity to 900,000 bpd. Ex TC-1, 2.1.2, p. 8.	The Project will consist of the Steele City Segment. From north to south, the Steele City Segment extends from Hardisty, Alberta, Canada, southeast to Steele City, Nebraska. It will interconnect with the previously approved and constructed 298-mile-long, 36-inch-diameter Keystone Cushing Extension segment of the Keystone Pipeline System allowing crude oil to be delivered to Gulf Coast Refineries. The pipeline would have a maximum capacity to transport 830,000 barrels per day.
16	The Project is an approximately 1,707 mile pipeline with about 1,380, miles in the United States. The South Dakota portion of the pipeline will be approximately 314 miles in length and will extend from the Montana border in Harding County to the Nebraska border in Tripp County. The Project is proposed to cross the South Dakota counties of Harding, Butte, Perkins, Meade, Pennington, Haakon, Jones, Lyman and Tripp. Ex TC-1, 1.2 and 2.1.1, pp. 1 and 8. Detailed route maps are presented in Ex TC-1, Exhibits A and C, as updated in Ex TC-14.	The Project is an approximately 1202 mile pipeline with about 876 miles in the United States. The South Dakota portion of the pipeline will be approximately 315 miles in length and will extend from the Montana border in Harding County to the Nebraska border in Tripp County. The Project is proposed to cross the South Dakota counties of Harding, Butte, Perkins, Meade, Pennington, Haakon, Jones, Lyman and Tripp.
17	Construction of the Project is proposed to commence in May of 2011 and be completed in 2012. Construction in South Dakota will be conducted in five spreads, generally proceeding in a north to south direction. The Applicant expects to place the Project in service in 2012. This in-service date is consistent with the requirements of the Applicant's shippers who have made the contractual commitments that underpin the viability and need for the project. Ex TC-1, 1.4, pp. 1 and 4; TR 26.	Construction of the Project is proposed to commence when all necessary permits are obtained. Construction in South Dakota will be conducted in three or four spreads, generally proceeding in a north to south direction. The Applicant expects to place the Project in service when construction is completed.
18	The pipeline in South Dakota will extend from milepost 282.5 to milepost 597, approximately 314 miles. The pipeline will have a 36-inch nominal diameter and be constructed using API 5L X70 or X80 high-strength steel. An external fusion bonded epoxy ("FBE") coating will be applied to the pipeline and all buried facilities to protect against corrosion. Cathodic protection will be provided by impressed current The pipeline will have batching capabilities and will be able to transport products ranging from light crude oil to heavy crude oil. Ex TC-1, 2.2, 2.2.1, 6.5.2, pp. 8-9, 97 -98; Ex TC-8, ¶ 26.	The pipeline in South Dakota will extend from milepost 285.6 to milepost 600.9, approximately 315 miles. The pipeline will have a 36-inch nominal diameter and be constructed using API 5L X70M high-strength steel. An external fusion bonded epoxy ("FBE") coating will be applied to the pipeline and all buried facilities to protect against corrosion. Cathodic protection will be provided by impressed current. The pipeline will have batching capabilities and will be able to transport products ranging from light crude oil to heavy crude oil.
19	The pipeline will operate at a maximum operating pressure of 1,440 psig. For location specific low elevation segments close to the discharge of pump stations, the maximum operating pressure will be 1,600 psig. Pipe associated with these segments of 1,600 psig MOP are excluded from the Special Permit application and will have a design factor of 0.72 and pipe wall thickness of 0.572 inch (X-70) or 0.500 inch (X-80). All other segments in South Dakota will have a MOP of 1,440 psig. Ex TC-1, 2.2.1, p. 9.	At most locations, the pipeline will operate at a maximum operating pressure of 1,307 psig. For location specific low elevation segments close to the discharge of pump stations, the maximum operating pressure will be 1,600 psig. Pipe associated with these segments of 1,600 psig MOP will have a design factor of 0.72 and a nominal pipe wall thickness of 0.572 inch (X-70M). All other segments in South Dakota will have a MOP of 1,307 psig.

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20	The Project will have seven pump stations in South Dakota, located in Harding (2), Meade, Haakon, Jones and Tripp (2) Counties. TC-1, 2.2.2, p. 10. The pump stations will be electrically driven. Power lines required for providing power to pump stations will be permitted and constructed by local power providers, not by Keystone. Initially, three pumps will be installed at each station to meet the nominal design flow rate of 700,000 bpd. If future demand warrants, pumps may be added to the proposed pump stations for a total of up to five pumps per station, increasing nominal throughput to 900,000 bpd. No additional pump stations will be required to be constructed for this additional throughput. No tank facilities will be constructed in South Dakota. Ex TC-1, 2.1.2, p.8. Sixteen mainline valves will be located in South Dakota. Seven of these valves will be remotely controlled, in order to have the capability to isolate sections of line rapidly in the event of an emergency to minimize impacts or for operational or maintenance reasons. Ex TC-1, 2.2.3, pp. 10- 11.	The Project will have seven pump stations in South Dakota, located in Harding (2), Meade, Haakon, Jones and Tripp (2) Counties. TC-1, 2.2.2, p. 10. The pump stations will be electrically driven. Power lines required for providing power to pump stations will be permitted and constructed by local power providers, not by Keystone. Three to five pumps will be installed at each station to meet the maximum design flow rate of 830,000 bpd. No tank facilities will be constructed in South Dakota. Twenty mainline valves will be located in South Dakota. All of these valves will be remotely controlled, in order to have the capability to isolate sections of line rapidly in the event of an emergency to minimize impacts or for operational or maintenance reasons.
22	The Project will be designed, constructed, tested, and operated in accordance with all applicable requirements, including the U.S. Department of Transportation, Pipeline Hazardous Materials and Safety Administration (PHMSA) regulations set forth at 49 CFR Part 195, as modified by the Special Permit requested for the Project from PHMSA (see Finding 71). These federal regulations are intended to ensure adequate protection for the public and the environment and to prevent crude oil pipeline accidents and failures. Ex TC-1, 2.2, p. 8.	The Project will be designed, constructed, tested, and operated in accordance with all applicable requirements, including the U.S. Department of Transportation, Pipeline Hazardous Materials and Safety Administration (PHMSA) regulations set forth at 49 CFR Part 195, and the special conditions developed by PHMSA and set forth in Appendix Z to the Department of State ("DOS") January 2014 Final Supplemental Environmental Impact Statement ("Final SEIS"). These federal regulations and additional conditions are intended to ensure adequate protection for the public and the environment and to prevent crude oil pipeline accidents and failures.
23	The current estimated cost of the Keystone Project in South Dakota is $921.4 million. Ex TC-1, 1.3, p. 1.	The current estimated cost of the Keystone XL Project in South Dakota is $1.974 billion. The estimated cost of the South Dakota portion of the project has primarily increased due to the new technical requirements (for example, the 59 additional conditions set forth in the DOS Final SEIS), and inflation and additional costs (for example, increased project management; regulatory; and material storage and preservation costs) due to the projected six-year delay in starting construction.
	Demand for the Facility	
24	The transport of additional crude oil production from the WCSB is necessary to meet growing demand by refineries and markets in the U.S. The need for the project is dictated by a number of factors, including increasing WCSB crude oil supply combined with insufficient export pipeline capacity; increasing crude oil demand in the U.S. and decreasing domestic crude supply; the opportunity to reduce U.S. dependence on foreign off-shore oil through increased access to stable, secure Canadian crude oil supplies; and binding shipper commitments to utilize the Keystone Pipeline Project. Ex TC-1, 3.0, p. 23.	The June 29, 2010 order recites Findings of Fact demonstrating the strong demand for the Project. Given the dynamic nature of the crude oil market, there have been changes in the nature of this demand since 2010. As demonstrated below, however market demand for the Project remains strong today. The transport of additional crude oil production from the WCSB continues to be necessary to meet demand by refineries and markets in the U.S. The need for the project is driven by a number of factors, including increasing domestic U.S. and Canadian, crude oil production combined with insufficient pipeline capacity; an energy efficient and safe method to transport this growing production; the opportunity to reduce U.S dependence on foreign offshore crude oil through increased access to North American supplies; and binding shipper commitments to utilize the Keystone Pipeline System.
25	According to the U.S. Energy Information Administration ("EIA"), U.S. demand for petroleum products has increased by over 11 percent or 2,000,000 bpd over the past 10 years and is expected to increase further. The EIA estimates that total U.S. petroleum consumption will increase by approximately 10 million bpd over the next 10 years, representing average demand growth of about 100,000 bpd per year (EIA Annual Energy Outlook 2008). Ex TC-1, 3.2, pp. 23-24.	United States production of crude oil has increased significantly, from approximately 6.5 million barrels per day (bpd) in 2012, and is expected to peak at 9.6 million bpd by 2019. However, even with the domestic production growth, the U.S. is expected to remain a net importer of crude oil. According to the U.S. Energy Information Administration ("EIA"), U.S. demand for crude oil has held steady at approximately 15 million bpd and is expected to remain relatively stable into the future.[1]
26	At the same time, domestic U.S. crude oil supplies continue to decline. For example, over the past 10 years, domestic crude production in the United States has declined at an average rate of about 135,000 bpd per year, or 2% per year. Ex TC-1, 3.3, p. 24. Crude and refined petroleum product imports into the U.S. have increased by over 3.3 million bpd over the past 10 years. In 2007, the U.S. imported over 13.4 million bpd of crude oil and petroleum products or over 60 percent of total U.S. petroleum product	The rise in U.S. crude oil production, predominantly light crude, has replaced most foreign imports of light crude. However the demand persists for imported heavy crude oil by U.S. refineries that are optimally configured to process heavy crude slates.[2] The U.S. Gulf Coast continues to import approximately 3.5 million bpd of heavy and medium sour crude oil.[3]

[1] Energy Information Administration (EIA) Annual Energy Outlook 2014
[2] Id.
[3] Energy Information Administration – Company Level Imports

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	consumption. Canada is currently the largest supplier of imported crude oil and refined products to the U.S., supplying over 2.4 million bpd in 2007, representing over 11 percent of total U.S. petroleum product consumption (EIA 2007). Ex TC-1, 3.4, p.24.	
27	The Project will provide an opportunity for U.S. refiners in Petroleum Administration for Defense District III, the Gulf Coast region, to further diversify supply away from traditional offshore foreign crude supply and to obtain direct access to secure and growing Canadian crude supplies. Access to additional Canadian crude supply will also provide an opportunity for the U.S. to offset annual declines in domestic crude production and, specifically, to decrease its dependence on other foreign crude oil suppliers, such as Mexico and Venezuela, the top two heavy crude oil exporters into the U.S. Gulf Coast. Ex TC-1, 3.4, p. 24.	Canadian production of heavy crude oil continues to grow, the vast majority of which is currently exported to the United States to be processed by U.S. refineries. North American crude oil production growth and logistics constraints have contributed to significant discounts on the price of landlocked crude and led to growing volumes of crude shipped by rail in the United States and, more recently Canada. As the DOS Final SEIS makes clear, in the absence of new pipelines, crude oil will continue to be transported via rail at an increasing rate.[4] The North Dakota Pipeline Authority estimates that rail export volumes from the U.S. Williston Basin have increased from approximately 40,000 bpd in 2010 to over 700,000 bpd in early 2014. Over 60% of crude oil transported from the Williston Basin is delivered by rail.[5] The industry has also been making significant investments in increasing rail transport capacity for crude oil out of the Western Canadian Sedimentary Basin (WCSB).[6] In recent years, rail transport of crude oil in Canada has grown from approximately 10,000 bpd in 2010 to approximately 270,000 bpd by the end of 2013.[7] The DOS Final SEIS indicates that transportation of crude oil by pipeline is safer and less greenhouse gas intensive than crude oil transportation by rail.[8] The Project will provide an opportunity for U.S. refiners in Petroleum Administration for Defense District III, the Gulf Coast region, to further diversify supply away from traditional offshore foreign crude supply and to obtain direct access to secure and growing domestic crude supplies.
28	Reliable and safe transportation of crude oil will help ensure that U.S. energy needs are not subject to unstable political events. Established crude oil reserves in the WCSB are estimated at 179 billion barrels (CAPP 2008). Over 97 percent of WCSB crude oil supply is sourced from Canada's vast oil sands reserves located in northern Alberta. The Alberta Energy and Utilities Board estimates there are 175 billion barrels of established reserves recoverable from Canada's oil sands. Alberta has the second largest crude oil reserves in the world, second only to Saudi Arabia. Ex TC-1, 3.1, p. 23.	Reliable and safe transportation of crude oil will help ensure that U.S. energy needs are not subject to unstable political events. Of Canada's 173 billion barrels of oil reserves, 97% or 167 billion, barrels are located in the oil sands. In terms of overall oil reserves, Canada's 173 billion barrels is third only to Venezuela and Saudi Arabia.[9] Canada is the largest foreign supplier of crude oil to the U.S. and is likely to remain as such for the foreseeable future.[10]
29	Shippers have already committed to long-term binding contracts, enabling Keystone to proceed with regulatory applications and construction of the pipeline once all regulatory, environmental, and other approvals are received. These long-term binding shipper commitments demonstrate a material endorsement of support for the Project, its economics, proposed route, and target market, as well as the need for additional pipeline capacity and access to Canadian crude supplies. Ex TC-1, 3.5, p. 24.	Shippers have committed to long-term binding contracts, enabling Keystone to proceed with regulatory applications and construction of the pipeline once all regulatory, environmental, and other approvals are received. These long-term binding shipper commitments demonstrate a material endorsement of support for the Project, its economics, proposed route, and target market, as well as the need for additional pipeline capacity to access domestic and Canadian crude supplies. The DOS Final SEIS independently confirms the continuing strong market demand.[11]
	Environmental	
32	Table 6 to the Application summarizes the environmental impacts that Keystone's analysis indicates could be expected to remain after its Construction Mitigation and Reclamation Plan (CMR Plan) are implemented. Ex TC-1, pp. 31-37.	Table 6 is still applicable. The latest version of the CMR Plan is Rev4, April 2012. Attachment A to this Tracking Table is a redline version showing changes to the CMR Plan from Rev1 to the current Rev4. Overall changes to the CMR Plan were made to clarify language, provide additional detail related to construction procedures and incorporate lessons learned from previous pipeline construction, current right-of-way conditions and project requirements

[4] Final Supplemental Environmental Impact Statement, Keystone XL Pipeline Project, January 2014 at 1.4.3.2 and 1.4.3.3.
[5] North Dakota Pipeline Authority 2014 https://ndpipelines.files.wordpress.com/2012/04/nd-rail-estimate-april-2014.jpg
[6] Final Supplemental Environmental Impact Statement Keystone XL Pipeline Project, January 2014 at 1.4.1.3
[7] Transportation Safety Board of Canada http://www.tsb.gc.ca/eng/recommandations-recommendations/rail/2014/rec-r1401-r1403.asp
[8] Final Supplemental Environmental Impact Statement, Keystone XL Pipeline Project, January 2014, Chapter 5 and Errata Sheet at http://keystonepipeline-xl.state.gov/documents/organization/227464.pdf.
[9] Canadian Association of Petroleum Producers (CAPP) Crude Oil Forecast, Markets & Transportation June 2014
[10] EIA Annual Energy Outlook 2014
[11] Final Supplemental Environmental Impact Statement, Keystone XL Pipeline Project, January 2014 at 1.3.1 and 1.4.2.6

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33	The pipeline will cross the Unglaciated Missouri Plateau. This physiographic province is characterized by a dissected plateau where river channels have incised into the landscape. Elevations range from just over 3,000 feet above mean sea level in the northwestern part of the state to around 1,800 feet above mean sea level in the White River valley. The major river valleys traversed include the Little Missouri River, Cheyenne River, and White River. Ex TC-1, 5.3.1, p. 30; Ex TC-4, ¶ 15. Exhibit A to the Application includes soil type maps and aerial photograph maps of the Keystone pipeline route in South Dakota that indicate topography, land uses, project mileposts and Section, Township, Range location descriptors. Ex TC-1, Exhibit A. Updated versions of these maps were received in evidence as Exhibit TC-14.	The soil type maps and aerial photograph maps of the Keystone pipeline route in South Dakota that indicate topography, land uses, project mileposts and Section, Township, Range location descriptors that were submitted in evidence as Exhibit TC-14 are still generally consistent in the description of the current Project route through South Dakota. Keystone will submit updated maps prior to the initiation of construction as required by Condition No. 6 of the Amended Final Decision and Order.
41	Fifteen perennial streams and rivers, 129 intermittent streams, 206 ephemeral streams and seven man-made ponds will be crossed during construction of the Project in South Dakota. Keystone will utilize horizontal directional drilling ("HDD") to cross the Little Missouri, Cheyenne and White River crossings. Keystone intends to use open-cut trenching at the other perennial streams and intermittent water bodies. The open cut wet method can cause the following impacts: loss of in-stream habitat through direct disturbance, loss of bank cover, disruption of fish movement, direct disturbance to spawning, water quality effects and sedimentation effects. Alternative techniques include open cut dry flume, open cut dam-and-pump and horizontal directional drilling. Exhibit C to the Application contains a listing of all water body crossings and preliminary site-specific crossing plans for the HDD sites. Ex TC-14. Permitting of water body crossings, which is currently underway, will ultimately determine the construction method to be utilized. Keystone committed to mitigate water crossing impacts through implementation of procedures outlined in the CMR Plan. Ex TC-1, 5.4.1, pp. 45-46.	Fifteen perennial streams and rivers, 129 intermittent streams, and 206 ephemeral streams will be crossed during construction of the Project in South Dakota. No man-made ponds are crossed. Keystone will utilize horizontal directional drilling ("HDD") to cross the Little Missouri, Cheyenne, Bad, and White rivers, as well as Bridger Creek. Keystone intends to use open-cut trenching at other perennial streams and intermittent water bodies. The open cut wet method can cause the following impacts: loss of in-stream habitat through direct disturbance, loss of bank cover, disruption of fish movement, direct disturbance to spawning, water quality effects and sedimentation effects. Alternative techniques include open cut dry flume, open cut dam-and-pump and horizontal directional drilling. To supplement Exhibit C to the Application, Attachment B to this Tracking Table contains the preliminary site-specific crossing plans for the two newly identified HDD crossings; Bad River and Bridger Creek.
50	The total length of Project pipe with the potential to affect a High Consequence Area ("HCA") is 34.3 miles. A spill that could affect an HCA would occur no more than once in 250 years. TC-12, ¶ 24.	The total length of Project pipe with the potential to affect a High Consequence Area ("HCA") is 19.9 miles. A spill that could affect an HCA would occur no more than once in 250 years.
54	Of the approximately 314-mile route in South Dakota, all but 21.5 miles is privately owned. 21.5 miles is state-owned and managed. The list is found in Table 14. No tribal or federal lands are crossed by the proposed route. Ex TC-1, 5.7.1, p. 75.	Of the approximately 315-mile route in South Dakota, all but 27.9 miles are privately owned. 1.7 miles are local government owned, and 26.3 miles are state-owned and managed. No tribal or federal lands are crossed by the route.
	Design and Construction	
60	Keystone has applied for a special permit ("Special Permit") from PHMSA authorizing Keystone to design, construct, and operate the Project at up to 80% of the steel pipe specified minimum yield strength at most locations. TC-1, 2.2, p. 8; TR 62. In Condition 2, the Commission requires Keystone to comply with all of the conditions of the Special Permit, if issued.	Keystone withdrew its request to PHMSA for a special permit ("Special Permit") on August 5, 2010. Keystone will implement 59 additional safety measures as set forth in the DOS Final SEIS, Appendix Z. These measures provide an enhanced level of safety equivalent to or greater than those that would have applied under the previously requested Special Permit.
61	TransCanada operates approximately 11,000 miles of pipelines in Canada with a 0.8 design factor and requested the Special Permit to ensure consistency across its system and to reduce costs. PHMSA has previously granted similar waivers adopting this modified design factor for natural gas pipelines and for the Keystone Pipeline. Ex TC-8, ¶¶ 13, 17.	[Finding 61 is no longer relevant as Keystone has withdrawn its request for a Special Permit].
62	The Special Permit is expected to exclude pipeline segments operating in (i) PHMSA defined HCAs described as high population areas and commercially navigable waterways in 49 CFR Section 195.450; (ii) pipeline segments operating at highway, railroad, and road crossings; (iii) piping located within pump stations, mainline valve assemblies, pigging facilities, and measurement facilities; and (iv) areas where the MOP is greater than 1,440 psig. Ex TC-8, ¶ 16.	[Finding 62 is no longer relevant as Keystone has withdrawn its request for a Special Permit.]
63	Application of the 0.8 design factor and API 5L PSL2 X70 high-strength steel pipe results in use of pipe with a 0.483 inch wall thickness, as compared with the 0.512 inch wall thickness under the otherwise applicable 0.72 design factor, a reduction in thickness of .050 inches. TR 61. PHMSA previously found that the issuance of a waiver is not inconsistent with pipeline safety and that the waiver will provide a level of safety equal to or greater than that which would be provided if the pipeline were operated under the otherwise applicable regulations. Ex TC-8, ¶ 15.	The pipeline will operate at a maximum operating pressure of 1,307 psig. Use of API 5L X70 high-strength steel results in a 0.465 inch nominal pipe wall thickness. For location specific low elevation segments close to the discharge of pump stations, the maximum operating pressure will be 1,600 psig. Pipe associated with these segments of 1,600 psig MOP will have a design factor of 0.72 and a nominal pipe wall thickness of 0.572 inch (X-70M).

