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**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

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IN THE MATTER OF TRANSCANADA  
KEYSTONE PIPELINE, LP  
FOR ORDER ACCEPTING CERTIFICATION  
OF PERMIT ISSUED IN DOCKET HP09-001  
TO CONSTRUCT THE KEYSTONE XL  
PIPELINE

**ROSEBUD SIOUX TRIBE'S  
RESPONSE TO KEYSTONE'S  
MOTION TO EXCLUDE  
TESTIMONY OF RICHARD  
KUPREWICZ**

**HP14-001**

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The Rosebud Sioux Tribe, by and through counsel, requests that the PUC deny Keystone's Motion to Exclude Testimony of Richard Kuprewicz. In support therein Rosebud submits the following response in support:

**Introduction**

The Rosebud Sioux Tribe filed the direct testimony, report and resume of one of its expert witnesses, Richard Kuprewicz, on April 24, 2015. The direct testimony, report and resume of the witness are attached hereto as Exhibit 1, 2 and 3 respectively and are incorporated by reference herein as if reiterated in full. Keystone moves to exclude most of Kuprewicz's report. The Kuprewicz findings directly relate to three of four elements of proof under SDCL 49-41 B-22, which is part of the PUC's jurisdiction and which the PUC has the authority to consider.

Keystone relies on three bases of law to support its motion. Keystone alleges that the subjects in the Kuprewicz report are either (1) preempted by federal law, (2) are within the exclusive jurisdiction of the Pipeline Hazardous Materials Safety Administration (PHMSA), and (3) are statutorily beyond the scope of the PUC's jurisdiction. The arguments are spurious and PHMSA itself has already rejected similar arguments. In May 2014, PHMSA explicitly

informed TransCanada that (i) federal law recognizes the right of states to adopt federal safety standards and to inspect, regulate and take enforcement action against the operators of pipelines within their borders; and that (ii) no federal agency has the power to determine the siting of oil pipelines and therefore this responsibility rests largely with the individual states. Furthermore, as will be discussed below, the Kuprewicz report is directly relevant to a meaningful evaluation of the key elements of proof that the PUC considers based on SDCL 49-41B-22. Keystone's motion to exclude testimony is therefore baseless and without merit and should be denied accordingly.

Each theory used to support Keystone's motion will be identified and addressed in turn. This will be followed by an examination of the proper basis that the PUC should consider in determining the admissibility of expert testimony. In considering the motion, it is of particular importance for the PUC to examine some of the existing permit conditions, particularly that of Amended Permit Condition 1.

The existing permit rests on the finding that Keystone can satisfy the requirements of SDCL 49-41B-22 "Applicant's burden of proof" if they operate and construct the pipeline. Throughout these proceedings compliance with SDCL 49-41B-22 is a continuing obligation.

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.

The findings of the Kuprewicz report directly relate to three of four elements of proof ((2), (3) and (4)) under SDCL 49-41 B-22, which is part of the PUC's jurisdiction. The Kuprewicz report is admissible since it is directly relevant to a meaningful evaluation of the key elements of proof that the PUC considers in its decision making process.

With respect to the first element of proof (1), in issuing the current permit for the facility and in order to comply with the requirements of SDCL49-41B-22, Amended Permit Condition 1 requires Keystone to comply with all applicable laws and regulations in its construction, and operation of the Project. Amended Condition 1 specifically includes, among other requirements, compliance with "other various pipeline safety statutes currently codified at 49 USC 60101 et sec., (collectively the Pipeline Safety Act) and Department of Transportation regulations implementing the PSA, particularly 49 CFR Parts 194 and 195." These are areas that originate beyond the jurisdiction of the PUC and regulated (but not preempted) in South Dakota exclusively by the PHMSA. The current permit conditions require Keystone to comply with requirements that are beyond the regulatory jurisdiction of the PUC.

Preemption is not a new legal theory advanced by Keystone as evidenced by the May 28, 2014 letter from the U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration addressed to Mr. Russell K. Girling, President of TransCanada Corporation. This letter is attached hereto as RST Exhibit 4, the contents of which are incorporated by reference as if reiterated in full herein. PHMSA's clarification to TransCanada's CEO in this letter is again directly applicable to Keystone's motion to exclude the testimony of

Richard Kuprewicz. Indeed, PHMSA's own words soundly refute Keystone's allegations that the subjects in the Kuprewicz report are either (1) preempted by federal law, (2) are within the exclusive jurisdiction of the Pipeline Hazardous Materials Safety Administration (PHMSA), or (3) are statutorily beyond the scope of the PUC's jurisdiction.

In response to numerous inquiries that PHMSA had received regarding the rights of state and local governments to affect the siting, design, construction operation and maintenance of interstate hazardous liquid pipelines, in connection with TransCanada's Keystone XL Pipeline, PHMSA sent the May 28, 2014 letter to TransCanada. In this letter, PHMSA explicitly informs TransCanada that no federal agency has the power to determine the siting of oil pipelines and therefore the responsibility rests largely with the individual states.