Appendix C
South Dakota PUC Amended Final Decision and Order
Tracking Table of Changes
9/15/14

Finding Number	Amended Final Decision and Order	Update
68	TransCanada has thousands of miles of this particular grade of pipeline steel installed and in operation. TransCanada pioneered the use of FBE, which has been in use on its system for over 29 years. There have been no leaks on this type of pipe installed by TransCanada with the FBE coating and cathodic protection system during that time. When TransCanada has excavated pipe to validate FBE coating performance, there has been no evidence of external corrosion. Ex TC-8, ¶ 27.	TransCanada has thousands of miles of this particular grade of pipeline steel installed and in operation. TransCanada pioneered the use of FBE, which has been in use on its system for over 33 years. There have been no leaks on this type of pipe installed by TransCanada with the FBE coating and cathodic protection system during that time. When TransCanada has excavated pipe to validate FBE coating performance, there has been no evidence of external corrosion except for one instance where an adjacent foreign utility interfered with the cathodic protection system. No similar situations exist on the Project in South Dakota.
73	The Applicant has prepared a detailed CMR Plan that describes procedures for crossing cultivated lands, grasslands, including native grasslands, wetlands, streams and the procedures for restoring or reclaiming and monitoring those features crossed by the Project. The CMR Plan is a summary of the commitments that Keystone has made for environmental mitigation, restoration and post-construction monitoring and compliance related to the construction phase of the Project. Among these, Keystone will utilize construction techniques that will retain the original characteristics of the lands crossed as detailed in the CMR Plan. Keystone's thorough implementation of these procedures will minimize the impacts associated with the Project. A copy of the CMR Plan was filed as Exhibit B to Keystone's permit application and introduced into evidence as TC-1, Exhibit B.	Keystone has updated its CMR Plan since the Amended Final Decision and Order. Overall changes to the CMR Plan were made to clarify language, provide additional detail related to construction procedures and incorporate lessons learned from previous pipeline construction, current right-of-way conditions and project requirements. A redlined version of the CMR Plan showing changes since the version considered in 2010 is attached as Attachment A to this Tracking Table.
80	Keystone is in the process of preparing, in consultation with the area National Resource Conservation Service, construction/reclamation unit ("Con/Rec Unit") mapping to address differing construction and reclamation techniques for different soils conditions, slopes, vegetation, and land use along the pipeline route. This analysis and mapping results in the identification of segments called Con/Rec Units. Ex. TC-5; TC-16, DR 3-25.	In consultation with the area National Resource Conservation Service, Keystone has completed construction/reclamation unit ("Con/Rec Unit") mapping to address differing construction and reclamation techniques for different soils conditions, slopes, vegetation, and land use along the pipeline route.
83	Keystone will utilize HDD for the Little Missouri, Cheyenne and White River crossings, which will aid in minimizing impacts to important game and commercial fish species and special status species. Open-cut trenching, which can affect fisheries, will be used at other perennial streams. Keystone will use best practices to reduce or eliminate the impact of crossings at the perennial streams other than the Cheyenne and White Rivers. Ex TC-1 , 5.4.1, p. 46; 5.6.2, p. 72; TC-16, DR 3-39.	Keystone will utilize HDD for the Little Missouri, Cheyenne, Bad and White River crossings, as well as Bridger Creek, which will aid in minimizing impacts to important game and commercial fish species and special status species. Open-cut trenching, which can affect fisheries, will be used at other perennial streams. Keystone will use best practices to reduce or eliminate the impact of crossings at the perennial streams that are open cut.
	Operation and Maintenance	
90	The Keystone pipeline will be designed constructed, tested and operated in accordance with all applicable requirements, including the PHMSA regulations set forth at 49 CFR Parts 194 and 195, as modified by the Special Permit. These federal regulations are intended to ensure adequate protection for the public and the environment and to prevent crude oil pipeline accidents and failures. Ex TC-8, ¶ 2.	The Keystone pipeline will be designed constructed, tested and operated in accordance with all applicable requirements, including the PHMSA regulations set forth at 49 CFR Parts 194 and 195, and the 59 PHMSA Special Conditions as set forth in DOS Final SEIS, Appendix Z. These federal regulations and additional conditions are intended to ensure adequate protection for the public and the environment and to prevent crude oil pipeline accidents and failures.
	Socio-Economic Factors	
107	Socio-economic evidence offered by both Keystone and Staff demonstrates that the welfare of the citizens of South Dakota will not be impaired by the Project. Staff expert Dr. Michael Madden conducted a socio-economic analysis of the Keystone Pipeline, and concluded that the positive economic benefits of the project were unambiguous, while most if not all of the social impacts were positive or neutral. S-2, Madden Assessment at 21. The Project, subject to compliance with the Special Permit and the Conditions herein, would not, from a socioeconomic standpoint: (i) pose a threat of serious injury to the socioeconomic conditions in the project area; (ii) substantially impair the health, safety, or welfare of the inhabitants in the project area; or (iii) unduly interfere with the orderly development of the region.	[Keystone has withdrawn its Special Permit application but will comply with the 59 additional conditions set forth in the DOS Final SEIS, Appendix Z, which provide an enhanced level of safety equivalent to or greater than those that would have applied under the requested Special Permit.] The increased cost of the Project reflected in updated Finding 23 is likely to result in increased tax revenue to the affected counties.

DEPARTMENT OF STATE
RECORD OF DECISION AND NATIONAL INTEREST DETERMINATION

TransCanada Keystone Pipeline, L.P. Application for Presidential Permit, Keystone XL Pipeline

Contents:

1.0 Summary

On May 4, 2012, TransCanada Keystone Pipeline, L.P. (Keystone) submitted an application to the U.S. Department of State (Department) for a Presidential permit that would authorize construction, connection, operation, and maintenance of pipeline facilities at the U.S.-Canada border in Phillips County, Montana, to import crude oil from Canada into the United States. The proposed project, called Keystone XL (the proposed Project), would consist of approximately 1,204 miles of new, 36-inch-diameter pipeline extending from Hardisty, Alberta, to Steele City, Nebraska. The proposed Project would have the capacity to deliver up to 830,000 barrels per day (bpd) of crude oil. It would predominantly transport crude oil from the Western Canadian Sedimentary Basin (WCSB), but, subject to commercial demand, would also transport quantities of crude oil from Montana and North Dakota via a proposed pipeline and associated facilities known as the Bakken Marketlink Project. If issued, the permit would authorize operations at the border segment, which is from the international border near Morgan, Montana, to the first mainline shut-off valve within the United States located approximately 1.2 miles from the international border.

On November 6, 2015, Secretary of State Kerry determined under Executive Order 13337 that issuing a Presidential permit to Keystone for the proposed Keystone XL pipeline's border facilities would not serve the national interest, and denied the permit application (2015 Decision). On January 24, 2017, President Trump issued a Presidential Memorandum Regarding Construction of the Keystone XL Pipeline (Presidential Memorandum) which, *inter alia*, invited Keystone "to re-submit its application to the Department of State for a Presidential permit for the construction and operation of the Keystone XL Pipeline..." On January 24, 2017, President Trump also issued an Executive Order on Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects in which he set forth the general policy of the Executive Branch "to streamline and expedite, in a manner consistent with law, environmental reviews and approvals for all infrastructure projects, especially projects that are a high priority for the Nation," and cited pipelines as an example of such high priority projects.

On January 26, 2017, the Department received a re-submitted application from Keystone for the proposed Project. The re-submitted application includes minor route alterations due to agreements with local property owners for specific right-of-ways and easement access, but remains entirely within the areas previously surveyed by the Department in the 2014 Supplemental Environmental Impact Statement (EIS).

Keystone is a limited partnership organized under Delaware law with a primary business address in Houston, Texas. Its affiliate, TC Oil Pipeline Operations Inc. would operate the proposed Project. TC Oil Pipeline Operations Inc. is a limited company organized under the laws of Canada with its headquarters located in Calgary, Alberta, Canada. Both Keystone and TC Oil Pipeline Operations Inc. are owned by affiliates of TransCanada Corporation, a Canadian company with stock publicly traded on the Toronto and New York stock exchanges.

Executive Order 13337 (April 30, 2004) delegates to the Secretary of State the President's authority to receive applications for permits for the construction, connection, operation, or maintenance of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels (except for natural gas) at the borders of the United States and to issue or deny such Presidential permits upon a national interest determination. The determination is Presidential action, made through the exercise of Presidentially delegated authorities, and therefore the requirements of the National Environmental Policy Act of 1969 (NEPA), the National Historic Preservation Act of 1966 (NHPA), the Endangered Species Act of 1973 (ESA), the Administrative Procedure Act (APA), and other similar laws and regulations that do not apply to Presidential actions are also inapplicable here. Nevertheless, the Department's review of the Presidential permit application for the proposed Project has, as a matter of policy, been conducted in a manner consistent with NEPA. A Final Supplemental EIS was released on January 31, 2014 as noted above. In the Supplemental EIS, the Department evaluated the potential construction and operational impacts of the proposed Project and alternatives that may occur without the proposed Project on a wide range of environmental and cultural resources. Similarly, as a matter of policy, the Department conducted reviews of the proposed Project consistent with Section 106 of the NHPA, as amended, and with Section 7 of the ESA. The Department solicited public comment and conducted a broad range of consultations with state, local, tribal, and foreign governments and other federal agencies as it considered Keystone's application.

Acting on behalf of the President under delegated authorities in accordance with Executive Order 13337 and the Presidential Memorandum, the Under Secretary of State for Political Affairs has determined that issuing a Presidential permit to Keystone to construct, connect, operate, and maintain at the border of the United States pipeline facilities for the import of crude oil from Canada to the United States as described in the Presidential permit application for the proposed Project would serve the national interest. Accordingly, the request for a Presidential permit is approved.

2.0 Legal Authority

The President of the United States has authority to require permits for transboundary infrastructure projects based upon his Constitutional powers. In Executive Order 13337, acting pursuant to the Constitution and laws of the United States, including Section 301 of Title 3 of the United States Code, the President delegated to the Secretary of State the authority to receive applications and make determinations regarding approval or denial of a Presidential permit for certain types of border facilities, including those for cross-border petroleum pipelines, based on the Secretary's finding as to whether issuance of a permit would serve the national interest. Because the proposed Project seeks to build new petroleum facilities that cross the international border, the authority to make a determination for the issuance of a Presidential permit for the border facilities is within the scope of authority delegated to the Secretary of State by the President. The functions assigned to the Secretary have been further delegated within the Department including to the Deputy Secretary of State, the Under Secretary of State for Political Affairs, and the Under Secretary of State for Economic Growth, Energy, and the Environment.

(Department of State Delegations of Authority No. 245-1, 118-2).

As noted above, when reviewing an application for a Presidential permit, the Secretary or his delegate is required by the Executive Order to determine if issuance of the permit would serve the national interest. The determination is made pursuant to the President's Constitutional authority. No statute establishes criteria for this determination. The President or his delegate may take into account factors he or she deems germane to the national interest. With regard to the proposed Project, the Under Secretary of State for Political Affairs has considered a range of factors, including but not limited to foreign policy; energy security; environmental, cultural, and economic impacts; and compliance with applicable law and policy. The determination is Presidential action, made through the exercise of Presidentially delegated authorities, and therefore the requirements of NEPA, the ESA, the NHPA, the APA, and other similar laws and regulations that do not apply to Presidential actions are also inapplicable here. Nevertheless, as a matter of policy and in order to inform the Under Secretary's determination regarding the national interest, the Department has reviewed the potential impacts of the action on the environment and cultural resources in a manner consistent, where appropriate, with these statutes. The purpose of preparing an environmental impact statement and undertaking the other statutory processes noted above was to produce a comprehensive review to inform decisionmakers and the relevant Executive Branch agencies about the potential environmental impacts of the proposed Project.

In accordance with the Presidential Memorandum, the agency notification and fifteen-day delay requirements of sections 1(g), 1(h) and 1(i) of Executive Order 13337 have been waived with respect to this re-submitted application.

3.0 Agency and Tribal Involvement and Public Comment

The Department conducted extensive public outreach and consultation during several stages of its consideration of Keystone's Presidential permit application in order to solicit input on issues to be considered. The Department also conducted government-to-government consultation with Indian tribes regarding historic properties in a manner consistent with the NHPA, and consulted with relevant agencies consistent with the ESA and other statutes as appropriate. Finally, the Department sought views of other federal agencies as required by Executive Order 13337. The public notice, outreach, and consultation efforts during consideration of Keystone's application are further detailed below. The Department has taken all comments and relevant information into account in making the national interest determination.

3.1 Public Notice: Upon receipt of Keystone's application in 2012, the Department published in the Federal Register a Notice of Receipt of the Keystone XL Pipeline Application (77 FR 27533, May 10, 2012). At that time, the Department also established a website that it updated with information and significant documents throughout its review of the Presidential permit application (*see* https://keystonepipeline-xl.state.gov/). In February 2017, the Department also published in the Federal Register a Notice of Receipt of TransCanada Keystone Pipeline, L.P.'s Re-Application for a Presidential

Permit to Construct, Connect, Operate, and Maintain Pipeline Facilities on the Border of the United States and Canada (82 FR 10429, Feb. 10, 2017).

3.2 Public Comment Periods: There has been significant opportunity for public comment on this project. On June 15, 2012, the Department published a notice in the Federal Register informing the public that it intended to prepare a Supplemental EIS (77 FR 36032). The notice also announced plans for developing the scope of the environmental review and content of the Supplemental EIS, and invited public participation in that process, including soliciting public comments. The Department received over 400,000 comments during the scoping period (including letters, cards, emails, and telephone calls), which were considered and reflected as appropriate in developing the scope of the Supplemental EIS. The Department also published all comments received during this and all other public comment periods in the review, consistent with its commitment to conduct an objective, rigorous, and transparent review process.

In March 2013, the Department released a Draft Supplemental EIS, which was posted on the Department's website for the project. The Department distributed copies to public libraries along the pipeline route and to interested Indian tribes, federal and state agencies, elected and appointed officials, media organizations, non-governmental organizations (NGOs), private landowners, and other interested parties. On March 27, 2013, the Department published a notice in the Federal Register inviting the public to comment on the document (78 FR 18665). The Department then held a public meeting on April 18, 2013, in Grand Island, Nebraska, to receive further views from the public and other interested parties. In total, the Department received more than 1.5 million submissions during the public comment period for the Draft Supplemental EIS. These submissions came from members of the public, federal, state, and local representatives, government agencies, Indian tribes, NGOs, and other interested groups and stakeholders. All comments were considered as part of the Supplemental EIS; Volumes V and VI of the Supplemental EIS address the comments that were received.

On February 5, 2014, five days after releasing the Supplemental EIS, the Department published a notice in the Federal Register inviting members of the public to comment within 30 days on any factors they deemed relevant to the national interest determination (79 FR 6984). Executive Order 13337 allows for such a public comment process, but does not require the Department to solicit public input. The response during the 30-day public comment period was unprecedented. The Department received more than three million submissions.

All comments were reviewed by subject matter experts from several Department bureaus who were knowledgeable about the proposed Project and involved in drafting sections of this Record of Decision and National Interest Determination, as well as by the third-party contractor engaged to assist the Department with tasks relating to the review of the permit application. The contractor, with guidance from Department experts, sorted the comments into six overarching issue areas discussed in the comments—environmental impacts (including climate change), cultural resources impacts, socioeconomic impacts, energy security, foreign policy considerations, and compliance with relevant federal and

state laws and regulations. For each of these issue areas, the contractor identified a number of themes that captured the ideas or points raised by public comments. The Department's subject matter experts directly reviewed all of the issues and information raised in the public comments. The Department determined that the comments largely addressed issues that were also raised during preparation of the Supplemental EIS.