As you know, Congress has invested the U.S. Department of Transportation (DOT) with the authority to regulate the design, construction, operation and maintenance of gas and hazardous liquid (primarily oil) pipelines and to protect life, property and the environment from hazards associated with pipeline operations. While the Federal Energy Regulatory Commission (FERC) has exclusive authority to regulate the siting of interstate gas transmission pipelines, no federal agency has the power to determine the siting of oil pipelines. **Therefore, the responsibility for siting new interstate oil pipelines such as Keystone XL rests largely with the individual states through which the lines will operate and is governed by state law.** (RST Exhibit 4 at page 2, emphasis added)

The PHMSA letter further emphasized that the "message being conveyed by PHMSA that all three levels of government – federal, state and local – play an important role in ensuring that the Nation's pipeline system operates safely and efficiently to supply vital energy for the American economy." (RST Exhibit 4 at page 1.) PHMSA went on to clarify the role of state pipeline regulators, the role of local governments and the role of PHMSA as it relates to the operation of interstate hazardous liquid pipelines.

PHMSA explained that Congress had vested the U.S. Department of Transportation with the authority to regulate the design, construction, operation and maintenance of gas and hazardous liquid (primarily oil) pipelines and to protect life, property and the environment from hazardous associated with pipeline operations.” (RST Exhibit 4 at page 2)

As Exhibit 4 explains, the existing regulatory scheme and federal pipeline safety laws, require PHMSA to be the federal agency responsible for carrying out the nationwide program that regulates most of the oil and gas pipelines in the United States. The standards for pipeline safety, design, construction operation and maintenance are found in 49 C.F.R. Parts 190-199 as the PUC is aware. Exhibit 4 goes on to explain the role of State pipeline regulators to TransCanada by stating that “[f]ederal law recognizes the right of states to adopt federal safety standards and to inspect, regulate and take enforcement action against the operators of pipelines within their borders.” (RST Exhibit 4 at page 2) PHMSA also acknowledges that this includes the recognition that states have the right to impose safety standards that are more stringent than the federal minimum requirements, so long as the two sets of regulations are compatible. According to the PHMSA letter, “[f]ederal preemption of pipeline safety means that neither state nor local governments have any independent authority to regulate pipeline safety,” with each deriving “any such authority from federal law.” (RST Exhibit 4 at page 2)

Lastly, regarding the role of local governments, PHMSA in RST Exhibit 4 acknowledges the role the local governments play in pipeline safety. Regarding preemption, PHMSA explained to Keystone that there is nothing in federal law that infringes on the rights of local governments to regulate traditional land use and property development in the vicinity of pipelines, “so long as local officials do not attempt to regulate the field of pipeline safety that is preempted by federal law.” (RST Exhibit 4 at page 2).

## 1. The PUC is preempted by Federal Law

Keystone first asserts that the offered testimony should be excluded because the subject matter of Kuprewicz's testimony is preempted by federal law, particularly the Pipeline Safety Act 49 USC 60101-60140 (herein after PSA) and its implementing regulations found at 49 CFR parts 194 and 195. It is without question that the PSA, as amended, applies to the proceedings currently before the PUC. Keystone's motion to exclude at page 2 states that the PSA applies to the current proceeding and Rosebud agrees with that assertion. Although Rosebud concludes that preemption is not relevant to this PUC proceeding or the matter presently before it, a more detailed response is nonetheless provided.

The PSA regulates "to provide adequate protection against risks to life and property posed by pipeline transportation and pipeline facilities by improving the regulatory and enforcement authority of the Secretary of Transportation." *Olympic Pipeline Co. vs. City of Seattle*, 437 F. 3d 872 (9<sup>th</sup> Cir. 2006). Additionally, the PSA provides a manner in which "a national liquid pipeline safety program with nationally uniform minimum standards and with enforcement administered through a Federal-State partnership, citing 49 C.F.R. part 195, appx. A." *City of Seattle* at 878.

The PSA addresses both inter and intra state liquid hazardous materials (oil pipelines) transportation facilities. Regarding interstate pipelines the PSA provides that "state and local authorities generally may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation." 49 U.S.C. 60104 (c). Concerning safety regulations regarding intrastate pipelines, the PSA provides that a state enforcement agency that "has submitted a current certification under section [60105 \(a\)](#) of this title may adopt additional or

more stringent safety standards for intrastate pipeline facilities and intrastate pipeline transportation only if those standards are compatible with the minimum standards prescribed under this chapter.” 49 U.S.C. 60104 (c).

The law provides two exceptions to the prohibition regarding intrastate pipelines. First, where a state has entered into a pipeline safety agreement for the DOT, the state may participate in the oversight of interstate pipeline facilities. Secondly, the DOT may designate an agent with authority to participate in the oversight process. The law regarding intrastate pipelines for design, construction and operation is preempted, with two exceptions that provide for state participation in the oversight and operations of interstate pipelines. Regarding intrastate pipelines, the PSA provides at 49 U.S.C. 60104(c) that states may, through an annual certification process pursuant to section 60105, regulate and impose safety standards that exceed the minimum requirements of federal law if they have applied for and are approved for the certification process from 60105 and the standards are compatible with federal minimum standards.

The simple statement made by Keystone, that a state is preempted by the PSA, without a full and complete explanation, is an incorrect assertion of law in this matter. The assertion is an incorrect interpretation of federal preemption, particularly as it relates to matters of pipeline safety and the application of the overall regulatory scheme regarding the transportation of liquid fuels through the lands of the United States and its States. A preemption analysis would be appropriate if the PUC were attempting to enforce, or require compliance with pipeline safety standards that were conflicting with the PSA. This is not such a case. There are three ways in which state laws could be preempted by federal law. Generally speaking, state law will be

preempted by federal law when state law (or local land use ordinances) conflicts with or frustrates federal law.

“It is familiar doctrine that there are three primary ways that federal law may preempt state law.” *Northern Nat’l Gas Co. v. Iowa Utilities Board*, 377 F.3d 817, 824 (8<sup>th</sup> Circuit 2004). “First, state law is preempted where Congress has expressly stated that it intends to prohibit state regulation in an area.” *Lorillard Tobacco Co. v. Reilly*, [533 U.S. 525](#), 541, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001). Second, Congress may implicitly preempt state regulation of an area through occupation of a field. *Id.* A field is occupied when the federal regulatory scheme is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.” *Rice v. Santa Fe Elevator Corp.*, [331 U.S. 218](#), 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947). Finally, even if Congress has not completely precluded the ability of States to regulate in a field, state regulations are preempted to the extent they conflict with federal law. *Silkwood v. Kerr-McGee Corp.*, [464 U.S. 238](#), 248, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984). Such a conflict will be found “when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.” *Id.* (citations omitted).” Quoting in its entirety from *Northern Nat’l Gas Co. v. Iowa Utilities Board*, 377 F.3d 817, 821 (8<sup>th</sup> Circuit 2004).

Conveniently in its motion, Keystone leaves out the preceding section of 49 U.S. C. 60104 (c) which states that “[a] State authority that has submitted a current certification under section [60105 \(a\)](#) of this title may adopt additional or more stringent safety standards for intrastate pipeline facilities and intrastate pipeline transportation only if those standards are compatible with the minimum standards prescribed under this chapter.” 49 U.S.C. 60104 (c). Although this is not a case involving an intrastate pipeline, it is included as an example that the

PSA does not completely preempt pipeline safety. There is nothing in the record that the State of South Dakota, the PUC or any local government has taken any action to enact or enforce pipeline safety standards that are in excess of the minimum federal standards embodied in the Pipeline Safety Act and 49 CFR 194 and 195.

This is not a case concerning preemption of state authority under the PSA, rather it is a case to determine if the facts underlying the conditions upon which Keystone's permit was granted remain the same: a case clearly within the PUC's jurisdiction. Keystone's compliance with applicable federal laws is one of those conditions. Clearly, the SD PUC has the jurisdictional authority to determine if facts underlying conditions have changed and if the current information submitted along with the Petition for Certification is in compliance with all applicable laws and conditions upon which the permit was granted. Compliance with the PSA is just one of many laws and conditions from the original permit that Keystone must comply with and show that all conditions associated with the same remain unchanged since 2010 pursuant to the requirements of statute.

South Dakota's legislative scheme does not provide for more stringent safety standards than federal law. The manner in which the PUC carries out its duties and responsibilities under law is not contrary to federal law, nor does it conflict with the purpose of federal law. This is not a case involving preemption. Accordingly, nothing from the federal preemption doctrine supports the exclusion of the report submitted by Richard Kuprewicz. The preemption doctrine is not appropriate to consider when determining the admissibility of expert testimony. Such considerations are governed by SDCL 15-6-43(a) and 19-15-2. Rather, the regulatory and permitting scheme encourages the inclusion of such testimony in order to assist the PUC in making an informed decision regarding Keystone's Certification Petition.

**2. The subject matter is within the exclusive jurisdiction of the Pipeline Hazardous Materials Safety Administration (PHMSA)**

Keystone's next argument is that the subject matter of Kuprewicz's report and testimony are within the exclusive jurisdiction of the Pipeline Hazardous Materials Safety Administration (PHMSA) and should be excluded. This is a variation of the previously stated preemption argument. The same analysis and reasoning used to reject the preemption argument can be applied here. Following Keystone's logic will lead the PUC to an unacceptable result. This result is not contemplated by the law. Nor is it a result that comports with the fact finding mission which is necessary to carry out the mandates of the law through this certification proceeding.

In this docket, Keystone is asking the PUC to issue an order that satisfies the requirements of SDCL 49-41B-27. Examining and making a determination regarding Keystone's application for the order of certification requires the PUC to identify the conditions of the permit and to hear testimony and take evidence regarding compliance with those conditions. Keystone is asking the PUC to not allow evidence related to conditions because they originate in federal law. All matters of pipeline safety originate in federal law. While the primary enforcement may rest with the jurisdiction of PHMSA, the overall permitting scheme that exists in the United States as evidenced through congressional actions (the Pipeline Safety Act along with other federal statutes), applicable agency regulations (49 C.F.R. Parts 190-199) and various state permitting legislative schemes created a regulatory system that provides for minimum federal standards regarding pipeline safety and operations, creates a system whereby the federal government, through the Department of Transportation (PHMSA) works in a series of

partnerships, agreements and certifications with various states and local governments to enforce federal and state pipeline safety regulations and laws.

**3. The Subject of the Testimony is Statutorily Beyond the Scope of the PUC's Jurisdiction.**

Finally, Keystone asserts that the portions of the Kuprewicz report address opinions related to matters that are statutorily beyond the scope of PUC's jurisdiction. The subject matter of the report relates to the requirements of the permit which includes compliance with the PSA and C.F.R. Parts 194 and 195. The argument is not supported in law and is misplaced. It is yet another variation of the first two arguments presented to exclude relevant testimony. It should be rejected accordingly.