3.3 Tribal Consultation: The Department directly contacted 84 Indian tribes within the United States that could have an interest in the resources potentially affected by the proposed Project. Of the 84 Indian tribes, 67 notified the Department that they would like to consult on the proposed Project or were undecided. The Department conducted extensive government-to-government consultations with those 67 Indian tribes on the environmental, cultural, and other potential impacts of the proposed Project. In addition to communications by phone, email, and letter, Department officials held tribal meetings in October 2012 (three meetings), May 2013 (one meeting), and July 2013 (teleconference). The face-to-face meetings were held in four locations: Billings, Montana; Pierre, South Dakota; Rapid City, South Dakota; and Lincoln, Nebraska.

In addition to the government-to-government consultations, the Department engaged in discussions consistent with Section 106 of the NHPA with Indian tribes, Tribal Historic Preservation Officers, State Historical Preservation Officers, and the Advisory Council on Historic Preservation. The topics of these discussions included cultural resources, in general, as well as cultural resources surveys, Traditional Cultural Properties surveys, effects on cultural resources, and potential mitigation. Additionally, Indian tribes were provided cultural resources survey reports for the proposed Project and were invited both to conduct Traditional Cultural Property surveys funded by Keystone and to help develop and participate in the Tribal Monitoring Plan. New cultural resources survey information provided by Keystone in its re-submitted application will be shared as appropriate according to the terms and conditions of the 2013 Amended Programmatic Agreement.

3.4 Consultation with Federal and State Agencies: Ten federal entities agreed to assist the Department as Cooperating Agencies during preparation of the Supplemental EIS: the U.S. Army Corps of Engineers, the Farm Service Agency, the Natural Resource Conservation Service, the Rural Utilities Service, the Department of Energy, the Bureau of Land Management, the National Park Service, the U.S. Fish and Wildlife Service (FWS), the Pipeline and Hazardous Materials Safety Administration's Office of Pipeline Safety (PHMSA), and the U.S. Environmental Protection Agency (EPA). These agencies had significant input into the drafting of the Draft and Final Supplemental EIS.

Consistent with Section 7 of the ESA, the Department consulted with the FWS and submitted a Biological Assessment on the proposed Project. The FWS issued a Biological Opinion in 2013 that is available as an attachment to the Supplemental EIS. Prior to issuance of the 2015 Decision, consultations with the FWS were reinitiated regarding the rufa red knot (*Calidris canutus rufa*), designated a threatened species effective January 12, 2015, and the northern long-eared bat (*Myotis septentrionalis*), designated a threatened species effective May 4, 2015. Following publication of the Supplemental EIS, the Department and FWS have concluded Section 7 consultations with

regard to both the rufa red knot and the northern long-eared bat to supplement the existing Biological Opinion for the proposed Project. The Department also reviewed the 2013 Biological Opinion and received confirmation from FWS that Section 7 consultations need not be reinitiated for any other species and that, following implementation of the conservation measures contained within that Opinion, no other species included in the project area would be adversely affected.

Executive Order 13337 requires that the Secretary request the views of eight specified U.S. federal agencies with regard to the permit application. Accordingly, the Department requested the views of the Department of Defense, the Department of Justice, the Department of the Interior, the Department of Commerce, the Department of Transportation, the Department of Energy, the Department of Homeland Security, and the EPA. The Department of Justice and the Department of Commerce informed the Department that they did not plan to provide any views with regard to the permit application. The other six agencies provided their views in writing; those views were released in conjunction with the 2015 Decision.

The Department has also monitored other federal and state permitting and licensing processes, including, for example, litigation and the recent application to the Nebraska Public Service Commission concerning the proposed Project's route through that state.

3.5 Information Provided by Keystone: The Department had robust communication with Keystone throughout the review of the application for the proposed Project. Keystone responded to multiple requests for information and provided supplemental views and information on its own initiative, including through letters on February 24, 2015, June 29, 2015, February 3, 2017, and March 17, 2017. The Department has taken all information provided by Keystone into account in making the national interest determination.

4.0 Project Background

4.1 Keystone XL Project: The proposed Project would consist of approximately 1,204 miles of new, 36-inch-diameter pipeline extending from Hardisty, Alberta, to Steele City, Nebraska. Approximately 875 miles of the pipeline would be located in the United States. The pipeline would cross the international border between Saskatchewan, Canada and the United States near the town of Morgan, Montana, in Phillips County. The border segment is from the international border near Morgan, Montana, to the first mainline shut-off valve within the United States located approximately 1.2 miles from the international border. The pipeline would have the capacity to deliver up to 830,000 bpd of crude oil. Annual quantities would likely vary based on market conditions and other factors.

Subject to commercial demand, Bakken crude will enter the pipeline within the United States through the proposed Bakken Marketlink Project—a five-mile pipeline with pumps, meters, and storage tanks that would connect to the Keystone XL pipeline near Baker, Montana. The facilities would supply up to 100,000 bpd of Bakken crude oil to the proposed Keystone XL pipeline.

At its southern terminus, the proposed Project would connect to the existing Keystone Cushing Extension pipeline, which extends from Steele City, Nebraska, to Cushing, Oklahoma. The Keystone Cushing Extension in turn connects to Keystone's Gulf Coast pipeline, which extends south to Nederland, Texas, in order to serve Gulf Coast refineries.

In addition to the pipeline and potential Bakken Marketlink Project facilities, the proposed Project would include ancillary facilities. Eighteen pumping stations would be located along the Keystone XL pipeline, and two pumping stations would be added to the Keystone Cushing Extension. Keystone further anticipates new pumping capacity on the Keystone Cushing Extension in Kansas. The pipeline would be located in a 50-foot-wide permanent right of way (ROW). The temporary construction ROW would be wider—110 feet—and access roads, construction camps, and related facilities would be needed during construction.

According to the application submitted by Keystone, the primary purpose of the proposed Project would be to transport crude oil from the border with Canada to delivery points in the United States (primarily to the Gulf Coast area). The proposed Project is meant to supply U.S. refineries with crude oil of the kind found in the WCSB (often called heavy crude oil). Subject to commercial demand, the proposed Project may also provide transportation for the kind of crude oil found within the Bakken formation of North Dakota and Montana (often called light crude oil).

Most recent U.S. production growth has been from tight oil formations—unlocked through technical innovations like hydraulic fracturing and horizontal drilling—that typically yield light, sweet crude. As a result, U.S. crude production growth has tended to displace imports from other countries also producing light, sweet crude—predominately in Africa. Oil sands bitumen consists of heavy, sour, viscous crude oil that is produced and marketed differently than most domestic unconventional crudes. Many U.S. refineries, particularly in the Midwest and Gulf Coast, are optimized to process heavy crudes like those from the oil sands.

As the Supplemental EIS explains, North American production growth coupled with constraints on transporting landlocked crude oil to market have contributed to discounts on the price of landlocked crude and led to growing volumes of crude shipped by rail. This has heightened the attractiveness of the proposed Project to many in industry. Keystone has stated that the proposed Project is commercially viable and sees the demand to be substantially similar to that which existed when Keystone first applied.

The Department notes that the ultimate disposition of crude oil that would be transported by the proposed Project, as well as any refined products produced from that crude oil, would be determined by market demand and applicable law. In the absence of heavy crude oil from Canada, U.S. refineries, particularly in the Gulf Coast, will continue to rely on comparable foreign heavy crudes.

4.2 Prior Permit Application: Keystone's first application for the Keystone XL pipeline was submitted to the Department on September 19, 2008. A Final EIS was published on August 26, 2011 (2011 Final EIS). The route proposed in 2008 included the same U.S.-Canadian crossing as the border currently proposed Project, but a different pipeline route in the United States. That route traversed a substantial portion of the Sand Hills Region of Nebraska, as identified by the Nebraska Department of Environmental Quality (NDEQ). Moreover, the 2011 Final EIS route went from Montana to Steele City, Nebraska, and then from Cushing, Oklahoma, to the Gulf Coast area.

In November 2011, the Department determined that additional information was needed to fully evaluate the application—in particular, information about alternative routes within Nebraska that would avoid the NDEQ-identified Sand Hills Region. In late December 2011, Congress enacted a provision of the Temporary Payroll Tax Cut Continuation Act that sought to require the President to make a decision on the Presidential permit for the 2008 application within 60 days. At the time, the prior administration determined that the deadline did not allow sufficient time for the Department to prepare a rigorous, transparent, and objective review of an alternative route through Nebraska. Accordingly, the Presidential permit was denied.

In February 2012, Keystone informed the Department that it considered the Gulf Coast portion of the originally proposed pipeline project (from Cushing, Oklahoma, to the Gulf Coast area) to have independent economic utility, and indicated that Keystone intended to proceed with construction of the Gulf Coast pipeline as a separate project, called the Gulf Coast Project. The Gulf Coast Project did not require a Presidential permit because it does not cross an international border. Construction on the Gulf Coast Project is now complete.

On May 4, 2012, Keystone filed a new Presidential permit application for the Keystone XL Project. The proposed Project has a new route and a new stated purpose and need. The new proposed route differs from the 2011 Final EIS Route in two significant ways: 1) it would avoid the environmentally sensitive NDEQ-identified Sand Hills Region and 2) it would terminate at Steele City, Nebraska. From Steele City, existing pipelines would transport the crude oil to the Gulf Coast area. The proposed Project no longer includes a southern segment.

In addition to the NDEQ-identified Sand Hills Region, the proposed Project route would avoid other areas in Nebraska (including portions of Keya Paha County) that have been identified by the NDEQ as having soil and topographic characteristics similar to the Sand Hills Region. The proposed Project route would also avoid or move further away from water wellhead protection areas for the towns of Clarks and Western, Nebraska.

On November 6, 2015, Secretary of State Kerry determined under Executive Order 13337 that issuing a Presidential permit to Keystone for the proposed Keystone XL pipeline's border facilities would not serve the national interest, and denied the permit application in the 2015 Decision. On January 24, 2017, President Trump issued the Presidential Memorandum which, inter alia, invited Keystone "to re-submit its application to the

Department of State for a Presidential Permit for the construction and operation of the Keystone XL Pipeline. . . ." On January 26, 2017, the Department received a re-submitted application from Keystone for the proposed Project. The proposed route in the re-submitted application includes minor route alterations due to changes in right-of-way and easement agreements with local property owners, but remains entirely within the area previously examined by the Department in the Supplemental EIS.

5.0 Issues Considered in the Final Supplemental Environmental Impact Statement

This Record of Decision and National Interest Determination is informed by the Supplemental EIS prepared by the Department and published in January 2014, which identified and analyzed a broad range of potential impacts of the proposed Project. The Presidential Memorandum directed the Department to consider to the maximum extent permitted by law the Supplemental EIS "and the environmental analysis, consultation, and review described in that document (including appendices)" to satisfy any provision of law that requires executive department consultation or review, including any applicable requirements of NEPA. As described above, the Department's determination with respect to an application for a Presidential permit is Presidential action, made through the exercise of Presidentially delegated authorities, and therefore the requirements of NEPA, the ESA, the NHPA, the APA, and other similar laws and regulations that do not apply to Presidential actions are inapplicable. As a matter of policy, however, and in order to inform the Department's determination regarding the national interest, the Department has reviewed the potential impacts of the proposed Project on the environment and cultural resources in a manner consistent, where appropriate, with these statutes.

The Supplemental EIS presents information and analysis on a range of potential impacts of the proposed Project. It also describes the tribal consultations undertaken as part of the Supplemental EIS process. The Supplemental EIS also considers reasonable alternative pipeline routes and No Action Alternative scenarios.

Key topics in the Supplemental EIS, particularly those that received significant public interest, are described below. The Supplemental EIS reflects the expected environmental impacts of the proposed Project. Certain topics examined therein such as greenhouse gas (GHG) emissions analysis and market analysis are dynamic, although, for the reasons discussed below, the Supplemental EIS continues to inform the Department's national interest determination in respect of these topics. With respect to other topics such as threatened and endangered species, changes brought about either by the passage of time or differences in underlying law or regulations are noted. The Department has reviewed and considered these changes and concluded that they do not represent substantial changes, do not present significant new information, and do not affect the continued reliability of the Supplemental EIS.

5.1 Greenhouse Gas (GHG) Emissions: GHG emissions and the potential climate change impacts associated with the proposed Project were key areas of interest highlighted by the comments received by the Department. The Supplemental EIS evaluates the relationship between the proposed Project with respect to GHG emissions

and climate change from the following perspectives:

- The GHG emissions associated with the construction and operation of the proposed Project and its connected actions;

- The indirect lifecycle (wells-to-wheels) GHG emissions associated with the WCSB crude oil that would be transported by the proposed Project as compared to the GHG emissions of the crudes it may displace; and

- How the GHG emissions associated with the proposed Project cumulatively contribute to climate change.

GHG Emissions Associated with Construction and Operation

According to the Supplemental EIS, the proposed Project would emit approximately 0.24 million metric tons of carbon dioxide (CO2) equivalents (MMTCO2e) per year during the construction period. These emissions would be emitted directly through fuel use in construction vehicles and equipment as well as land clearing activities, including open burning, and indirectly from electricity usage. To operate and maintain the pipeline, approximately 1.44 MMTCO2e would be emitted per year, largely attributable to electricity use for pump station power, fuel for vehicles and aircraft for maintenance and inspections, and fugitive methane emissions at connections. The 1.44 MMTCO2e emissions would be equivalent to GHG emissions from approximately 300,000 passenger vehicles operating for one year, or 71,928 homes using electricity for one year.

GHG Emissions Associated with the Indirect Lifecycle of WCSB Crudes

To enable a more comprehensive understanding of the potential indirect GHG impact of the proposed Project, it is important to consider the wider GHG emissions associated with the crude oil that would be transported by the proposed Project. A lifecycle analysis is a technique used to evaluate the environmental aspects and impacts (in this case GHGs) that are associated with a product, process, or service from raw materials acquisition through production, use, and end-of-life (wells-to-wheels). This approach evaluates the GHG implications of the WCSB crudes that would be transported by the proposed Project compared to other crude oils that would likely be replaced or displaced by those WCSB crudes in U.S. refineries (hereinafter, reference crudes). The actual increase in GHG lifecycle emissions attributable to the proposed Project depends on whether or how much approval and use of the pipeline would cause an increase in oil sands production. Conclusions drawn from the Department's market review, detailed further below, indicate that the proposed Project would be unlikely to significantly impact the rate of extraction in the oil sands and is therefore not likely to lead to a significant net increase in GHG emissions.

The Supplemental EIS analysis considers wells-to-wheels GHG emissions, including extraction, processing, transportation, refining, and refined product use (such as combustion of gasoline in cars) of WCSB crudes compared to other reference crudes, including heavy slates. The lifecycle analysis also considers the implications associated with other generated products during the lifecycle stages (so-called co-products) such as

petroleum coke. The largest single source of GHG emissions in the lifecycle analysis is the finished-fuel combustion of refined petroleum fuel products, which is consistent for different crude oils.

WCSB crudes are generally more GHG intensive than other crudes they would replace or displace in U.S. refineries, and emit an estimated 17 percent more GHGs on a lifecycle basis than the average barrel of crude oil refined in the United States. As the EPA notes in its letter of February 2, 2015 to the Secretary, "oil sands crude is substantially more carbon intensive than reference crudes and its use will significantly contribute to carbon pollution."

According to the Supplemental EIS, the total lifecycle emissions associated with production, refining, and combustion of 830,000 bpd of oil sands crude oil transported through the proposed Project is approximately 147 to 168 MMTCO2e per year. The annual lifecycle GHG emissions from 830,000 bpd of the four reference crudes examined in the Supplemental EIS are estimated to be 124 to 159 MMTCO2e. The range of incremental GHG emissions for crude oil that would be transported by the proposed Project is estimated to be 1.3 to 27.4 MMTCO2e annually. The estimated range of potential emissions is large because there are many variables, such as which reference crude is used for the comparison and which study is used for the comparison. Nevertheless, at the high end, the Supplemental EIS states that 27.4 MMTCO2e per year is equivalent to the annual GHG emissions from 5.7 million passenger vehicles or 7.8 coal-fired power plants.

GHG lifecycle emissions analysis performed by the Department after publication of the Supplemental EIS in the context of the environmental review for a Presidential permit for another pipeline, Enbridge's Line 67 Expansion, estimates that GHG emissions from WCSB crude may be five to 20 percent higher than previously indicated. Using the Greenhouse Gases, Regulated Emissions, and Energy Use in Transportation (GREET) model, an alternative "well-to-wheels" fuel-cycle model developed by the Argonne National Laboratory (Argonne National Laboratory 2016, 2015), the Line 67 Expansion Draft Supplemental EIS places emissions per barrel of WCSB at 584 kg CO2-eq per barrel, compared to approximately 485-555 kg CO2-eq per barrel to in the Supplemental EIS for the proposed Project.[1]

The estimates provided in the Supplemental EIS characterize the potential increase in emissions attributable to the proposed Project if one assumes that approval or denial of the proposed Project would directly result in a change in production of 830,000 bpd of oil sands crudes in Canada. That is because the estimates represent the total incremental emissions associated with production and consumption of 830,000 bpd of oil sands crude

[1] The primary driver for the Department's determination for Line 67 is the assumption that coke produced in the process of extraction of WCSB would not offset the use of coal as a source of energy to fuel WCSB extraction. If coke displaces coal, WCSB emissions would be 528 kg CO2-eq per barrel according to the Line 67 Expansion Supplemental EIS. We note that comparing lifecycle greenhouse gas emissions to the U.S. average mix in GREET could potentially lead to over-estimating the change in emissions from using heavy WCSB crude oil, and under-estimating the change from using lighter WCSB crude oil.

above and beyond the current baseline compared to the reference crudes. However, as discussed further below, the Department's analysis continues to show that the approval of this proposed Project is unlikely to have a substantial effect on the rate of extraction of the oil sands and is also therefore unlikely to directly result in significant change in production in oil sands crudes in Canada.

5.2 Market Analysis

Proposed Project's Impact on Oil Sands Production

The Supplemental EIS utilizes analysis of evolving market conditions, transportation costs, oil-sands supply costs, and varying supply-demand scenarios to inform conclusions about the proposed Project's potential impact on oil sands production. The analysis concluded at the time it was published in January 2014 that approval or denial of any one crude oil transport project, including the proposed Project, would be unlikely to significantly impact the rate of extraction in the oil sands, or the continued demand for heavy crude oil at refineries in the United States. The Supplemental EIS balances this position by emphasizing that uncertainty underlies a number of key variables critical to projecting Canadian production growth.

Generally, the dominant drivers of oil sands development remain more global than any single infrastructure project. Oil sands production and investment could slow or accelerate depending on oil price trends, regulations, and technological developments, but the potential effects of those factors on the industry's rate of expansion need not be conflated with the more limited effects of individual pipelines. Under most market conditions, alternative transportation infrastructure would allow growing oil sands production to reach markets irrespective of the proposed Project. Most recently, this has been demonstrated by the growth in rail loading capacity in Western Canada, which as of February 25, 2017, the National Energy Board (NEB) of Canada now estimates at over 1,075,000 bpd. This significant rail capacity has been utilized to export over 160 million barrels of Canadian crude oil to the United States since 2011. The Supplemental EIS also determined that construction of the proposed Project would have some effect on discrete decisions about whether to develop specific oil sands projects if (1) no new pipeline capacity to Canadian ports or to the United States becomes operational and (2) the price of oil in the long run persists at a level where other transport options are no longer economical.

Coupled with supply growth in the WCSB, major crude oil export pipelines from the region have largely operated at, or near, capacity for several years; an observation highlighted by Prime Minister Trudeau on November 29, 2016 when he announced the conditional approval of Kinder Morgan's expansion of the Trans Mountain pipeline from Alberta to the port at Vancouver, British Columbia, which would increase the pipeline's capacity from 300,000 bpd to 890,000 bpd of crude oil. Kinder Morgan expects to begin construction of the Trans Mountain pipeline in September 2017. Current market projections from the Energy Information Administration (EIA) and the International Energy Agency (IEA) anticipate production growth in Canadian WCSB to continue, even when factoring in delays and cancellations of certain planned large-scale greenfield

projects resulting from the current crude oil price environment, further stressing the capability of existing pipeline infrastructure to keep pace with supply growth, and suggesting that there continues to be sustained demand for additional pipeline capacity. This near-term production growth in the WCSB is due largely to the start of other projects with long lead-times and continued incremental investment by certain market players to expand production from existing brownfield projects.

The impact on oil sands development is difficult to gauge with precision, in part because the cost differential between other modes of transport and pipelines may change over time, and production costs vary from one oil sands development to another. While the Department does not know all of the production costs or other investment factors for specific Canadian projects, the Supplemental EIS concluded that many projects are expected to break even when sustained oil prices are in the range of $65-$75 per barrel. On this basis, the Department's analysis found that oil sands production is expected to be most sensitive to transport costs with oil prices in or below that range.

Since the publication of the Supplemental EIS, the price of benchmark West Texas Intermediate (WTI) crude oil has declined by over 50 percent from $98.23 per barrel in January 2014 to approximately $48 per barrel at present. This represents a sizeable near-term price decline; however, the Department notes that the 30-year real price average (i.e., the nominal price adjusted for inflation using March 2017 $) of WTI crude is $55 per barrel. Although prices have rebounded from 2016 lows, global liquids production for the time being continues to outpace consumption. Organization for Economic Cooperation and Development commercial stocks of crude oil remain approximately 300 million barrels above the five-year average. This includes U.S. commercial oil stocks, which are at an all-time high of 528 million barrels or approximately 35 days of domestic supply needs. The EIA expects a relatively balanced oil market in the next two years, with inventory builds averaging 100,000 bpd in 2017 and 200,000 bpd in 2018. However, the Department underscores that short-term fluctuations in price driven by current market supply and demand dynamics are less indicative of the industry's general outlook than the broader macroeconomic forces that drive investment in the oil and gas sector.

In making long-term investment decisions, companies often distinguish between new development and production from existing projects with previously sunk capital costs. While oil prices consistently below supply costs over the long-term may lead some investors to delay or even cancel some future projects, decisions about proceeding with or expanding existing projects and those already under construction or with financing in place are largely based on marginal operating costs. In general, existing projects and those under development are unlikely to slow or stop unless revenues persistently fall below current operating costs, which are much lower than total supply costs ($20 to $40 per barrel according to most estimates reviewed). Most reports further indicate that oil sands supply costs have fallen in the lower-price environment. Collectively, these factors help to explain why Canadian crude oil production, including from the oil sands, has proven resilient despite lower oil prices, including a period during the first quarter of 2016 when price remained at or below $40 per barrel. These market observations also

explain the growth trends expected by the Department and other market energy information organizations, such as the EIA, which predicts 340,000 bpd in crude production growth in Canada through 2018.

The Department recognizes that oil prices are volatile, particularly over the short term. However, the long-term trends that drive WCSB crude oil production and the amount of new transportation capacity needed to meet them, coupled with the documented ability of Canadian upstream producers to sustain production during a period of lower oil prices, lead the Department to have confidence in the forecasts presented by market experts at the EIA and IEA, and affirm the Department's conclusion that such infrastructure is supported by mid- and long-term market outlooks.

Crude-by-Rail

In recent years, industry has looked toward existing Canadian crude oil production forecasts and commercial realities tied to prevailing midstream bottlenecks as justification for further investment in alternative crude oil transportation. Although there are a number of possible alternative transportation avenues for crude from the oil sands to reach U.S. or other markets, significant investment has been made in the development of crude-by-rail loading and off-loading facilities throughout North America. Current WCSB rail loading capacity has been estimated to exceed 1,075,000 bpd, with potential to expand further. Under current market conditions, existing pipelines coupled with crude-by-rail facilities will likely have the capacity to accommodate new supply from upstream projects under construction and in various stages of completion in western Canada. Although existing rail capacity moderates the impact of pipeline constraints, according to NEB of Canada, it remains a more expensive form of transportation than pipelines, an observation that supports the economic utility and commercial viability of new pipeline infrastructure. Additionally, as stated in the Supplemental EIS, per unit rail transport of WCSB oil would be more GHG-intensive than transport by pipeline when accounting for the total aggregate lifecycle GHG emissions (including direct and indirect emissions).

The extent to which rail transport will actually occur, however, or would prove to be a major form of transport for WCSB crude to the United States in the long term, remains uncertain. Utilization of rail facilities will depend upon many factors, including the availability of cheaper pipeline transport options from the respective production areas, the rate of growth in emerging areas of crude production, demand from refineries that may be better served by rail from these sources, differences in the price of oil paid in the production areas and the price of oil paid at the refinery markets (particularly on the coasts), and arbitrage opportunities that may be available through faster rail-based transport.

Producers seeking to preserve margins in the face of narrowing price gaps between Western Canada Select crude, WTI, and other crudes such as the Mexican Maya, may seek to maximize the efficiency of existing pipeline infrastructure in lieu of rail. Moreover, implementation of new Department of Transportation rules intended to improve the safe transportation of large quantities of crude-by-rail may lead to a marginal

increase in crude-by-rail costs.

5.3 Potential Spill Risk and Safety Impacts: Many concerns were raised in comments received by the Department regarding the potential environmental effects of a pipeline release, leak, and/or spill. The Supplemental EIS analyzes impacts from potential releases from the proposed Project by analyzing historical spill data. The analysis identifies the types of pipeline system components that historically have been the source of spills, the sizes of those spills, and the distances those spills would likely travel. The resulting potential impacts to natural resources, such as surface waters and groundwater, are also evaluated and mitigation measures are included that are designed to prevent, detect, minimize, and respond to oil spills.

The Supplemental EIS analyzes historical crude oil pipeline incident data within the PHMSA and National Response Center incident databases. Over a period of ten years, from January 2002 through July 2012, a total of 1,692 incidents were reported in the United States, of which 321 were reported to be pipe incidents and 1,027 incidents were reported to involve different equipment components such as tanks, valves, or pumps.

Most spills over this period were small. Of the 1,692 incidents between 2002 and 2012, 79 percent of the incidents were in the small (zero to 50 barrel) range—roughly equivalent to a spill of up to 2,100 gallons. Four percent of the incidents were in the large (greater than 1,000 barrel) range. If a pipeline spill were to occur, the severity of its impact would depend on the volume and aerial extent of oil released; the distance of the impacted entity from the spill source; site-specific environmental circumstances, including climate and species present; and the timing and nature of response efforts.

An oil spill that reaches a surface waterbody or wetland could cause effects such as reduced dissolved oxygen levels or high benzene contaminant levels. The Supplemental EIS states that acute toxicity could occur if substantial amounts of crude oil were to enter rivers and streams. If diluted bitumen is accidentally released and it flowed into surface water, the diluent fraction would tend to volatilize or dissolve into the water, leaving bitumen behind to sink or become suspended. Upwards of 25 percent of residual hydrocarbons could be reasonably removed by natural attenuation, while active recovery methods would be required for remediation of the remaining spill volume. Aggressive cleanup methods could mix oil and water, which might result in longer-lasting impacts to sensitive waterbody habitat. Passive cleanup methods are less likely to impact resources, but require a timeframe on the order of tens of years.

There are 39 stream crossings within 40 miles upstream of protected or specially designated segments of the Niobrara and Missouri rivers, which are in proximity to the proposed Project route. The shortest distance an oil spill would have to travel to impact a protected waterbody is approximately 28.5 miles. Based on an analysis of PHMSA historical incident data of large-diameter pipeline releases, the probability of a spill occurring that would convey oil to a protected waterbody is once every 542 years.

Spilled crude oil could affect wildlife directly and indirectly. Direct effects include

physical processes such as oiling and toxicological effects, which could cause sickness or mortality. Indirect effects include habitat impacts, nutrient cycling disruptions, and alterations to the ecosystem.

A surface release could produce localized effects on plant populations by direct oiling or by oil permeating through the soil, affecting root systems and indirectly affecting plant respiration and nutrient uptake. Generally, most past spills on terrestrial habitats have caused minor ecological damage, and ecosystems have shown a good potential for recovery.

At the time of the release of the Supplemental EIS, there were 1,232 identified wells within the potential range of a large spill from the proposed Project. In Nebraska, the potential spill range from the proposed Project overlaps with the Steele City Wellhead Protection Area. Keystone agreed to provide an alternative water supply if an accidental release from the proposed Project contaminates groundwater or surface water used as potable water or for irrigation or industrial purposes.

Normal operations would be expected to result in less than one human injury per year. In the event of a spill, human health exposure pathways could include direct contact with crude oil, inhalation of airborne emissions from crude oil, or consumption of food or water contaminated by either the crude oil or components of the crude oil. Mitigation measures, including spill response and containment and emergency response plans, would reduce and minimize human and environmental exposures.

Keystone has agreed to incorporate additional mitigation measures in the design, construction, and operation of the proposed Project, in some instances exceeding what is normally required, including 59 Special Conditions, 57 of which were recommended by PHMSA. These commitments by Keystone remain in effect. Many of these mitigation measures are intended to reduce the likelihood of a release occurring. Other measures provide mitigation intended to reduce the consequences and impact of a spill should such an event occur.

Since the publication of the Supplemental EIS, several new studies related to cleanup of diluted bitumen have been published. The National Academy of Science (NAS) 2016 study, Spills of Diluted Bitumen from Pipelines: A Comparative Study of Environmental Fate, Effects, and Response, found that diluted bitumen presents more challenges for cleanup response than other types of oil commonly moved by pipeline. The NAS 2016 study also found that various government agencies (PHMSA, EPA, and the U.S. Coast Guard) and first responders are in need of more training and better communication in order to adequately and effectively address spills of diluted bitumen.

But as described in the Supplemental EIS, Appendix Z, Compiled Mitigation Measures, Keystone has agreed to develop and carry out multiple mitigation measures including developing monitoring plans and response plans, among other spill and spill-prevention mitigation measures. For example, if a spill were to occur, Keystone would provide material safety data sheets to first responders within one hour of the occurrence, and

would provide potable water for any affected communities, businesses, or affected entities within the spill area. Additionally, during the development and construction phase of the project, Keystone has agreed to consult with local emergency responders during development of an Emergency Response Plan (ERP) and update its mitigation and spill response plans with new knowledge or information on the chemistry of diluted bitumen as it becomes available. Accordingly, the measures that Keystone has already committed to—including commitments relating to development of an ERP and other mitigation plans that account for new information –adequately address the new challenges, training needs, and communication needs identified in the NAS 2016 study.

The Supplemental EIS also discusses transportation by rail, in particular as part of the No Action Alternative scenarios (in other words, scenarios that may occur if the proposed Project were denied), and concludes that transport by rail likely results in a greater number of injuries and fatalities per ton-mile than transportation by pipeline, as well as a greater number of accidental releases of crude oil and a greater overall volume of crude oil released. However, the average size of an accidental release associated with crude-by-rail transportation is smaller than the average size of an accidental release associated with a pipeline.

5.4 Socioeconomic Impacts: Socioeconomic impacts associated with the proposed Project were also of particular concern in the comments received by the Department throughout its process. The Supplemental EIS analyzes these impacts and provides information regarding economic activity that may result from an approval of the proposed Project.

Employment and Economic Activity

The Department utilized subject matter experts and established methodologies to characterize the macroeconomic impacts of the proposed Project in the Supplemental EIS. Benchmarking against 2010 economic data, construction spending on the proposed Project was found to support a combined total of approximately 42,100 jobs throughout the United States for the up to two-year construction period. Of these jobs, approximately 16,100 would be direct jobs supported at firms that are awarded contracts for goods and services, including construction, by Keystone. The other approximately 26,000 jobs would result from indirect and induced spending; this would consist of goods and services purchased by the construction contractors and spending by employees working for either the construction contractor or for any supplier of goods and services required in the construction process. About 12,000 jobs, or 29 percent of the total 42,100 jobs, would be supported in Montana, South Dakota, Nebraska, and Kansas.

Of the 42,100 supported jobs described above, approximately 3,900 (or 1,950 per year if construction took two years) would comprise a direct, temporary, construction workforce in the proposed Project area. Employment supported by construction of the proposed Project would translate to approximately $2.05 billion in employee earnings. Of this, approximately 20 percent ($405 million in earnings) would be allocated to workers in the proposed Project area. The remaining 80 percent, or $1.6 billion, would occur in other locations around the country.

According to Keystone, once the proposed Project enters service, operations would require approximately 50 total employees in the United States: 35 permanent employees and 15 temporary contractors. This small number would result in negligible impacts on population, housing, and public services in the proposed Project area.

The total estimated property tax from the proposed Project in the first full year of operations would be approximately $55.6 million spread across 27 counties in three states. This impact to local property tax revenue receipts would be substantial for many counties, constituting a property tax revenue benefit of 10 percent or more in 17 of these 27 counties. Operation of the proposed Project is not expected to have an impact on residential or agricultural property values.

Construction contracts, materials, and support purchased in the United States would total approximately $3.1 billion. Another approximately $233 million would be spent on construction camps for workers in remote locations of Montana, South Dakota, and northern Nebraska. Construction of the proposed Project would contribute approximately $3.4 billion to the U.S. gross domestic product (GDP). This figure includes not only earnings by workers, but all other income earned by businesses and individuals engaged in the production of goods and services demanded by the proposed Project, such as profits, rent, interest, and dividends.

According to the U.S. Bureau of Economic Analysis, the U.S. oil and gas industry contributed 1.1% to total U.S. GDP in 2015. The proposed Project would make a meaningful contribution to this critically important sector of U.S. economy.

Since 2010, from which data the economic data was benchmarked, the U.S. economy has returned closer to full employment capacity but simultaneously has seen relative economic weakness in certain sectors and states due to the downturn in global energy prices in 2014. As a result, the economic benefits in terms of job creation from the proposed Project may be significantly different than the initial estimates.

Health Impacts

A number of commenters raised concerns about the potential for impacts on human health associated with the proposed Project. The Department took into account, with peer-reviewed research where appropriate, impacts to human health throughout the various resource areas in the Supplemental EIS.

For example, in the Potential Releases chapter, the Supplemental EIS examined potential health risks associated with exposure to crude oil and other relevant chemicals, were there to be a spill. In the Air Quality and Noise chapter, the Supplemental EIS addressed air pollution that would be associated with the construction and operation of the proposed Project. In the Cumulative Effects Assessment and Extraterritorial Concerns chapter, the Supplemental EIS described potential changes in pollution associated with refineries. Finally, the Supplemental EIS also examined potential human health impacts in Canada associated with oil sands development and pipeline construction and operation.

Environmental Justice

According to the Office of Environmental Justice in EPA, environmental justice refers to the "fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." A total of 17 separate census areas with minority and/or low income populations could potentially be affected by construction or operation of the proposed Project. Temporary environmental justice impacts during construction could include exposure to construction dust and noise, disruption to traffic patterns, and increased competition for medical or health services in underserved populations. Positive impacts could include increased employment and earnings.

Minority or low-income populations could be more vulnerable should an oil release occur along the segment of the pipeline that transits through their communities. Further, Indian tribes with significant dependence on natural resources could be disproportionately affected.

Mitigation of environmental justice concerns would include ensuring adequate communication with affected populations, such as through public awareness materials in appropriate languages so as to ensure an appropriate level of emergency preparedness. With respect to employment opportunities, Keystone has committed to employee and supplier diversity and has programs in place to mitigate impacts on vulnerable populations.

Some comments, particularly from Indian tribes, have expressed concern that temporary camps of construction workers along the proposed Project route may increase crime and otherwise disrupt local communities. In their letters to the Department of February 2, 2015, the Department of Homeland Security and the Department of the Interior also expressed concerns in this regard. Keystone committed to take several measures to ensure greater safety for those communities along the route, including security provisions and a code of conduct for the workers.

5.5 Physical Disturbance Impacts:

Water Resources

Construction and operation of the proposed Project could result in temporary and permanent surface water impacts, including stream sedimentation, changes in stream channels and stability, and temporary reduction in stream flow. The proposed Project's pipeline route would avoid surface water whenever possible, but would cross approximately 1,073 surface water bodies, including 56 perennial rivers and streams, as well as approximately 24 miles of mapped floodplains. Mitigation measures would include tunneling the pipeline underneath major rivers to mitigate construction impacts, erosion control during construction, and restoration of waterbodies as soon as practical after construction.

Wetlands

The proposed Project would affect approximately 383 acres of wetlands, two acres of which may be permanently lost. Remaining wetlands affected by the proposed Project would remain as functioning wetlands, provided that impact minimization and restoration efforts described in the mitigation plan are successful. The proposed route includes modifications to the route that Keystone originally proposed in 2012 to avoid wetland areas (such as the sensitive NDEQ-identified Sand Hills Region) and Keystone has committed to additional mitigation measures. Additionally, Keystone has identified mitigation measures for the protection of sensitive areas, including wetlands, such as industry-standard avoidance measures and best practices for working near sensitive areas as described in the Construction, Mitigation, and Reclamation Plan (CMRP), as well as a commitment to abide by all state, local, and tribal regulations and requirements. Finally, Keystone will work with state and local response agencies to develop and carry-out mitigation measures related to work near wetlands.