Keystone's motion claims that "Kuprewicz's opinions about (1) the sufficiency of Keystone's risk assessment; (2) the adequacy of the number and placement of valves and (3) the safety of the pipeline due to its routing in areas of high landslide potential, should be excluded." As discussed above, the May 2014 PHMSA letter (RST Exhibit 4 at page 2) explicitly informed TransCanada that no federal agency has the power to determine the siting of oil pipelines and therefore this responsibility rests largely with the individual states. Moreover, the letter also specifies that "[f]ederal law recognizes the right of states to adopt federal safety standards and to inspect, regulate and take enforcement action against the operators of pipelines within their borders." (RST Exhibit 4 at page 2) As such, it is clear from RST Exhibit 4 that the Kuprewicz report does not address issues of pipeline safety that are outside the scope of the PUC's jurisdiction.

A discussion of the PUC's jurisdiction is required. The PUC derives its jurisdiction from SDCL 49-41B, SDCL 49-01 and 1-26. Pursuant to SDCL 49-01 "Public Utilities Commission,"

the PUC may promulgate rules subject to the requirements of SDCL 1-26 “Administrative Procedures Act.” As it relates to the current motion, the PUC’s rulemaking authority is limited to the confines and parameters of SDCL 1-26 and SDCL 49-34B-3 “Pipeline safety inspection program created” and SDCL 49-34B-4 “Promulgation of safety standards Considerations.”

SDCL 49-34B-3 created the PUC’s pipeline safety inspection program and provides that the federal safety standards adopted as Code of Federal Regulations, title 49 Parts 191, 192, 193, and 199 as amended to January 12, 2012, are adopted as the minimum safety standards for this chapter. The same statute also requires the PUC to establish and implement a compliance program to enforce these safety standards. The program is required to be established and implemented in a manner that fully complies with the requirements for state certification under the United States Code, title 49, section 60105, as amended to January 12, 2012 which the PUC has done. See <http://www.puc.sd.gov/pipelinesafety/default.aspx> SDCL 49-34B-3 specifically omits C.F.R. 49 parts 194 and 195, the implementing regulations for the PSA. If Keystone is trying to assert that the PUC is somehow acting contrary to its duties under the law regarding the creation and enforcement of pipeline safety standards in violation of law, then that matter could be taken up elsewhere.

This is not a case where there are any allegations that the PUC has sought to do so. This is a certification proceeding under SDCL 49-41B-27 whereby the applicant must prove that the facts underlying the conditions upon which the permit was granted are the same today as they were when the permit issued. Preemption is a doctrine used to challenge the authority of state or local government actions in certain areas of law, rather than a mechanism designed to be used to exclude testimony. If the ability of the PUC to issue permits for the construction and operation

of pipeline facilities was truly preempted by federal law, then the PUC would not have the authority to issue these permits.

Clearly the PUC does not have state or federal authority to enact or enforce crude oil pipeline safety standards. There is no indication that it is attempting to do so. The PUC has the statutory jurisdiction and authority to issue permits for the construction and operation of energy transmission facilities; to require that facilities that are granted a permit apply with all applicable laws; (including laws that originate federally) the PUC has the jurisdiction to examine compliance with all required permits and applicable laws, to revoke or suspend permits, to prosecute for violations of the same, to deny applications for permits and to certify conditions of permits. In order to carry out its functions under law, the PUC must be able to examine the contents and requirements of the permits it issues, apply testimony and evidence and make determinations as to compliance with permit conditions.

The PUC possesses what could be referred to as “investigatory jurisdiction.” The PUC has the jurisdiction to fully investigate all of the matters that are properly before it. By statute, the PUC has the power to make rules necessary to carry out the law, is required to have regular hearings, to remain in continuous operation, to issue orders, to regulate the manner in which parties conduct themselves before the commission, to issue subpoenas, to hear contested cases, to require written testimony to be prefiled, to follow the South Dakota Rules of Civil procedures in its proceedings, to deny, revoke or suspend permits among other powers. Clearly the PUC must have the power and jurisdiction to investigate all of the matters that are properly put before it under the law and to make appropriate decisions accordingly.

Keystone makes reference to Conclusion of Law 12 to support its motion to exclude testimony as well. Conclusion of Law 12 states that “PHMSA is delegated exclusive authority

over the establishment and enforcement of safety-orientated design and operational standards for hazardous materials pipelines. 49 USC 60101, et.seq.” Rosebud takes no exception to this reference. If this were a case whereby the PUC was attempting to “establish or enforce” safety-orientated design and operational standards for hazardous material pipelines that are in excess of minimum federal standards, as previously stated, those actions would not be permissible consistent with South Dakota and federal laws. The SD legislative scheme does not permit the PUC to enact or enforce pipeline safety laws that are more stringent than federal standards. SDCL 49-34B-4 and SDCL 49-34B-3.

The PUC regularly considers evidence and testimony regarding laws that originate at the federal level in many of its transactions. The Commission has done so in this docket and other interstate pipeline dockets as well. We can only assume that it will continue to do so for as long as the law requires it to do so. Keystone is asking the PUC to stop engaging in that process by requesting that Kuprewicz’s testimony be excluded.

By way of example, and not limited to the following, Keystone has submitted direct testimony from the following witnesses Heidi Tillquist and Meera Kothari regarding matters that have their origin in federal law and are outside of the PUC’s jurisdiction. Under Keystone’s theory, that testimony should also be excluded. Through direct testimony, these witnesses are testifying at a minimum, to Keystone’s current compliance with the PSA and PHMSA compliance regarding 49 C.F.R. parts 194 and 195 each of which requires compliance with laws and regulations that originate beyond the PUC’s jurisdiction.

Furthermore, the PUC heard testimony from these and other witnesses in HP 09-001 on matters that originate beyond the scope of the PUC’s jurisdiction. The PUC did not reject those requirements and laws, rather the PUC adopted some of them and required those laws and

requirements to be part of the permit conditions. Clearly, the PUC has previously considered matters that originate outside of its jurisdiction and required that Keystone comply with each of those requirements as evidenced by Amended Permit Condition 1.

Specifically related to the pending docket, Keystone offers the testimony of Heidi Tillquist, an environmental toxicologist and consultant for Keystone. Her direct testimony (attached as RST Exhibit 5, is attached and incorporated by reference herein) in the present docket states that she will testify about risk assessments related to the project, route changes in the project, the probability of spills occurring within High Consequence Areas (RST Exhibit 5 at page 2) and issues related to worst case spill scenarios, environmental clean-up and the potential impacts to groundwater resources (RST Exhibit 5 at page 3). All of these topics are related to compliance with requirements of the PSA, an area of federal law that originates beyond the jurisdiction of the PUC, yet is still a requirement of the permit. She also testified for Keystone in Docket HP 07-001 and in Docket HP 09-001 on similar issues.

In Docket HP 09-001 Ms. Tillquist testified about the risks associated with siting the pipeline in high risk landslide areas and the manner in which the risk assessment for seismic and landslide areas was performed. Again, the acceptance of this testimony demonstrates the Commission's concern and authority to require compliance with federal laws and safety regulations in the context of the permitting process. Keystone seeks to exclude Kuprewicz's testimony, which addresses some of the same issues. Said motion should be denied accordingly.

To further demonstrate Keystone's understanding that Keystone must comply with the requirements of federal law in operation of the Project (and that such compliance is related to the PUC's regulatory and investigative jurisdiction over the matter before it), Keystone also offers the testimony of Meera Kothari, manager, technical services pipeline engineering for Keystone

oil projects. This testimony is attached as RST Exhibit 6 and incorporated by reference herein. This witness has oversight responsibility for design and engineering for the Project. (RST Exhibit 6 at page 1.) This witness also testified before the PUC in Docket HP 07-001 and HP 09-001. In the current proceeding, the witness will testify to portions of Appendix C of the Application, finding numbers 60, 61, 62, 63, 68, 83, 90 and 107 in addition to design and construction of the project and PHMSA compliance. (RST Exhibit 6 at page 2.) At a minimum the testimony related to PHMSA compliance is associated with matters and requirements that originate in federal law, but are not out of the reach of the PUC 's investigative jurisdiction.

There was nothing in the original permit proceeding that prohibited the PUC from applying and requiring compliance with laws and regulations that originate in federal law. In fact, many of the current permit conditions require compliance with federal laws, often times whose compliance and enforcement are outside of the province of the PUC itself. Many other PUC permits require compliance with federal laws. There is nothing in the certification statute or other state statutes which prohibits the PUC from examining the permit conditions along with Keystone's certification petition and reaching a conclusion as to (1) whether Keystone can continue to meet the Amended Permit Conditions and (2) whether there have been changes in the findings of fact on which the Amended Permit Conditions and the PUC's 2010 Decision to grant the permit were based.

### **The Proper Standard to Consider**

The Rosebud Sioux Tribe has prefiled the direct testimony of Mr. Kuprewicz as expert testimony and intends on offering the in person testimony of Mr. Kuprewicz as a pipeline safety expert at the evidentiary hearing scheduled for July 27-30 and August 3 and 4, 2015, consistent

with the requirements of the Rules of Civil Procedure. The admission of this witness' expert testimony is governed by SDCL 19-15-2 (Rule 702), not the preemption doctrine.

The admission of expert testimony is governed by SDCL 19-15-2 (Rule 702), which provides:

If scientific, technical, or otherwise specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. *State vs. Guthrie*, 627 N.W.2d 401 (2001).

Courts must address two preliminary issues prior to determining the admissibility of expert testimony. First, expert testimony must be relevant to the matter in question and secondly the opinion must assist the fact finder in understanding the evidence or deciding the issues. *State vs. Guthrie*. Keystone has not asked the PUC to consider either of these factors, nor have they asked the PUC to consider SDCL 19-15-2 (Rule 702) in its decision.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." SDCL 19-12-1. The Kuprewicz report is directly relevant to a meaningful evaluation of the key elements of proof that the PUC considers based on SDCL 49-41B-22. The report offers opinions about (1) the sufficiency of Keystone's risk assessment; (2) the adequacy of the number and placement of valves and (3) the safety of the pipeline due to its routing in areas of high landslide potential. These opinions will assist the PUC in examining the permit conditions along with Keystone's certification petition and reaching a conclusion as to (1) whether Keystone can continue to meet the Amended Permit Conditions and (2) whether there have been changes in the findings of fact on which the Amended Permit Conditions and the PUC's 2010 Decision to grant the permit were based.

The relevant questions in determining the admissibility of expert testimony are (1) is the evidence sought to be excluded relevant, (2) if it is relevant is the testimony based on reliable methods and experiences and (3) if it is based upon a reliable foundation, does the opinion on the ultimate issue help the finder of fact with deciding the issue. By these proper standards, the Kuprewicz report is highly admissible. In its motion to exclude Kuprewicz's testimony, Keystone has ignored these rules for determining admissibility.