Threatened and Endangered Species

Thirteen federally listed threatened or endangered species occur in the proposed project area. The endangered American burying beetle (*Nicrophorus americanus*) is the only species that is likely to be adversely affected by the proposed Project, but other species could potentially be affected. These include the federally endangered black-footed ferret (*Mustela nigripes*), interior least tern (*Sternula antillarum*), whooping crane (*Grus americana*), and pallid sturgeon (*Scaphirhynchus albus*); and the threatened piping plover (*Charadrius melodus*), western prairie fringed orchid (*Platanthera praeclara*), northern long-eared bat (*Myotis septentrionalis*), and rufa red knot (*Calidris canutus rufa*).

The FWS issued a Biological Opinion in May 2013 to the Department regarding potential impacts of the proposed Project on seven federally protected species. The American burying beetle was the only species determined by the FWS to likely be adversely affected by the proposed Project. Since that time, two additional species have become federally listed as threatened—the northern long-eared bat and the rufa red knot. The consultations for both species were completed, with the FWS concurring in a "may affect, but is not likely to adversely affect" determination. The Department also reviewed the 2013 Biological Opinion and received confirmation from FWS that Section 7 consultations need not be reinitiated for any other species and that, following implementation of the conservation measures contained within that Opinion, no other species included in the project area would be adversely affected. The Department is committed to ensuring that all measures identified in the 2013 Biological Opinion, as supplemented, are implemented, including by Keystone.

Geology and Soils

The proposed Project's pipeline route extends through relatively flat and stable areas, and the potential for seismic hazards (earthquakes), landslides, or subsidence (sink holes) is low. The route would avoid the NDEQ-identified Sand Hills Region, where soils are particularly susceptible to damage from pipeline construction. Potential impacts to soil resources in other areas associated with construction or operation of the proposed Project and connected actions include soil erosion, loss of topsoil, soil compaction, an increase in

the proportion of large rocks in the topsoil, soil mixing, soil contamination, and related reductions in the productivity of desirable vegetation or crops. Mitigation measures would include construction of temporary erosion control systems, implementation of topsoil segregation methods, and restoration of the ROW after construction.

Terrestrial Vegetation

Potential construction and operations-related impacts to terrestrial vegetation resources associated with the proposed Project include impacts to cultivated crops, developed land, grassland/pasture, upland forest, open water, forested wetlands, emergent herbaceous wetlands, and shrub-scrub communities. The proposed Project route would impact biologically unique landscapes and vegetation communities of conservation concern. Keystone committed to restore areas to preconstruction conditions as practicable, and reseed disturbed areas, and to use specific best management practices and procedures to minimize and mitigate the potential impacts to native prairie areas.

Wildlife

The proposed Project would cause minor impacts to wildlife and wildlife habitat. Potential impacts to wildlife include habitat loss, alteration, and fragmentation; direct mortality during construction and operation (e.g., wildlife collisions with vehicles and power lines/power poles); and reduced survival or reproduction due to stress or avoidance of feeding caused by factors such as construction and operations noise and increased human activity. Mitigation measures to reduce potential construction and operations-related effects to wildlife where habitat is entered would include construction timing restrictions and buffer zones developed in consultation with regulatory agencies as well as measures to minimize adverse effects to wildlife habitats. Keystone committed to develop and implement a conservation plan for migratory birds and bald and golden eagles and their habitats in consultation with the FWS.

Fisheries

Impacts to fisheries within the rivers and perennial streams crossed by the proposed Project route would occur during construction and would be temporary. The CMRP contains measures for waterbody crossings to reduce potential effects on fish and aquatic/stream bank habitat and otherwise minimize potential impacts to fisheries resources. Mitigation measures would include best practices in open-cut stream crossings to reduce stream bed disturbance, sediment impacts, and interference with spawning periods; crossing under large rivers using horizontal directional drilling methods; minimization of vehicle contact with surface waters; and development of site-specific contingency plans to address unintended releases of drilling fluids that include preventative measures and a spill response plan.

Land Use, Recreation, and Visual Resources

Approximately 15,296 acres of land would be affected by construction of the proposed Project, though only approximately 5,569 acres would be retained for operation within permanent easements along the pipeline ROW and at the locations of ancillary facilities (e.g., access roads, pump stations). Approximately 89 percent of the total affected acreage (13,597 acres) is privately owned and the remainder government-owned.

Rangeland (approximately 63 percent) and agricultural land (approximately 33 percent) comprise the vast majority of land use types that would be affected by construction. Impacts to land use resources include lease or acquisition and development of the pipeline ROW and land for ancillary facilities (e.g., access roads, pump stations, and construction camps), damage to agricultural features and productivity, visual impacts, and increased dust and noise.

Construction activities would temporarily affect recreational traffic and use patterns in special management and recreational areas, such as historic or scenic trails and rivers with recreational designations. Impacts of operation of the proposed Project on recreation would be minimal.

Visual impacts associated with the proposed Project would primarily occur during construction, when pipeline and ancillary facility construction, trenching, and facilities such as pipe yards would be visible. Permanent visual impacts following operation would include the presence of new ancillary facilities as well as visual disturbances in the landscape, such as tree removal, along the pipeline route.

Keystone committed to compensate landowners for construction- and operation-related impacts. It would implement measures to reduce impacts to land uses, recreation, and visual resources such as topsoil protection, restoring disturbed areas, and developing traffic access and management plans.

Air Quality and Noise

Construction dust and emissions from construction equipment would typically be localized, intermittent, and temporary since pipeline construction would move through an area relatively quickly. During normal operation of the proposed Project, there would be only minor emissions from valves and pumping equipment at the pump stations. Keystone would implement mitigation measures to reduce air quality impacts, including dust control measures and compliance with state and local air quality restrictions.

Construction noise impacts would also be localized, intermittent, and temporary. Noise impacts from operation of the pipeline would be limited to the electrically driven pump stations. During construction, Keystone would limit the hours during which activities with high-decibel noise levels are conducted in residential areas, require noise mitigation procedures, and develop site-specific mitigation plans to comply with regulations. During operations, Keystone would implement a noise control plan to mitigate noise impacts at affected sites and, as necessary, install sound barriers.

5.6 Cultural Resources: Pipeline construction may present a risk to historic and cultural resources unless appropriately addressed through avoidance or mitigation. This risk was a key concern for Indian tribes and other commenters. The Department of Interior in its February 2, 2015 letter to the Secretary reiterated these concerns. The Department concluded a Programmatic Agreement (an agreement with several interested parties that contemplates mitigation of certain cultural resources impacts in the event of construction). The Programmatic Agreement is appended to the Supplemental EIS, and

was concluded in consultation with Indian tribes, federal and state agencies, and the permit applicant. The Department incorporated input from Indian tribes to amend the Programmatic Agreement on cultural resources that had been developed for Keystone's 2008 permit application. The Programmatic Agreement describes the processes that would be followed by Keystone and applicable state and federal agencies to identify cultural resources and to avoid or mitigate adverse impacts.

The proposed Project was designed to avoid disturbing cultural resources listed in the National Register of Historic Places (NRHP), those considered to be eligible for listing in the NRHP, and others of potential concern that have not been evaluated for NRHP listing, to the extent possible. With regard to cultural resources that cannot be avoided, Keystone has committed to minimize and mitigate impacts whenever feasible. Additionally, Keystone would implement Unanticipated Discovery Plans in order to ensure minimization of impacts to as-yet-unknown cultural resources that might be inadvertently encountered during construction or operation of the proposed Project.

5.7 Cumulative Effects: The cumulative effects analysis in the Supplemental EIS evaluates the way that the proposed Project's impacts interact with the effects of other past, present, or reasonably foreseeable future actions or projects. The goal of the cumulative impacts analysis is to identify situations where sets of comparatively small individual impacts, taken together, constitute a larger collective impact. Cumulative effects associated with the proposed Project and connected actions vary among individual environmental resources and locations. Generally, where long-term or permanent impacts from the proposed Project are absent, the potential for additive cumulative effects with other past, present, and reasonably foreseeable future projects is negligible.

5.8 Alternatives: The Supplemental EIS provides a detailed description of the categories of alternatives to the proposed Project that were analyzed, as well as the alternative screening process and the detailed alternatives identified for further evaluation.

Consistent with NEPA and Council on Environmental Quality (CEQ) regulations, the Department compared the proposed Project with four reasonable alternatives: a pipeline that partly follows an alternative route (the "I-90 Corridor Pipeline Alternative"), and three different "No Action Alternative" scenarios that could result if the Presidential permit is not granted and the crude oil from the WCSB and the Bakken formations is carried on a different form of transport.

Consistent with CEQ regulations and the Department's authority, the Supplemental EIS specifically identifies the alternatives that are before the decisionmaker in considering the application and making the national interest determination pursuant to Executive Order 13337: the No Action Alternative (Permit denial) and the proposed Project (Permit approval).

<u>No Action Alternative</u>
The Supplemental EIS separately analyzed three No Action Alternative scenarios, which are described briefly below. The No Action Alternative analysis considers what would

likely happen if the Presidential permit would be denied or the proposed Project would not otherwise implemented. It includes the Status Quo Baseline, which serves as a benchmark against which other alternatives are evaluated. Under the Status Quo Baseline, the proposed Project would not be constructed, its capacity to transport WCSB crude would not be replaced, and the resulting direct, indirect, and cumulative impacts that are described in this Supplemental EIS would not occur. The Status Quo Baseline is a snapshot of the crude oil production and delivery systems at January 2014 levels.

The No Action Alternative includes analysis of three alternative transport scenarios that, based on the findings of the market analysis, are believed to meet the proposed Project's purpose (i.e., providing WCSB and Bakken crude oil to meet refinery demand in the Gulf Coast area) if the Presidential permit for the proposed Project were denied, or if the pipeline were otherwise not constructed. Under the alternative transport scenarios, other environmental impacts would occur in lieu of the proposed Project. The Supplemental EIS includes analysis of various combinations of transportation modes for oil, including truck, barge, tanker, and rail. These scenarios are considered representative of the crude oil transport alternatives with which the market could respond in the absence of the proposed Project. These three alternative transport scenarios (the Rail and Pipeline Scenario, Rail and Tanker Scenario, and Rail Direct to the Gulf Coast Scenario) are described below.

Rail and Pipeline Scenario: Under this scenario, WCSB and Bakken crude oil (in the form of dilbit or synbit) would be shipped via rail from Lloydminster, Saskatchewan, and Epping, North Dakota respectively (the nearest rail terminal served by two Class I rail companies for both locations), to Stroud, Oklahoma, where it would be temporarily stored and then transported via existing and expanded pipelines approximately 17 miles to Cushing, Oklahoma to interconnect with the interstate oil pipeline system. This scenario would require the construction of two new or expanded rail loading terminals in Lloydminster, Saskatchewan (the possible loading point for WCSB crude oil), one new terminal in Epping, North Dakota (the representative loading point for Bakken crude oil), seven new terminals in Stroud, and up to 14 unit trains (consisting of approximately 100 cars carrying the same material and destined for the same delivery location) per day (12 from Lloydminster and two from Epping) to transport the equivalent volume of crude oil as would be transported by the proposed Project.

Rail and Tanker Scenario: The second transportation scenario assumes WCSB and Bakken crude oil would be transported by rail from Lloydminster to a western Canada port (assumed to be Prince Rupert, British Columbia), where it would be loaded onto Suezmax tankers (capable of carrying approximately 986,000 barrels of WCSB crude oil) for transport to the U.S. Gulf Coast (Houston and/or Port Arthur) via the Panama Canal. Bakken crude would be shipped from Epping to Stroud via BNSF Railway or Union Pacific rail lines, similar to the method described under the rail and pipeline scenario. The rail and tanker scenario would require up to 12 unit trains per day between Lloydminster and Prince Rupert, and up to two unit trains per day between Epping and Stroud. This scenario would require the construction of two new or expanded rail loading facilities in Lloydminster with other existing terminals in the area handling the

majority of the WCSB for shipping to Prince Rupert. Facilities in Prince Rupert would include a new rail unloading and storage facility and a new marine terminal encompassing approximately 4,200 acres and capable of accommodating two Suezmax tankers. For the Bakken crude portion of this Scenario, one new rail terminal would be necessary in both Epping, North Dakota, and Stroud, Nebraska.

Rail Direct to the Gulf Coast Scenario: The third transportation scenario assumes that WCSB and Bakken crude oil would be shipped by rail from Lloydminster, Saskatchewan, and Epping, North Dakota, directly to existing rail facilities in the Gulf Coast region capable of off-loading up to 14 unit trains per day. These existing facilities would then either ship the crude oil by pipeline or barge the short distance to nearby refineries. As with the rail and tanker scenario, this scenario would likely require construction of up to two new or expanded terminals to accommodate the additional WCSB shipments out of Canada. One new rail loading terminal would be needed in Epping to ship Bakken crude oil. Sufficient off-loading rail facilities currently exist or are proposed in the Gulf Coast area such that no new terminals would need to be built under this scenario.

Comparison of Alternatives Before the Decisionmaker

The Supplemental EIS provides detailed analysis of the differences between these alternatives. With regard to GHG emissions, during operation of the No Action Alternative transportation scenarios, including rail and combination modes, the increased number of trains along the rail routes would produce GHG emissions from diesel fuel combustion and electricity generation to support rail terminal operations. Annual GHG emissions (direct and indirect) attributed to the No Action transportation scenarios would be greater than for the proposed Project, but those emissions relate solely to the movement of equivalent amounts of oil from Alberta to the Gulf Coast. Construction of the rail terminals would also involve large numbers of truck trips to transport construction materials and equipment. This increased traffic could cause congestion on roads. Increased shipment of crude by rail could reduce rail capacity available for other goods.

Transportation by rail would likely lead to a greater number of injuries and fatalities per ton-mile than transportation by pipeline, as well as a greater number of accidental releases of crude oil and a greater overall volume of crude oil released. However, the average size of an accidental release associated with crude-by-rail transportation is smaller than the average accidental release associated with a pipeline. Physical disturbance impacts of the No Action Alternative would vary depending upon the modes of transportation chosen by shippers. All three scenarios would require new or expanded facilities, likely concentrated near loading and off-loading terminals. Nevertheless, expansion of infrastructure would affect fewer acres of land (1,500-6,427) during construction than a new pipeline. During operations, the No Action Alternative would permanently affect between 1,500 acres and 6,303 acres of land, compared to 5,309 acres for the proposed Project.

6.0 Basis for Decision

Acting on behalf of the President of the United States under authority delegated by the Secretary of State to him, the Under Secretary of State for Political Affairs has determined that it serves the national interest to issue a Presidential permit to TransCanada Keystone Pipeline, L.P. to construct, connect, operate, and maintain pipeline facilities at the U.S.-Canada border in Phillips County, Montana, as part of the proposed Project. In accordance with the Presidential Memorandum dated January 24, 2017, and Executive Order 13337, the Department has considered Keystone's Presidential permit application originally filed with the Department on May 4, 2012 and re-submitted to the Department on January 26, 2017, and all input received over the course of the Department's review. The determination to issue a Presidential permit for the proposed Project is based on consideration of a broad range of factors, including the following assessments:

- The Department finds that the proposed Project will meaningfully support U.S. energy security by providing additional infrastructure for the dependable supply of crude oil. Global energy security is a vital part of U.S. national security. Moreover, crude oil is vital to the U.S. economy and is used to produce transportation fuels, fuel oils for heating and electricity generation, asphalt for our roads, and petrochemical feedstocks used for the manufacturing of chemicals, synthetic rubber, and a variety of plastics. Accordingly, the Department works closely with our international partners to ensure that adequate supplies of energy reach the global economy and to help manage geopolitical changes arising from shifting patterns of energy production and consumption. Whether promoting national and regional markets that facilitate financing for transformational and clean energy or inspiring civil society and governments to embrace transparent and responsible development of natural resources, the Department works to ensure energy is employed as a tool for stability, security, and prosperity. For U.S. policymakers, this has often translated into an acute focus on oil markets. Historically, oil has been a major source of U.S. energy security concerns due to our relatively high volume of net imports, and oil's economic importance and military uses. Such concerns are well founded. Over the past year, crude oil supply disruptions internationally have trended noticeably higher when controlling for Iran's return to the international oil market. Largely attributable to political instability and manipulative market tactics on the part of OPEC, when compared to disruptions at the time of the 2015 Decision, today unplanned disruptions are over 500,000 bpd higher, having reached a peak high of nearly one million bpd in September 2016. Moreover, OPEC's total spare capacity remains at or below two million bpd, which provides very little cushion for fluctuations in supply in a context of rapidly rising demand or further geopolitical disruptions. While U.S. oil imports have abated sharply in recent years, the United States remains a net oil importer. Moreover, even if the United States were self-sufficient in terms of meeting its domestic energy needs, because oil is traded globally, the United States would stay integrated with global oil markets and subject to global price volatility. Accordingly, the U.S. national interest in ensuring access to stable, reliable, and affordable energy supplies will persist in the foreseeable future.

- Canada's role as the largest and fastest-growing source of U.S. crude imports cannot

be dismissed. According to the latest statistics from the EIA, the United States imported 3.17 million bpd of crude oil from Canada in 2016, which accounted for more than 43 percent of total U.S. crude oil imports. Although domestic production growth from tight oil formations, which is predominately light crude, continues to supplant the majority of international alternatives, U.S. imports of Canadian crude oil are increasing. The vast majority of these imports reach U.S. markets via existing pipeline infrastructure between Canada and the United States. A growing share, however, reaches markets by rail. Over 160 million barrels of Canadian crude oil has been imported by rail from Canada since 2011. Current estimates for WCSB rail loading capacity show crude oil transport by rail has potential to grow further.

- Canadian oil is a relatively stable and secure source of energy supply for many reasons, and few countries share all of the political or physical characteristics that enable Canada to remain in this position. Its producing areas are physically close to the U.S. market, and there are limited chokepoints to disrupt trade between Canada and the United States. Canada has a low likelihood of political unrest, resource nationalism, or conflict—above-ground factors that sometimes disrupt oil production in other regions. Additionally, it is not a member of OPEC, which acts to restrict oil production and influence market conditions. The Canadian oil sector is efficiently run, without undue political interference. Canadian oil sands projects have low production decline rates compared to conventional oil fields, providing greater geologic certainty of future supply levels. Moreover, as the Canadian Government's conditional approval of the Trans Mountain pipeline illustrates, failure to approve new transboundary pipeline infrastructure may redirect this source of reliable supply to Asian markets.