### **Conclusion**

If accepted by the PUC, Keystone's arguments and theories would place the PUC in the untenable position of not being able to look at evidence on matters relating to the PSA and 49 C.F.R. parts 194 and 195 to determine if the applicant has met its burden of proof for certification, simply because the topic of pipeline safety and design operational standards originate within federal law. Granting Keystone's motion also calls into question the authority of the PUC to even issue permits that require compliance with the PSA and 49 C.F.R. parts 194 and 195 for the construction and operation of crude oil pipelines. This is an absurd interpretation of the law, resulting in an even more absurd result, and must be denied.

The report offers opinions about (1) the sufficiency of Keystone's risk assessment; (2) the adequacy of the number and placement of valves and (3) the safety of the pipeline due to its routing in areas of high landslide potential. These opinions will assist the PUC in examining the permit conditions along with Keystone's certification petition and reaching a conclusion as to (1) whether Keystone can continue to meet the Amended Permit Conditions and (2) whether there have been changes in the findings of fact on which the Amended Permit Conditions and the PUC's 2010 Decision to grant the permit were based

Based on the foregoing, the Rosebud Sioux Tribe respectfully requests that the motion to exclude testimony be denied.

Dated this 2<sup>nd</sup> day of June, 2015.

RESPECTFULLY SUBMITTED:

/s/ Matthew L. Rappold  
Matthew L. Rappold  
Rappold Law Office  
PO Box 873  
Rapid City, SD 57709  
(605) 828-1680  
[Matt.rappold01@gmail.com](mailto:Matt.rappold01@gmail.com)

CERTIFICATE OF SERVICE

I certify that on the 2<sup>nd</sup> day of June, 2015, on behalf of the Rosebud Sioux Tribe, the original Response to Motion to Exclude Testimony of Richard Kuperewicz, RST Exhibits 1, 2, 3, 4, 5 and 6 in Case Number HP-14-001 was filed with the Public Utilities Commission of the State of South Dakota e-filing website and also that on this day a true and correct copy was sent via email and/or U.S. Mail first class postage prepaid to the following persons, as designated:

Ms. Patricia Van Gerpen  
Executive Director  
South Dakota Public Utilities Commission  
500 E. Capitol Ave.  
Pierre, SD 57501  
[patty.vangerpen@state.sd.us](mailto:patty.vangerpen@state.sd.us)  
(605) 773-3201 - voice

Ms. Kristen Edwards  
Staff Attorney  
South Dakota Public Utilities Commission  
500 E. Capitol Ave.  
Pierre, SD 57501  
[Kristen.edwards@state.sd.us](mailto:Kristen.edwards@state.sd.us)  
(605) 773-3201 - voice

Mr. Brian Rounds  
Staff Analyst  
South Dakota Public Utilities Commission  
500 E. Capitol Ave.  
Pierre, SD 57501  
[brian.rounds@state.sd.us](mailto:brian.rounds@state.sd.us)  
(605) 773-3201- voice

Mr. Darren Kearney  
Staff Analyst  
South Dakota Public Utilities Commission  
500 E. Capitol Ave.  
Pierre, SD 57501  
[darren.kearney@state.sd.us](mailto:darren.kearney@state.sd.us)  
(605) 773-3201 - voice

Mr. James E. Moore - Representing: TransCanada Keystone Pipeline, LP  
Attorney  
Woods, Fuller, Shultz and Smith P.C.  
PO Box 5027  
Sioux Falls, SD 57117  
[james.moore@woodsfuller.com](mailto:james.moore@woodsfuller.com)  
(605) 336-3890 - voice  
(605) 339-3357 - fax

Mr. William G. Taylor - Representing: TransCanada Keystone Pipeline, LP  
Attorney  
Woods, Fuller, Shultz and Smith P.C.  
PO Box 5027  
Sioux Falls, SD 57117  
[bill.taylor@woodsfuller.com](mailto:bill.taylor@woodsfuller.com)  
(605) 336-3890 - voice  
(605) 339-3357 - fax

Mr. James P. White  
Attorney  
TransCanada Keystone Pipeline, LP  
Ste. 225  
1250 Eye St., NW  
Washington, DC 20005  
[jim\\_p\\_white@transcanada.com](mailto:jim_p_white@transcanada.com)  
(202) 682-4701 ext. 224 - voice

Mr. Paul F. Seamans  
27893 249th St.  
Draper, SD 57531

[jackknife@goldenwest.net](mailto:jackknife@goldenwest.net)  
(605) 669-2777 - voice

Mr. John H. Harter  
28125 307th Ave.  
Winner, SD 57580  
[johnharter11@yahoo.com](mailto:johnharter11@yahoo.com)  
(605) 842-0934 - voice

Ms. Elizabeth Lone Eagle  
PO Box 160  
Howes, SD 57748  
[bethcbest@gmail.com](mailto:bethcbest@gmail.com)  
(605) 538-4224 - voice  
Serve both by email and regular mail

Mr. Tony Rogers  
Rosebud Sioux Tribe - Tribal Utility Commission  
153 S. Main St.  
Mission, SD 57555  
[tuc@rosebudsiouxtribe-nsn.gov](mailto:tuc@rosebudsiouxtribe-nsn.gov)  
(605) 856-2727 - voice

Ms. Viola Waln  
PO Box 937  
Rosebud, SD 57570  
[walnbranch@goldenwest.net](mailto:walnbranch@goldenwest.net)  
(605) 747-2440 - voice

Ms. Jane Kleeb  
Bold Nebraska  
1010 N. Denver Ave.  
Hastings, NE 68901  
[jane@boldnebraska.org](mailto:jane@boldnebraska.org)  
(402) 705-3622 - voice

Mr. Benjamin D. Gotschall  
Bold Nebraska  
6505 W. Davey Rd.  
Raymond, NE 68428  
[ben@boldnebraska.org](mailto:ben@boldnebraska.org)  
(402) 783-0377 - voice

Mr. Byron T. Steskal & Ms. Diana L. Steskal  
707 E. 2nd St.  
Stuart NE 68780

[prairierose@nntc.net](mailto:prairierose@nntc.net)

(402) 924-3186 - voice

Ms. Cindy Myers, R.N.