- Any impact on prices for refined petroleum products would be minimal if the proposed Project is approved. The Supplemental EIS recognized that the proposed Project is unlikely to have a meaningful effect on crude flows and domestic fuel prices. While crude oil prices matter to those involved in producing oil or refining oil into products, most Americans are mainly concerned with the price of gasoline and other refined products. The price of those refined products in the United States continues to be set largely by global crude prices, which are tied to global production and consumption, rather than the availability of pipelines. The findings in the Supplemental EIS have been reinforced by EIA studies that assert that U.S. gasoline prices move with the international benchmark Brent crude oil price rather than WTI. Accordingly, energy security concerns stemming from the proposed Project's impact on domestic fuel prices are largely unwarranted—cross-border pipeline capacity does not measurably translate into lower retail gasoline prices. Oil trade is driven by commercial considerations and occurs in the context of a globally traded market in which crude oil and products are relatively fungible. The market continually adjusts both logistically and in terms of price to balance global supply and demand. As a result, the level or origin of U.S. oil imports has a minimal impact on the prices U.S. consumers pay for refined products.

- By itself the proposed Project is unlikely to significantly impact the level of GHG-

intensive extraction of oil sands crude or the continued demand for heavy crude oil at refineries in the United States. As stated in the Supplemental EIS, the dominant drivers of oil sands development remain more global than any single infrastructure project. Moreover, under most market conditions, alternative transportation infrastructure would allow growing oil sands production to reach markets irrespective of the proposed Project. Still, uncertainties about the future growth of oil sands production remain. Oil prices are volatile, particularly over the short term. However, the long-term price and technological trends that drive WCSB crude oil production and subsequently the amount of new transportation capacity needed to meet them, coupled with the documented ability of Canadian upstream producers to sustain production during a brief period of lower oil prices, leads the Department to have confidence in the forecasts presented by market experts at the EIA and IEA, and affirms the Department's conclusion that such infrastructure is supported by mid- and long-term market outlooks.

- In the 2015 Decision, the Department determined that approval of the proposed Project at that time would have undercut the credibility and influence of the United States in urging other countries to address climate change. Since then, there have been numerous developments related to global action to address climate change, including announcements by many countries of their plans to do so. In this changed global context, a decision to approve this proposed Project at this time would not undermine U.S. objectives in this area. Moreover, a decision to approve this proposed Project would support U.S. priorities relating to energy security, economic development, and infrastructure.

- The Department recognizes the importance of the proposed Project to Canada and places great significance on maintaining strong bilateral relations. The United States and Canada are the closest of allies, economic partners, and friends. This unique bilateral relationship is based on shared history, common values, and a vast and intricate network of ties between our federal governments, states, cities, and people. In many economic sectors the United States and Canada enjoy deeper, more integrated structures than found even among European Union member states. The United States has over $2 billion in trade per day, U.S.-Canadian supply chains are interlinked, and U.S. and Canadian companies are heavily invested in each other's markets. The two countries coordinate closely on most foreign policy issues and have a robust partnership in critical areas around the world. Irrespective of the proposed Project, our relationship with Canada will endure. However, the United States recognizes Canada's interest in the completion of the proposed Project and finds that it is in the United States' interest to strengthen the role Canada plays as a secure conduit for crude oil to reach the U.S. market, and more broadly, to ensure our shared interests in energy, environmental, and economic issues continue to prosper.

- The Department considered the economic benefits of the proposed Project for the United States using an input-output model calibrated to 2010 data. During construction over a two-year period, the model estimates spending on the proposed Project would support approximately 42,100 jobs (direct, indirect, and induced jobs

combined), of which approximately 3,900 would be direct construction jobs. The majority of these jobs would be short-term in nature. According to the applicant, were the proposed Project to enter service, operations would require approximately 50 employees in the United States, consisting of 35 full-time employees and 15 temporary contractors. The proposed Project would also generate tax revenue for communities in the pipeline's path and it was estimated that pipeline activity would contribute $3.4 billion to U.S. GDP. Since 2010, the U. S. economy has returned closer to full employment capacity but simultaneously has seen relative economic weakness in certain sectors and states due to the downturn in global energy prices in 2014. As a result, the economic benefits in terms of job creation from the proposed Project may be more significant than the initial estimates. The economic benefits are likely to be meaningful and reflect the importance policymakers place on positive near- and long-term economic growth.

- There are a variety of potential environmental and cultural impacts associated with the proposed Project, just as there would be for alternative methods of transporting crude oil. TransCanada Keystone Pipeline, L.P. has agreed to abide by all the terms and conditions of the mitigation measures outlined in the Supplemental EIS, including all Appendices and supplements, follow all state, local, and tribal laws and regulations with respect to the construction and operation of the proposed Project, follow monitoring and reporting requirements, and carry out response activities of any spills if they occur. Additionally, the Department has considered the concerns of some Indian tribes raised in the context of the proposed Project regarding sacred cultural sites and avoidance of adverse impacts to the environment, including to surface and groundwater resources.

Having weighed multiple policy considerations, the Under Secretary of State for Political Affairs finds that, at this time, the proposed Project's potential to bolster U.S. energy security by providing additional infrastructure for the dependable supply of crude oil, its role in supporting, directly and indirectly, a significant number of U.S. jobs and provide increased revenues to local communities that will bolster the U.S. economy, its ability to reinforce our bilateral relationship with Canada, and its limited impact on other factors considered by the Department, all contribute to a determination that issuance of a Presidential permit for this proposed Project serves the national interest.

7.0 National Interest Determination

Pursuant to the authority vested in me under Executive Order 13337 of April 30, 2004, the Presidential Memorandum dated January 24, 2017, and Department of State Delegation of Authority No. 118-2 of January 26, 2006, I hereby determine that issuance of a permit to TransCanada Keystone Pipeline, L.P. (Keystone), a limited partnership organized under the laws of the State of Delaware, to construct, connect, operate, and maintain facilities at the border of the United States and Canada for the transport of crude oil from Canada to the United States across the international boundary in Phillips County, Montana, would serve the national interest.

The Presidential permit issued to TransCanada Keystone Pipeline, L.P. shall include authorizations to construct, connect, operate and maintain facilities at the border of the United States facilities for the transport of crude oil from Canada to the United States as described in the Presidential permit application dated January 26, 2017. No actions shall be taken by TransCanada Keystone Pipeline, L.P. pursuant to this authorization prior to Keystone's acquisition of all other necessary federal, state, and local permits and approvals from agencies of competent jurisdiction.

23 March 2017
Date

Thomas A. Shannon, Jr.
Under Secretary of State for Political Affairs

PRESIDENTIAL PERMIT

AUTHORIZING TRANSCANADA KEYSTONE PIPELINE, L.P. ("KEYSTONE") TO CONSTRUCT, CONNECT, OPERATE AND MAINTAIN PIPELINE FACILITIES AT THE INTERNATIONAL BOUNDARY BETWEEN THE UNITED STATES AND CANADA

By virtue of the authority vested in me as Under Secretary of State for Political Affairs, including those authorities under Executive Order 13337, 69 Fed. Reg. 25299 (2004), the January 24, 2017 Presidential Memorandum Regarding Construction of the Keystone XL Pipeline, and Department of State Delegation of Authority 118-2 of January 26, 2006; having considered the environmental effects of the proposed action consistent with the National Environmental Policy Act of 1969 (83 Stat. 852; 42 U.S.C. 4321 et seq.), Section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1536), and other statutes relating to environmental concerns; having considered the proposed action consistent with the National Historic Preservation Act of 1966 (80 Stat. 917, 16 U.S.C. 470f et seq.); and having requested and received the views of members of the public, various federal and state agencies, and various Indian tribes; I hereby grant permission, subject to the conditions herein set forth, to TransCanada Keystone Pipeline, L.P. (hereinafter referred to as the "permittee"), a limited partnership organized under the laws of the state of Delaware, owned by affiliates of TransCanada Corporation, a Canadian public company organized under the laws of Canada, to construct, connect, operate, and maintain pipeline facilities at the international border of the United States and Canada at Morgan, Montana, for the import of crude oil from Canada to the United States.

The term "facilities" as used in this permit means the relevant portion of the pipeline and any land, structures, installations or equipment appurtenant thereto.

The term "United States facilities" as used in this permit means those parts of the facilities located in the United States. The United States facilities consist of a 36-inch diameter pipeline extending from the international border between the United States and Canada at a point near Morgan in Phillips Country, Montana, to the first mainline shut-off valve in the United States located approximately 1.2 miles from the international border. The United States facilities also include certain appurtenant facilities.

This permit is subject to the following conditions:

Article 1. (1) The United States facilities herein described, and all aspects of their operation, shall be subject to all the conditions, provisions, and requirements of this permit and any amendment thereof. This permit may be terminated or amended at any time at the discretion of the Secretary of State or the Secretary's delegate or upon proper application therefor. The permittee shall make no substantial change in the United States facilities, the location of the United States facilities, or in the operation authorized by this permit until such changes have been approved by the Secretary of State or the Secretary's delegate.

(2) The construction, operation, and maintenance of the United States facilities shall be in all material respects as described in the permittee's application for a Presidential permit under Executive Order 13337, filed on May 4, 2012 and resubmitted on January 26, 2017, the Final Supplemental Environmental Impact Statement (SEIS) dated January 31, 2014 including all Appendices as supplemented, and any construction, mitigation, and reclamation measures included in the Construction, Mitigation, and Reclamation Plan (CMRP), Emergency Response Plan (ERP), Oil Spill Response Plan (SRP), and other mitigation and control plans that are already approved or that are approved in the future by the Department of State or other relevant federal agencies. In the event of any discrepancy among these documents, construction, connection, operation and maintenance of the United States facilities shall be in all material respects as described in the most recent approved document unless otherwise determined by the Department of State.

Article 2. The standards for, and the manner of, construction, connection, operation, and maintenance of the United States facilities shall be subject to inspection and approval by the representatives of appropriate federal, state and local agencies. The permittee shall allow duly authorized officers and employees of such agencies free and unrestricted access to said facilities in the performance of their official duties.

Article 3. The permittee shall comply with all applicable federal, state, local, and tribal laws and regulations regarding the construction, connection, operation, and maintenance of the United States facilities and with all applicable industrial codes. The permittee shall obtain requisite permits from relevant state and local governmental entities, and relevant federal agencies.

Article 4. All construction, connection, operation, and maintenance of the United

States facilities under this permit shall be subject to the limitations, terms, and conditions issued by any competent agency of the U. S. Government. The permittee shall continue the operations hereby authorized and conduct maintenance in accordance with such limitations, terms, and conditions. Such limitations, terms, and conditions could address, for example, environmental protection and mitigation measures, safety requirements, export or import and customs regulations, measurement capabilities and procedures, requirements pertaining to the pipeline's capacity, and other pipeline regulations. This permit shall continue in force and effect only so long as the permittee shall continue the operations hereby authorized in accordance with such limitations, terms, and conditions.

Article 5. Upon the termination, revocation, or surrender of this permit, and unless otherwise agreed by the Secretary of State or the Secretary's delegate, the United States facilities in the immediate vicinity of the international boundary shall be removed by and at the expense of the permittee within such time as the Secretary of State or the Secretary's delegate may specify, and upon failure of the permittee to remove, or to take such other appropriate action with respect to, this portion of the United States facilities as ordered, the Secretary of State or the Secretary's delegate may direct that possession of such facilities be taken and that they be removed or other action taken, at the expense of the permittee; and the permittee shall have no claim for damages by reason of such possession, removal, or other action.

Article 6. When, in the opinion of the President of the United States, the national security of the United States demands it, due notice being given by the Secretary of State or the Secretary's delegate, the United States shall have the right to enter upon and take possession of any of the United States facilities or parts thereof; to retain possession, management, or control thereof for such length of time as may appear to the President to be necessary; and thereafter to restore possession and control to the permittee. In the event that the United States shall exercise such right, it shall pay to the permittee just and fair compensation for the use of such United States facilities upon the basis of a reasonable profit in normal conditions, and the cost of restoring said facilities to as good condition as existed at the time of entering and taking over the same, less the reasonable value of any improvements that may have been made by the United States.

Article 7. Any transfer of ownership or control of the United States facilities or any part thereof shall be immediately notified in writing to the Department of State, including the submission of information identifying the transferee. This

permit shall remain in force subject to all the conditions, permissions and requirements of this permit and any amendments thereto unless subsequently terminated or amended by the Secretary of State or the Secretary's delegate.

Article 8. (1) The permittee is responsible for acquiring any right-of-way grants or easements, permits, and other authorizations as may become necessary and appropriate.

(2) The permittee shall hold harmless and indemnify the United States from any claimed or adjudged liability arising out of construction, connection, operation, or maintenance of the facilities, including but not limited to environmental contamination from the release or threatened release or discharge of hazardous substances and hazardous waste.

(3) The permittee shall maintain the United States facilities and every part thereof in a condition of good repair for their safe operation, and in compliance with prevailing environmental standards and regulations.

Article 9. The permittee shall take all necessary measures to prevent or mitigate adverse impacts on or disruption of the human environment in connection with the construction, connection, operation, and maintenance of the United States facilities. Such measures will include the actions and obligations agreed to by permittee in the CMRP and other mitigation, control plans, and special conditions found in the Final SEIS, including all Appendices as supplemented, all of which are appended to and made part of this permit, or that are approved in the future by the Department or other relevant federal or state agencies, and any other measures deemed prudent by the permittee.

Article 10. The permittee shall file with the appropriate agencies of the United States Government such statements or reports under oath with respect to the United States facilities, and/or permittee's activities and operations in connection therewith, as are now, or may hereafter, be required under any laws or regulations of the United States Government or its agencies. The permittee shall file electronic Export Information where required.

Article 11. The permittee shall provide information upon request to the Department of State with regard to the United States facilities. Such requests could include, for example, information concerning current conditions or anticipated changes in ownership or control, construction, connection, operation, or maintenance of the U.S. facilities.

Article 12. The permittee shall provide written notice to the Department of State at such time as the construction authorized by this permit is begun, at such time as construction is completed, interrupted, or discontinued, and at other times as may be designated by the Department of State.

Article 13. This permit shall expire five years from the date of issuance in the event that the permittee has not commenced construction of the United States facilities by that deadline.

IN WITNESS WHEREOF, I, Under Secretary of State for Political Affairs, have hereunto set my hand this 23rd day of March, 2017 in the City of Washington, District of Columbia.

Thomas A. Shannon, Jr.
Under Secretary of State for Political Affairs

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 28332

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

APPELLANT'S BRIEF

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Notice of Appeal filed July 19, 2017

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PRELIMINARY STATEMENT

References in this reply brief to Appellee TransCanada Keystone Pipeline, LP's ("TransCanada") *Appellee's Brief* are denoted by "TC Br." followed by the cited page number. References to *Appellee South Dakota Public Utilities Commission's Brief* are likewise cited as "PUC Br." References to *Appellant Yankton Sioux Tribe's Opening Brief* are cited as "YST Br." The Yankton Sioux Tribe ("Tribe") relies on the Jurisdictional Statement, Statement of Legal Issues, Statement of the Case, and Statement of Facts presented in its opening brief. YST Br. 1-8.

ARGUMENT

I. THE COMMISSION ERRED WHEN IT DENIED THE TRIBE'S *MOTION TO DISMISS* AND WHEN IT DENIED THE TRIBE'S *JOINT MOTION IN LIMINE*.

The Public Utilities Commission ("Commission") committed reversible error when it denied the Tribe's *Motion to Dismiss*, AR 001362-65, and the *Joint Motion in Limine to Exclude Evidence Pertaining to Keystone's Proposed Changes to Findings of Fact* ("*Motion in Limine"*), AR 009481-009620, and in finding that the pipeline facility described in TransCanada's *Petition for Order Accepting Certification Under SDCL 49-41B-27* is the same facility as described in Docket HP09-001. *Cir. Ct. Decision* at 28. TransCanada, the applicant itself, identified no less than 30 differences between the facility permitted in 2010 and the new proposed project for which it sought certification. AR 000079-83. Cumulatively, these differences constitute a changed project – a different facility.

In its response brief, TransCanada argues that SDCL 49-41B-27 "presumes that there can be changes to a project between granting a permit and starting construction." TC Br. 19. This is simply untrue. SDCL 49-41B-27 states that construction pursuant to

an existing permit may proceed more than four years after the permit was issued if the utility certifies to the Commission that the facility continues to meet the conditions upon which the existing permit was issued. The statute also provides for expansion and improvement of previously permitted and constructed facilities to proceed on such terms. *Id*. The statute does not, however, say that a utility may alter an unconstructed project between the time the permit was issued and the time construction commences.

While expansion and improvement to a facility necessarily encompass changes to the original project, construction of a new facility does not. The plain language of the statute says nothing about changes to a to-be-constructed project, thus such an element cannot be read into the statute. The statute only permits construction of a facility more than four years after issuance of a permit *if that facility is the same facility approved by the permit*. Because TransCanada has made changes to the initially permitted facility, the facility for which it now seeks certification is not the same project that was permitted in 2010 and thus it cannot be authorized to proceed pursuant to SDCL 49-41B-27.

TransCanada also claims that the Tribe has taken the position that compliance with the permit conditions creates a new project. TC Br. 20. The Tribe does not argue that compliance with the conditions creates a new project, as it is quite possible for an *unchanged* project to comply with original permit conditions. It is not the conditions that dictate whether the project is the same; rather, it is the attributes of the project itself. Here, because those attributes have clearly changed, the project has changed and cannot be certified pursuant to SDCL 49-41B-27.

The Commission, on the other hand, argues that it "simply chose not to consider whether any of the updates identified in [the Tracking Table of Changes] constituted

grounds for dismissal." PUC Br. 8. Such a decision was not within the realm of the Commission's options for disposing of the motion. The fact that the facility that has now been certified is a different facility from the one permitted in 2010 deprived the Commission of subject matter jurisdiction. Lack of subject matter jurisdiction leaves no discretion for the adjudicator – the matter must be dismissed. The judgment of the Commission is therefore void. *Cable v. Union County Bd. of County Comm'rs*, 769 N.W.2d 817, 825 (S.D. Sup. Ct. 2009).[1]

The Commission's assertion that the State Legislature "did not intend to create a complete bar to certification simply by establishing a standard that no project could satisfy" was made without explanation and is unfounded. PUC Br. 8. Nothing about the Tribe's correct interpretation of the law precludes certification if a project remains the same project. Further, whether or not changes to the proposed facility "have any bearing as to whether or not the project will comply with the conditions of the permit" is irrelevant. *Id*. Even a wholly different project may be able to comply with those conditions, but compliance with the conditions is not the issue. If the new project is different than the original project, the new project has no permit and the Commission had no authority to grant certification.