PO Box 104

Stuart, NE 68780

[csmyers77@hotmail.com](mailto:csmyers77@hotmail.com)

(402) 709-2920 - voice

Mr. Arthur R. Tanderup

52343 857th Rd.

Neligh, NE 68756

[atanderu@gmail.com](mailto:atanderu@gmail.com)

(402) 278-0942 - voice

Mr. Lewis GrassRope

PO Box 61

Lower Brule, SD 57548

[wisestar8@msn.com](mailto:wisestar8@msn.com)

(605) 208-0606 - voice

Ms. Carolyn P. Smith

305 N. 3rd St.

Plainview, NE 68769

[peachie\\_1234@yahoo.com](mailto:peachie_1234@yahoo.com)

(402) 582-4708 - voice

Mr. Robert G. Allpress

46165 Badger Rd.

Naper, NE 68755

[bobandnan2008@hotmail.com](mailto:bobandnan2008@hotmail.com)

(402) 832-5298 - voice

Mr. Louis T. Genung

902 E. 7th St.

Hastings, NE 68901

[tg64152@windstream.net](mailto:tg64152@windstream.net)

(402) 984-7548 - voice

Mr. Peter Capossela, P.C. - Representing: Standing Rock Sioux Tribe

Attorney at Law

PO Box 10643

Eugene, OR 97440

[pcapossela@nu-world.com](mailto:pcapossela@nu-world.com)

(541) 505-4883 - voice

Ms. Nancy Hilding  
6300 W. Elm  
Black Hawk, SD 57718  
[nhilshat@rapidnet.com](mailto:nhilshat@rapidnet.com)  
(605) 787-6779 - voice

Mr. Gary F. Dorr  
27853 292nd  
Winner, SD 57580  
[gfdorr@gmail.com](mailto:gfdorr@gmail.com)  
(605) 828-8391 - voice

Mr. Bruce & Ms. RoxAnn Boettcher  
Boettcher Organics  
86061 Edgewater Ave.  
Bassett, NE 68714  
[boettcherann@abbnebraska.com](mailto:boettcherann@abbnebraska.com)  
(402) 244-5348 - voice

Ms. Wrexie Lainson Bardaglio  
9748 Arden Rd.  
Trumansburg, NY 14886  
[wrexie.bardaglio@gmail.com](mailto:wrexie.bardaglio@gmail.com)  
(607) 229-8819 - voice

Mr. Cyril Scott  
President  
Rosebud Sioux Tribe  
PO Box 430  
Rosebud, SD 57570  
[cscott@gwtc.net](mailto:cscott@gwtc.net)  
[ejantoine@hotmail.com](mailto:ejantoine@hotmail.com)  
(605) 747-2381 - voice

Mr. Eric Antoine  
Attorney  
Rosebud Sioux Tribe  
PO Box 430  
Rosebud, SD 57570  
[ejantoine@hotmail.com](mailto:ejantoine@hotmail.com)  
(605)747-2381 - voice

Ms. Paula Antoine  
Sicangu Oyate Land Office Coordinator  
Rosebud Sioux Tribe  
PO Box 658

Rosebud, SD 57570  
[wopila@gwtc.net](mailto:wopila@gwtc.net)  
[paula.antoine@rosebudsiouxtribe-nsn.gov](mailto:paula.antoine@rosebudsiouxtribe-nsn.gov)  
(605) 747-4225 - voice

Mr. Harold C. Frazier  
Chairman  
Cheyenne River Sioux Tribe  
PO Box 590  
Eagle Butte, SD 57625  
[haroldcfrazier@yahoo.com](mailto:haroldcfrazier@yahoo.com)  
(605) 964-4155 - voice

Mr. Cody Jones  
21648 US HWY 14/63  
Midland, SD 57552  
(605) 843-2827 - voice

Ms. Amy Schaffer  
PO Box 114  
Louisville, NE 68037  
[amyanschaffer@gmail.com](mailto:amyanschaffer@gmail.com)  
(402) 234-2590

Mr. Jerry Jones  
22584 US HWY 14  
Midland SD 57552  
(605) 843-2264

Ms. Debbie J. Trapp  
24952 US HWY 14  
Midland, SD 57552  
[mtdt@goldenwest.net](mailto:mtdt@goldenwest.net)  
(605) 843-2155 - voice

Ms. Gena M. Parkhurst  
2825 Minnewasta Place  
Rapid City, SD 57702  
[gmp66@hotmail.com](mailto:gmp66@hotmail.com)  
(605) 716-5147 - voice

Ms. Joye Braun  
PO Box 484  
Eagle Butte, SD 57625  
[jmbraun57625@gmail.com](mailto:jmbraun57625@gmail.com)  
(605) 964-3813

Mr. Robert Flying Hawk  
Chairman  
Yankton Sioux Tribe  
PO Box 1153  
Wagner, SD 57380  
[Robertflyinghawk@gmail.com](mailto:Robertflyinghawk@gmail.com)  
(605) 384-3804 - voice