The Commission draws a comparison between the instant case and Docket EL12-063, in which the Commission granted certification for a project for which "the size and presence of a federal nexus[] had changed." *Id*. at 9. The Commission fails, however, to acknowledge that while those changes relate to the project, they are not changes to the

[1] A reviewing court is "required to consider the issue [of subject matter jurisdiction] even when not raised in order to avoid unwarranted exercise of judicial authority." *State v. Wiese*, 201 N.W.2d 734, 736 (Iowa 1972).

project itself. In Docket EL12-063, the Otter Tail Power Company's *Petition for Order Accepting Certification* made no mention of changes to the proposed facility itself, other than a diminishment in the project's size. The order granting certification in Docket EL12-063 made no mention of any changes to the facility, and the petition for certification went unchallenged. The Commission, in its reliance on Docket EL 12-063, offered no information that the Commission even considered the issue presented before this Court. That case, therefore, provides no support for the Commission's argument, which this Court must reject. Because Docket HP14-001 dealt with a different facility than Docket HP09-001, the Commission committed reversible error and this matter should have been dismissed.

II. THE COMMISSION ERRED BY ISSUING THE *ORDER GRANTING MOTION TO DEFINE ISSUES AND SETTING PROCEDURAL SCHEDULE*.

The Commission committed further reversible error when it issued the *Order Granting Motion to Define Issues and Setting Procedural Schedule* and unlawfully limited the scope of discovery. AR 001528-29. Contrary to TransCanada's position, the Commission lacked legal authority to restrict the scope of discovery to evidence relevant to the two issues identified in the Commission's order. Pursuant to South Dakota law, a party may only secure an order limiting discovery once discovery has been sought and upon filing a motion for protective order, "a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action," and a showing of good cause. SDCL 15-6-26(c). TransCanada filed no such motion, discovery had not yet been sought, and TransCanada failed to make the requisite certification and showing of good cause – thus the Commission had no authority to limit discovery. *Id.*

TransCanada further argues that a proceeding under SDCL 49-41B-22 is treated differently than a proceeding under SDCL 49-41B-27. TC Br. 23-24. TransCanada provides no support for this argument. Furthermore, neither Chapter 1-26 nor Chapter 49-41B makes a distinction regarding discovery between contested cases brought under these two statutes. As a contested proceeding, Docket HP14-001 was required to entail the same trappings of due process applicable in original permit proceeding. Therefore, due process was not adequate, and the Commission committed reversible error in granting the unlawfully restrictive discovery order.

The Commission suggests that the vast quantity of data produced during the course of discovery proves that the scope of discovery was sufficient and due process was given. There is no quantity of evidence that can justify an unlawful restriction on discovery. The quantity of evidence does not support the substantive limitations on scope. While the extent of discovery rests in the discretion of the court, adjudicative bodies are still bound by the rules of procedure, a violation of which constitutes reversible error. In addition, as discussed above, the Commission lacked authority to issue an order tantamount to a protective order absent a motion and other elements required by SDCL 15-6-26(c).

Finally, the Commission enumerates a number of circumstances that it alleges justify the discovery order. PUC Br. 13. None of these circumstances cures the defect in the discovery limitations imposed on the Tribe.

On April 17, 2015, relying on its unlawful discovery order, the Commission issued an order denying, in part, a motion to compel filed by the Tribe. AR 004712-13.

As a result, the Tribe was unable to explore avenues that were likely to lead to the discovery of admissible evidence.

Interrogatories 10 and 13 requested dates, phone numbers, emails, and names of persons responsible for conducting surveys, addressing property issues, and dealing with civil survey information (interrogatory 10) and of each environmental inspector incorporated into the Construction, Mitigation, and Reclamation Plan ("CMR"). Interrogatories 10 and 13 note that they pertain to Conditions 6 and 13, respectively, and the information sought in both instances relates to individuals who are likely to possess information or records relevant to Conditions 6 and 13. These interrogatories fell squarely within the permissible scope of discovery under SDCL 15-6-26(b) and were likely to lead to the discovery of admissible evidence. Instead, the Tribe was unable to determine whether TransCanada has proposed or made any material deviations to the pipeline route pursuant to Condition 6, or has complied with all mitigation measures set forth in the CMR or made modifications to those measures pursuant to Condition 13.

Similarly, interrogatory 16 requested information pertaining to communication between TransCanada contractors and agencies or regulatory bodies regarding any safety concerns or safety violations of any TransCanada pipeline located in Canada. Interrogatory 16 requested information that was likely to lead to the discovery of admissible evidence because the information requested could have shed light on TransCanada's compliance with applicable laws, regulations, and permits for its pipelines constructed and operated in Canada, an issue that is relevant to Conditions 1 and 2.

Interrogatory 32 sought the location of all construction camps and housing camps in South Dakota that will be used for construction, emergency response, and/or temporary

housing. The interrogatory relates to Conditions 1, 2, and 36. Conditions 1 and 2 address compliance with all applicable laws and permits, while Condition 36 deals specifically with TransCanada's preparation and implementation of an emergency response plan as required by federal regulations. Interrogatory 32 was tailored to lead to the discovery of evidence and information related to TransCanada's compliance with the conditions noted.

Lastly, request for production 6 asked TransCanada to provide all documents constituting the emergency response plan required by federal regulation and by Condition 32. The documentation sought through this request would address potential emergencies that may arise related to the proposed pipeline. Such information should have been of key importance to the Commission and was of vital importance to the Tribe because it has the potential to directly affect the safety of tribal members. As such, the requested documentation would have likely led to the discovery of admissible evidence.

Whether or not the information sought by the Tribe was relevant to the two issues as required by the discovery order, such information was undoubtedly discoverable pursuant to SDCL 15-6-26(b). As described *supra*, the Commission's unlawful discovery order precluded the Tribe's discovery of information likely to lead to the discovery of admissible evidence because that information was not relevant to the two issues enumerated in the discovery order. For the foregoing reasons, the Commission committed reversible error by unlawfully restricting the scope of discovery.

VII. THE COMMISSION ERRED BY PLACING THE BURDEN OF PROOF ON THE INTERVENORS AND BY FINDING THAT THE INTERVENORS FAILED TO ESTABLISH ANY REASON WHY TRANSCANADA COULD NOT CONTINUE TO MEET THE CONDITIONS ON WHICH THE 2010 PERMIT WAS ISSUED.

The Commission also erred when it placed the burden of proof on the intervenors and when it found that the intervenors failed to establish a reason that TransCanada could not continue to meet the permit conditions. AR 031687, 031689-91, 031694.

The Commission asserts that the language of SDCL 49-41-27 does not charge TransCanada with the four-factor burden of proof contained in SDCL 49-41B-22 and that this proceeding cannot be "a re-adjudication of the permit issuance proceeding." PUC Br. 14-15. The Tribe has never contested these points.

SDCL 49-41B-27 places the burden of proof on TransCanada, requiring that "the utility must certify." ARSD 20:10:01:15.01, which applies to contested proceedings such as Docket HP14-001, similarly asserts that the "Petitioner has the burden of going forward with the presentation of evidence unless otherwise ordered by the commission."

Despite this unambiguous language assigning the burden to TransCanada alone, the Commission departs from these textual authorities in its argument that

> 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.

PUC Br. 18. The Commission's improper burden shifting is also found in its final decision granting certification, in which it time and time again ruled in favor of TransCanada on the grounds that the intervenors had failed to produce evidence. AR 031686-87, 031694. The Commission repeats these incorrect burden-shifting assertions here. PUC Br. 21-24.

The Commission acted contrary to the plain language and purpose of SDCL 49-41B-27 and ARSD 20:10:01:15.01 by relieving TransCanada of its duty to prove it

continued to comply with all 50 conditions, and requiring the Tribe and other intervenors to prove that TransCanada *cannot* satisfy the conditions. Moreover, the Commission has not provided any case law, statute, or order of the Commission that supports shifting the burden. However, should this Court find that the burden did shift based on TransCanada's "certification" or otherwise, the intervenors have clearly presented sufficient rebuttal evidence to shift the burden of production back to TransCanada.

For example, if TransCanada met its burden of production through its certification alone as argued, then the contrary certification filed by the Tribe must have shifted the burden back to TransCanada. *YST Certification,* AR 031232-41; *see* YST Br. 20-21. But the Commission baldly asserts that the intervenors "simply did not provide any evidence showing that Keystone does not or cannot comply with the Conditions." PUC Br. 24. This statement demonstrates the Commission's disregard for every piece of evidence presented by the intervenors in 31,000-plus pages of record, including the "certification" filed by the Tribe and significant oral and written testimony. *See* AR 007536-42, 007984-85, 021935, 024563, 024792-95, 024838-39, 026301-02, 026909-10. This testimony must be given equal evidentiary weight, thereby shifting the burden back to TransCanada.

TransCanada argues that the "intervenors could prevail only by proving that Keystone's evidence should not be believed." TC Br. 31. This is the same position the Commission took in Conclusion of Law 9 when it found that TransCanada's certification satisfied its burden of proof because "no evidence was offered demonstrating that Keystone will be unable to meet the conditions in the future." AR 031694. In both of these instances, the Commission and TransCanada purport to impose a higher burden of

proof on the intervenors than the applicant by arguing that TransCanada met its burden by simply *asserting* that it will comply, but requiring intervenors to *offer evidence* showing that it cannot. Because the Commission misplaced the burden of proof contrary to law, the proceedings were fundamentally unjust and the Commission committed reversible error.

TransCanada further asserts that the Tribe's argument must fail because it requires compliance with prospective conditions and that, because some conditions are prospective, it "did not have to prove in Docket HP09-001 that it did or could meet all 50 permit conditions." PUC Br. 19; TC Br. 26-28. These positions improperly constrain the language of the statute to apply to a specific subset of conditions, relieving TransCanada of its duty to show compliance with forty-two of the fifty conditions simply because they are prospective in some aspect. TC Br. 31-32. Nothing in SDCL 49-41B-27 allows for the application of a different standard of compliance for prospective conditions.

While prospective conditions may certainly hinder a complete showing of continued compliance in some instances, the prospective nature of conditions cannot alleviate an applicant of its duty under the statute. At a minimum, a petitioner can certify compliance with prospective conditions by showing it has taken proactive steps toward compliance or developed plans for how it intends to comply with conditions once applicable. For example, Condition 15 requires TransCanada to develop units applicable to particular soil classification. AR 000065. In order to comply with this condition, TransCanada has already completed a consultation and soil analytical probing. *Id*. TransCanada has similarly taken affirmative steps to comply with a number of other

conditions such as Conditions 16.f, 21, 22, and 44 among others. AR 000065, 000067, 000068, 000075.

TransCanada failed to similarly address numerous other prospective conditions. For example, Condition 43 imposes a number of obligations on TransCanada related to discovery of cultural resources. AR 000075. However, nothing in the record shows how TransCanada intends to define cultural artifacts or how it will train construction personnel to properly identify cultural artifacts in the field. TransCanada similarly failed to address Conditions 16.o, 38, 42a, 45, 45.a, 46, 48, and 49

Despite an understanding that proactive measures show compliance with prospective conditions, TransCanada has not produced evidence of such measures with respect to all of the proposed conditions. The plain language of SDCL 49-41B-27 requires continued compliance with all conditions. Because TransCanada has failed to provide substantial evidence that it continued to comply with all 50 conditions, the Commission committed reversible error when it found TransCanada met its burden of proof.

Furthermore, the Tribe does not rely solely on TransCanada's failure to produce evidence of continued compliance with prospective conditions. The shortage of evidence demonstrating compliance with the conditions cannot be understated. TransCanada failed to produce sufficient evidence, or any evidence, to show that it continued to meet Conditions 1-4, 6, 7, 9-11, 14, 17-23, 25, 28, 33-35, 37-40, 45, and 46. TransCanada's evidentiary shortcomings were well documented in the post-hearing briefs submitted by the Tribe as well as by the Cheyenne River Sioux Tribe, the Rosebud Sioux Tribe, and the Standing Rock Sioux Tribe. AR 029538-59, 029560-75, 029703-54. By way of

example, Mr. Cory Goulet, the President of Keystone Projects and the man who "certified" that TransCanada continued to comply with the permit conditions, was unable to recall whether TransCanada had or was complying with Conditions 6, 7, 10, and 34, among others. PUC Tr. 024111, 024113-34, 024128, 024130, 024159, 024162, 024251, 024260-61.

There was blatantly insufficient or no evidence offered to show compliance with a number of additional conditions. For example, TransCanada produced no evidence to show compliance with Condition 1 regarding its compliance with the Endangered Species Act. Likewise, TransCanada produced insufficient evidence to show that it could undertake and complete all actions that it guaranteed it would in its original application pursuant to Condition 5 and that it provided all required information to law enforcement agencies and local governments as required by Condition 7.

In all, TransCanada failed to meet its burden to show that it continued to comply with the conditions of its permit. In fact, TransCanada's evidence was so insufficient in some aspects that the record of the evidentiary hearing is entirely void of any mention of some of the conditions. The Commission therefore committed reversible error when it found that TransCanada met its burden of proof.

VIII. THE COMMISSION ERRED WHEN IT FOUND THAT TRANSCANADA PROPERLY CERTIFIED THAT IT REMAINS ELIGIBLE TO CONSTRUCT THE KEYSTONE XL PIPELINE AND THAT TRANSCANADA'S SUBMISSION OF A SIGNED "CERTIFICATION" MET ITS BURDEN OF PROOF.

The Commission committed reversible error when it found that TransCanada properly certified its continued compliance with the permit conditions and that TransCanada's submission of a signed certification met its burden of proof. AR 031678, 031693, 031695.

In its brief, the Commission notes that because it is a South Dakota agency, its decisions must be based upon substantial evidence to ensure they are reasonable and not arbitrary. PUC Br. 18. This means that TransCanada, as the petitioner and the burden bearer, was required to "certify" through the submission of substantial evidence that it "continues to meet the conditions upon which [the 2010 Permit] was granted." SDCL 49-41B-27.

Glaringly, TransCanada fails to address the substantial evidence standard while the Commission only mentions it briefly outside of its main argument. PUC Br. 18. Instead, the Commission argues that the burden of proof in this case "boils down to what is meant by the term 'certify' in [SDCL 49-41B-27]." PUC Br. 14.

The Commission asserts that under the plain language of SDCL 49-41B-27, TransCanada's one-paragraph document labeled "certification" satisfied its burden of proof to "verify in writing or to attest as true" that it continued to meet the 50 conditions upon which the original permit was granted. PUC Br. 16. TransCanada similarly argues that its burden generally was "to affirm as true that it continues to meet the conditions on which the permit was granted." TC Br. 26.

The Tribe agrees that TransCanada must certify its compliance, but argues that "certify" must mean more than submission of a written promise of compliance by an individual without firsthand knowledge. The Commission and TransCanada base their argument on the meaning of the word "certify" as defined in Black's Law Dictionary; "to authenticate or verify in writing" or "to attest as being true or as meeting certain criteria." TC Br. 26; PUC Br. 16. However, neither party defines "authenticate" or "verify," instead focusing on the word "attest." This is because the central element of both

"authenticate" and "verify" is an element of proof. "Verify" is defined as "to *prove* to be true; to *confirm or establish* the truth or truthfulness of," while "authenticate" is defined as "to *show* (something) to be true or real." *Black's Law Dictionary* (10th ed. 2014) (emphasis added).

TransCanada's and the Commission's restricted interpretation of "certify" in SDCL 49-41B-27 enables the Commission to abdicate its responsibility under the statute and common law by claiming that it did not even have the authority to "disallow or reject" TransCanada's certification. PUC Br. 25. However, the Commission's decision to open a contested proceeding in Docket HP09-001 and a full reading of the definition of "certify" run counter to this argument and support a determination that certification under SDCL 49-41B-27 requires evidence or proof related to TransCanada's continued compliance.

IX. THE COMMISSION ERRED WHEN IT ISSUED THE *ORDER GRANTING MOTION TO PRECLUDE CONSIDERATION OF ABORIGINAL TITLE OR USUFRUCTUARY RIGHTS* AND PRECLUDED TESTIMONY AND CONSIDERATION OF TRIBAL TREATY RIGHTS.

The Commission committed reversible error when it issued the *Order Granting Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights* and precluded testimony from the intervenors regarding, and consideration of, tribal treaty rights. AR 007383. TransCanada and the Commission assert that the Commission did not need to consider the Tribe's aboriginal and usufructuary rights for four reasons: 1) Docket HP14-001 was only a proceeding to determine whether TransCanada could still construct the pipeline in compliance with the 2010 permit conditions; 2) the Commission lacks jurisdiction to route the proposed pipeline; 3) the Commission lacks jurisdiction to

adjudicate aboriginal and usufructuary interests; and 4) the Tribe lacks usufructuary rights in the relevant region. TC Br. 32-36; PUC Br. 28. Each of these arguments fails.

The Tribe agrees that Docket HP14-001 was a proceeding to determine TransCanada's compliance with the 2010 permit conditions. Crucially, the Commission and TransCanada needed to consider how the route of the pipeline would affect the Tribe's usufructuary rights in order to comply with the permit conditions. For example, under Condition 6.a, TransCanada will continue to develop route adjustments to "accommodate environmental features identified during surveys, *property-specific issues*, and civil survey information." AR 000060 (emphasis added). The Tribe's usufructuary rights, such as the rights to hunt, fish, and capture on certain lands the proposed pipeline would run through, are *property* rights. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 700 F.2d 341, 352 (7th Cir. 1983) ("[T]reaty-recognized rights of use depend neither on title nor right of permanent occupancy; rather, they are similar to profit à prendre."). By refusing to consider these property rights, the Commission could not confirm that TransCanada continued to meet the permit conditions.