Ms. Thomasina Real Bird - Representing - Yankton Sioux Tribe  
Attorney  
Fredericks Peebles & Morgan LLP  
1900 Plaza Dr.  
Louisville, CO 80027  
[trealbird@ndnlaw.com](mailto:trealbird@ndnlaw.com)  
(303) 673-9600 - voice  
(303) 673-9155 - fax

Ms. Jennifer S. Baker – Representing Yankton Sioux Tribe  
Attorney  
Fredericks Peebles & Morgan LLP  
1900 Plaza Dr.  
Louisville, CO 80027  
[Jbaker@ndnlaw.com](mailto:Jbaker@ndnlaw.com)  
303-673-9600 - voice  
303-673-9155 – fax

Ms. Chastity Jewett  
1321 Woodridge Dr.  
Rapid City, SD 57701  
[chasjewett@gmail.com](mailto:chasjewett@gmail.com)  
(605) 431-3594 - voice

Mr. Duncan Meisel  
350.org  
20 Jay St. #1010  
Brooklyn, NY 11201  
[duncan@350.org](mailto:duncan@350.org)  
(518) 635-0350 - voice

Ms. Sabrina King  
Dakota Rural Action  
518 Sixth Street, #6  
Rapid City, SD 57701  
[sabrina@dakotarural.org](mailto:sabrina@dakotarural.org)  
(605) 716-2200 - voice

Mr. Frank James  
Dakota Rural Action  
PO Box 549  
Brookings, SD 57006  
[fejames@dakotarural.org](mailto:fejames@dakotarural.org)  
(605) 697-5204 - voice  
(605) 697-6230 - fax

Mr. Bruce Ellison  
Attorney  
Dakota Rural Action  
518 Sixth St. #6  
Rapid City, SD 57701  
[belli4law@aol.com](mailto:belli4law@aol.com)  
(605) 716-2200 - voice  
(605) 348-1117 - voice

Mr. Tom BK Goldtooth  
Indigenous Environmental Network (IEN)  
PO Box 485  
Bemidji, MN 56619  
[ien@igc.org](mailto:ien@igc.org)  
(218) 760-0442 - voice

Mr. Dallas Goldtooth  
38371 Res. HWY 1  
Morton, MN 56270  
[goldtoothdallas@gmail.com](mailto:goldtoothdallas@gmail.com)  
(507) 412-7609

Mr. Ronald Fees  
17401 Fox Ridge Rd.  
Opal, SD 57758  
(605) 748-2422 - voice

Ms. Bonny Kilmurry  
47798 888 Rd.  
Atkinson, NE 68713  
[bjkilmurry@gmail.com](mailto:bjkilmurry@gmail.com)  
(402) 925-5538 - voice

Mr. Robert P. Gough  
Secretary  
Intertribal Council on Utility Policy  
PO Box 25  
Rosebud, SD 57570

[bobgough@intertribalCOUP.org](mailto:bobgough@intertribalCOUP.org)

(605) 441-8316 - voice

Mr. Terry & Cheryl Frisch

47591 875th Rd.

Atkinson, NE 68713

[tcfrisch@q.com](mailto:tcfrisch@q.com)

(402) 925-2656 - voice

Ms. Tracey Zephier - Representing: Cheyenne River Sioux Tribe

Fredericks Peebles & Morgan LLP

Ste. 104

910 5th St.

Rapid City, SD 57701

[tzephier@ndnlaw.com](mailto:tzephier@ndnlaw.com)

(605) 791-1515 - voice

Mr. Travis Clark - Representing: Cheyenne River Sioux Tribe

Fredericks Peebles & Morgan LLP

Ste. 104

910 5th St.

Rapid City, SD 57701

[tclark@ndnlaw.com](mailto:tclark@ndnlaw.com)

(605) 791-1515 - voice

Mr. Robin S. Martinez - Representing: Dakota Rural Action

Martinez Madrigal & Machicao, LLC

616 W. 26th St.

Kansas City, MO 64108

[robin.martinez@martinezlaw.net](mailto:robin.martinez@martinezlaw.net)

(816) 979-1620 – voice

(888) 398-7665 - fax

Ms. Mary Turgeon Wynne, Esq.

Rosebud Sioux Tribe - Tribal Utility Commission

153 S. Main St

Mission, SD 57555

[tuc@rosebudsiouxtribe-nsn.gov](mailto:tuc@rosebudsiouxtribe-nsn.gov)

(605) 856-2727 - voice

Ms. April D. McCart - Representing: Dakota Rural Action

Certified Paralegal

Martinez Madrigal & Machicao, LLC

616 W. 26th St.

Kansas City, MO 64108

[april.mccart@martinezlaw.net](mailto:april.mccart@martinezlaw.net)

(816) 415-9503 - voice

Mr. Paul C. Blackburn - Representing: Bold Nebraska

Attorney

4145 20th Ave. South

Minneapolis, MN 55407

[paul@paulblackburn.net](mailto:paul@paulblackburn.net)

(612) 599-5568 - voice

Ms. Kimberly E. Craven - Representing: Indigenous Environmental Network (IEN)

Attorney

3560 Catalpa Way

Boulder, CO 80304

[kimecraven@gmail.com](mailto:kimecraven@gmail.com)

(303) 494-1974 - voice

Matthew L. Rappold

Matthew L. Rappold