Although the Commission lacked authority to route the pipeline, it "ha[d] the authority to approve or to disapprove permit applications, including the proposed route." *Application of Nebraska Public Power Dist*., 354 N.W.2d 713 (S.D. 1984). TransCanada asserts that *Application of Nebraska Public Power District* is inapplicable because that case concerned a trans-state transmission facility, not a transmission facility like the Keystone XL pipeline.[2] However, the statutes applicable in the South Dakota Supreme

[2] TransCanada also asserts that the Commission is authorized to route power lines, but not pipelines. However, neither SDCL 49-41B-20 nor SDCL 49-41B-36 treats pipelines

Court's analysis in the relevant portion of *Application of Nebraska Public Power Dist.* (namely, SDCL 49-41B-11(2), 49-41B-20, 49-41B-22.1, and 49-41B-22.2) apply to all "facilities" as defined in SDCL 49-41B-2(7), including transmission facilities and trans-state transmission facilities.[3] Although other parts of the South Dakota Codified Laws differentiate between transmission facilities and trans-state transmission facilities, the relevant statutes here apply equally to all facilities. Thus, even though *Application of Nebraska Public Power Dist.* concerned a trans-state transmission facility, the Supreme Court's conclusion that the Commission has the authority to "disapprove permit applications, including the proposed route" applies here. 354 N.W.2d at 721. For the foregoing reasons, while the Commission cannot propose a reroute itself, it is within the Commission's authority to deny permit certification for factors tied to the location of a proposed project when those factors are relevant to the project's certification. To hold otherwise would constitute an unauthorized judicial re-writing on SDCL 49-41B-1.

While the Commission does not have the authority to adjudicate the Tribe's usufructuary rights, the Commission cannot accept TransCanada's certification without considering these rights. Condition 1 requires TransCanada to comply with all applicable

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different from power lines. Pipelines and power lines are both transmission facilities as used in both SDCL 49-41B-20 and SDCL 49-41B-36.

[3] Pursuant to SDCL 49-41B-2(7), a "facility" includes all transmission facilities, including electric transmission facilities. SDCL 49-41B-2(7); SDCL 49-41B2.1(a). A trans-state transmission facility is a type of electric transmission facility. SDCL 49-41B-2(11) ("A trans-state transmission facility is simply 'an electric transmission line . . . which originates outside the State of South Dakota, crosses this state and terminates outside the State of South Dakota'"). Thus, the term "facility" encompasses trans-state transmission facilities and transmission facilities.

laws, including federal law,[4] and, as explained *supra*, Condition 6.a requires it to develop route adjustments for property-specific issues. The Commission must consider the Tribe's usufructuary rights to determine whether TransCanada continues to comply with the original permit conditions. *In re West River Electric Association*, 675 N.W.2d 222 (S.D. 2004), relied upon by TransCanada, is inapplicable because that case only held that the Commission lacked authority to give new interpretations to statutory language. Importantly, the Tribe has not asked the Commission to adjudicate its usufructuary rights, but rather, desires to submit testimony and evidence related to such rights in order to aid the Commission in its review of TransCanada's certification.

For the foregoing reasons, the Circuit Court committed reversible error when it upheld the Commission's issuance of the *Order Granting Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights*. The Commission had the authority, and was required, to consider the Tribe's usufructuary rights in the region in order to comply with the permit conditions. This Court should so rule.

Finally, the TransCanada's implication that all the Tribe's usufructuary rights along the route have been extinguished is plainly incorrect.[5] TC Br. 35-36. If this Court

[4] The Tribe has usufructuary rights in the territory ("1851 Treaty Territory") recognized by the Treaty of Fort Laramie with the Sioux, Etc. ("1851 Treaty") pursuant to federal law. Treaty of Fort Laramie with Sioux, Etc., Sept. 17, 1851, art. 5, 11 Stat. 749, II KAPP 1065.

[5] For example, TransCanada's conclusion that the Tribe cannot assert claims to the west of the Missouri River under *Yankton Sioux Tribe v. United States*, 24 Ind. Cl. Comm. 208 (1970), is patently incorrect. For one, the Tribe's usufructuary rights stem from the 1851 Treaty, which recognized Indian title to lands west of the Missouri River. Additionally, TransCanada and the Commission have consistently alleged that the Tribe claims aboriginal rights to lands along the proposed pipeline's route. Throughout this litigation, however, the Tribe has only discussed its usufructuary rights in the 1851 Treaty Territory. *Yankton Sioux Tribe's Response to Applicant's Mot. to Preclude Consideration of Aboriginal Title or Usufructuary Rights*, AR 007095-007111; *Yankton Sioux Tribe's Opening Brief, In the Matter of Public Utilities Comm'n Docket No. HP14-001, Civ. No.*

decides to address the usufructuary rights the Tribe retains in the 1851 Treaty Territory,[6] this Court should hold that the Tribe's usufructuary rights in the area exist today.[7] Usufructuary rights are a tribe's and its members' treaty-recognized rights to use land for traditional subsistence activities such as hunting, fishing, and gathering. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 700 F.2d at 352. A tribe does not need to hold title to land to possess usufructuary rights on that land. *Id*. Further, a treaty does not need to expressly reserve usufructuary rights for those rights to be retained. *Menominee Tribe v. United States*, 391 U.S. 404 (1968).

The Tribe derives a number of usufructuary rights from the 1851 Treaty. The 1851 Treaty specifically stated that the Tribe did "not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described," which encompassed the 1851 Treaty territory. Treaty of Fort Laramie with Sioux, Etc. art. 5, Sept. 17, 1851, 11 Stat. 749, II KAPP 594, IV KAPP 1065. Additionally, "[w]hen a treaty reserves or grants lands to a tribe, tribal ownership necessarily includes full

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16-33, 16-34, 16-36, 16-37, 16-38, 16-39 at 23-25; YST Br. 30-34. Once again, here, the Tribe discusses its usufructuary rights, not its aboriginal rights, along the pipeline route.

[6] Throughout the appeal stages of this litigation, the Tribe refrained from fully arguing the merits of its usufructuary rights claims because the Commission refused to hear those arguments. The Tribe has maintained its position that the Commission, as the agency charged with certification under SDCL 49-41B-27, is the body to which the Tribe would "demonstrate these interests and their relevance to the Commission's certification determination at the evidentiary hearing and through post-hearing briefing." *Yankton Sioux Tribe's Response to Applicant's Mot. to Preclude Consideration of Aboriginal Title or Usufructuary Rights*, AR 007099. The Tribe reiterates its position that its usufructuary rights arguments should be heard by the Commission upon remand.

[7] TransCanada's and the Commission's argument that no court has ever declared that usufructuary rights exist is irrelevant. Private rights clearly do not require adjudication to exist. *See Block v. North Dakota*, 461 U.S. 273, 291 (1983) ("If a claimant has title to a disputed tract of land, he retains title even if his suit to quiet his title is deemed time-barred under 2409a(f).").

hunting, fishing, and gathering rights on those lands." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, 18.02, 1156 (Nell Newton ed. 2012 ed.) (hereinafter, COHEN'S HANDBOOK) (*citing Menominee Tribe v. United States*, 391 U.S. 404, 406 (1968)). Thus, the 1851 Treaty expressly recognized the Tribe's right to continue hunting and fishing within the 1851 Treaty Territory.

Moreover, the 1851 Treaty was intended to create a homeland for the Tribe. Letter from Orlando Brown, Commissioner of Indian Affairs, to Thomas Fitzpatrick, Superintendent of Indian Affairs (Aug. 16, 1849) ("There should also be a clear and definite understanding as to the general boundaries of the sections of country respectively claimed by [the signatory tribes], *as their residence and hunting grounds*." (emphasis added)); *Crow Tribe of Indians v. United States*, 151 Ct. Cl. 281, 286 (1960) (The 1851 Treaty served as "a recognition by the United States of the Indians' title to the areas for which they are to be held responsible, and which are described as 'their respective territories.'"); *Assiniboine Indian Tribe v. United States*, 77 Ct. Cl. 347 (1933) ("one of [the 1851 Treaty's] purposes was to give each tribe some fixed boundaries within which they should *stipulate generally to reside*." (emphasis added)).

Congress has never abrogated the Tribe's usufructuary rights in the 1851 Treaty. Although the "plenary power of Congress" purports to enable Congress to abrogate treaty rights, courts have repeatedly held that Congress must clearly express its intent to do so. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 700 F.2d at 354 ("termination of treaty-recognized rights by subsequent legislation must be by *explicit* statement or

must be *clear* from the surrounding circumstances or legislative history" (emphasis in original)).

For example, in *Mille Lacs Band of Chippewa Indians*, the U.S. Supreme Court reviewed whether the Chippewa Indians relinquished usufructuary rights derived from their 1837 Treaty when they entered into their 1855 Treaty. 526 U.S. at 175. Although the 1837 Treaty had guaranteed the Chippewa the privilege of hunting and fishing within all ceded lands, in 1855 the United States and the Chippewa entered into a new treaty whereby "the said Indians do further *fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be*, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere." Treaty with the Chippewas, Feb. 22, 1855, 10 Stat. 1165, II KAPP 685 (emphasis added). Looking at the historical context of the 1855 Treaty, the court found that, despite the foregoing relinquishment language, the "1855 Treaty was a land purchase treaty and *not a treaty that also terminated usufructuary rights*." *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 199 (emphasis added). Most importantly, the Court noted that "[t]he entire 1855 Treaty, in fact, is devoid of any language expressly mentioning—much less abrogating—usufructuary rights." *Id*. at 195.

The case at hand is similar to *Mille Lacs Band of Chippewa Indians*. As described *supra*, the Tribe entered into the Treaty of Fort Laramie with the United States in 1851. In 1858, the Tribe entered into a treaty with the United States in which the Tribe ceded and relinquished "all the lands now owned, possessed, or claimed by them, wherever situated, except four hundred thousand acres thereof." Treaty with the Yankton Sioux art. 1, Apr. 19, 1858, 11 Stat. 743, II KAPP 776 ("1858 Treaty"). Like the 1855

Treaty with the Chippewas, the 1858 Treaty ceded and conveyed land to the United States, but was silent as to usufructuary rights.

Additionally, the surrounding circumstances and legislative history of the 1858 Treaty do not show the clear intent necessary to abrogate the Tribe's usufructuary rights in the 1851 Treaty territory. Although events surrounding the 1858 Treaty indicate that the amount of available wild game was decreasing, and the 1858 Treaty itself indicates that Tribal members were to cultivate land within the new treaty territory, there is no evidence indicating that Tribal members were to cease hunting and fishing and rely solely on agriculture. Tribal members likely intended to continue supporting themselves in part through their usufructuary rights in the 1851 Treaty Territory. Because "doubts concerning the meaning of a treaty with an Indian tribe should be resolved in favor of the tribe," the 1858 Treaty cannot be read to extinguish the Tribe's usufructuary rights in the 1851 Treaty Territory. *Or. Dep't of Fish and Wildlife v. Klamath Indian Tribes*, 473 U.S. 753, 766 (1985); *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 194 n.5, 196, 200.

Thus, the 1858 Treaty language ceding and relinquishing the Tribe's possessory interest in the 1851 Treaty territory and the circumstances surrounding the 1858 Treaty were insufficient to terminate the Tribe's usufructuary rights in the 1851 Treaty Territory. This holds true even for the usufructuary rights not expressly reserved by the 1851 Treaty. *Menominee Tribe v. United States*, 391 U.S. 404 (1968) (holding that even though the 1854 Treaty did not discuss hunting and fishing rights, these rights were not abrogated by the Termination Act of 1954).

Finally, the Treaty of April 29, 1868, 15 Stat. 635, II KAPP 998 ("1868 Treaty"), and the Act of March 2, 1889, ch. 405, 25 Stat. 635 ("1889 Act"), do not affect this

analysis. First, the Tribe was not a signatory to either. Additionally, neither the 1868 Treaty nor the 1889 Act even mentions the Tribe because by this time, the Tribe already had a separate reservation. Thus, the negotiations did not include the Tribe, and the Tribe was unaffected by the 1868 Treaty or 1889 Act. Moreover, even if it could be held that these laws somehow did involve the Tribe, these laws would be insufficient to strip the Tribe of its usufructuary rights in the 1851 Treaty Territory because they contain no express language to that effect. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) ("termination of treaty-recognized rights by subsequent legislation must be by *explicit* statement or must be *clear* from the surrounding circumstances or legislative history").

While the Tribe ceded and conveyed to the United States its title to and possession of the 1851 Treaty Territory, the Tribe maintained and continues to maintain its usufructuary rights in those lands. These property rights exist regardless of whether they have been specifically adjudicated, therefore the Commission committed reversible error in failing to consider them.

X. THE COMMISSION ERRED WHEN IT DECIDED THAT TRIBES SHOULD NOT BE TREATED AS LOCAL GOVERNMENTAL UNITS, AND THAT NO PERMIT CONDITION REQUIRED TRANSCANADA TO CONSULT WITH TRIBES.

Finally, the Commission erred when it decided that tribes should not be treated as local governmental units and when it found that no permit condition required TransCanada to consult with tribes about the proposed pipeline. AR 031690. In considering whether the Commission erred when it concluded that the Tribe is not a "local governmental unit" under Condition 6, the Circuit Court erroneously affirmed the Commission, noting in its Order that while the Tribe is a sovereign nation within the

bounds of the United States, it is not a local unit of government within the State of South Dakota's government structure. Regardless of the Tribe's relation to South Dakota's government structure, the Tribe remains a local governmental unit under Condition 6, and the decision of the Circuit Court should be reversed.

TransCanada mischaracterizes the Tribe's arguments, stating that the Tribe contends that TransCanada had an obligation to consult with the Tribe as part of the certification proceedings. TC Br. 37-38. The Tribe's actual position is that it qualifies as a local governmental unit under Condition 6,[8] and has meaningful local knowledge under Condition 34,[9] requiring TransCanada to consider the Tribe's views and local knowledge.

The Commission argues in its brief and in its decision granting certification that because Condition 6 "does not specify Tribes," they are not local governmental units. PUC Br. 29-30. TransCanada argues that because the Tribe is a sovereign government[10] and not a political subdivision of the state, it cannot be a local governmental unit. TC Br. 38. These arguments are fatally flawed, reading restrictions into Condition 6 that do not exist and that contravene proper statutory interpretation.

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[8] Condition 6 requires TransCanada to "advise the Commission and all affected…local governmental units prior to implementing" changes to the route. *Amended Final Decision and Order; Notice of Entry, In the Matter of the Application by TransCanada Keystone Pipeline, LP for a Permit Under the South Dakota Energy Conversion and Transmission facilities Act to Construct the Keystone XL Project*, HP09-001, at 26.

[9] Condition 34 requires TransCanada to "seek out and consider local knowledge, including the knowledge of…local landowners and government officials" in "its continuing assessment and evaluation of environmentally sensitive and high consequence areas." *Id.* at 34-35.

[10] TransCanada also cites case law describing tribes as domestic dependent nations subject to the purported plenary power of Congress. These characterizations of tribes are irrelevant to the questions posed in this appeal, and if anything, support the fact that, as a "sovereign pre-existing the Constitution," a tribe can surely be a local unit of government.

Condition 6 stems from the requirements in SDCL 49-41B-22(4),[11] which obligates TransCanada to prove that 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. Nowhere in the language of Condition 6 or the statute is there support for a determination that a "local unit of government" must be part of the state of South Dakota's government structure. Tribes are, among other things, units of government. Where the legislature wanted to require that a local unit of government be limited to subdivisions the State of South Dakota, language was included to make this distinction. Therefore, here, where there is no distinction, local units of government include tribes.

In other places in the South Dakota Codified Laws, general references to local units of government are defined broadly to include units of government outside of the state of South Dakota's government structure. SDCL 34A-6-61(3) ("'Local unit of government,' a county, municipality, school district, special district or other political subdivision of the State of South Dakota *or a similar unit of government of another state or nation*") (emphasis added); 59A-9-102(45) ("'Governmental unit' means a subdivision, agency, department, county, parish, municipality, *or other unit of the government of the United States, a state, or a foreign country*") (emphasis added); 38-7-2(6) ("'Government' or 'governmental,' the government of this state, the government of the United States, and any subdivision, agency, or instrumentality, corporate or

[11] Again, the Tribe is not attempting to relitigate TransCanada's permit, but arguing that it fails to continue to comply with the permit conditions, specifically Condition 6.

otherwise, of either of them") (emphasis added). Clearly, TransCanada's claim that a political subdivision of the State is the common understanding of local government fails.

Where the legislature intended to limit application of statutes to only governments that are political subdivisions of the State, express language was used to make this distinction.[12] SDCL 38-7-2(1) ("'Agency of this state,' the government *of this state* and any subdivision, agency, or instrumentality, corporate or otherwise, of the government *of this state*" (emphasis added)); 59-11-2(3) ("'Domestic entity,' an entity whose internal affairs are governed by the law *of this state*" (emphasis added)); 57A-9-102(2) ("'Account'…means…operated or sponsored by a state, governmental unit *of a state,* or person licensed or authorized to operate the game by a state or governmental unit *of a state*" (emphasis added)). Because SDCL 49-41B-44(4) fails to specify that it is limited to subdivisions of the State, it includes tribes in its application. This informs the proper interpretation and application of Condition 6, which also necessarily includes tribes.

TransCanada also argues that whether the Tribe is "affected" is questionable. The Tribe (headquartered in Wagner, South Dakota, not Marty) is 45 miles from the path of the proposed pipeline, but this is a tiny distance relative to its remoteness and the impacts of the man camps. The man camps will be located in remote areas and the entertainment, services, and negative impacts from the camps will not be limited to the path of the pipeline; they will expand and harm the Tribe. Interestingly, TransCanada and the

[12] SDCL 23A-45-9 is the Criminal Procedure chapter, defining unit of local government as a chartered governmental unit, county, township, municipality, and any other subdivision of the state which may enforce its ordinances, bylaws, or regulations by bringing a court action which may result in a fine or imprisonment being imposed on the defendant thereof. Criminal procedure and jurisdiction are uniquely state-specific, whereas impacts of projects are not, therefore the statute at issue in this appeal should be interpreted broadly.

Commission did not oppose the Tribe's *Application for Party Status* in which it asserts it is a sovereign government whose ancestral and treaty lands include the proposed pipeline corridor. AR 000321. The pipeline route crosses the traditional homeland of the Tribe since time immemorial; to argue the Tribe is not affected and does not have meaningful local knowledge is ignorant and incorrect. The Commission therefore committed reversible error in its findings and decision.

CONCLUSION

Wherefore, the Tribe requests that the Court reverse the decision of the Circuit Court upholding the Commission's *2016 Final Decision* and remand the matter to the Commission with instructions to vacate the certification and dismiss the *2016 Petition*.

Respectfully submitted this 2nd day of January, 2018.

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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 the appendix, contains 7,473 words as determined by reliance on Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of January 2018, I served electronically via email a true and correct copy of the foregoing on the following:

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