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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 HP09-001  
CONVERSION AND TRANSMISSION FACILITY  
ACT TO CONSTRUCT THE KEYSTONE XL PROJECT

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Transcript of Proceedings  
May 4, 2010

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BEFORE THE PUBLIC UTILITIES COMMISSION,  
DUSTY JOHNSON, CHAIRMAN  
STEVE KOLBECK, VICE CHAIRMAN  
GARY HANSON, COMMISSIONER

COMMISSION STAFF  
John Smith  
Rolayne Ailts Wiest  
Kara Semmler  
Karen Cremer  
Greg Rislov  
Tim Binder  
Bob Knadle  
Brian Rounds  
Terri Labrie Baker  
Stacey Splittstoesser  
Demaris Axthelm

APPEARANCES

Brett M. Koenecke	appearing as co-counsel on behalf of the Applicant
James White	appearing as co-counsel on behalf of the Applicant
Paul Blackburn	appearing by telephone on behalf of Dakota Rural Action

Reported By Cheri McComsey Wittler, RPR, CRR

1       ALSO PRESENT BY TELEPHONE

2               Ross Hargrove

3               Peter Larson

4       = = = = =

5               TRANSCRIPT OF PROCEEDINGS, held in the  
6       above-entitled matter, at the South Dakota State Capitol  
7       Building, 500 East Capitol Avenue, Pierre, South Dakota,  
8       on the 4th day of May, 2010, commencing at 11:30 a.m.

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1           CHAIRMAN JOHNSON: We are back on the internet  
2 and ready to take up our final action for our final  
3 Docket for the day, I believe. Yep.

4           This deals with Keystone XL Pipeline, and  
5 specifically the Applicant has made a Motion for limited  
6 reconsideration of some of the permit conditions. We do  
7 have a second question regarding the liaison officer.  
8 And maybe that's easier to dispense with right away, if  
9 that's acceptable to the Applicant.

10          Go ahead, Mr. Koenecke, if you want to address  
11 that issue.

12          MR. KOENECKE: Thank you very much,  
13 Commissioners. Good morning, Commissioners and Staff.  
14 Brett Koenecke, a lawyer from Pierre and representing the  
15 Applicant this matter.

16          We have filed a Motion to have Sarah Metcalf,  
17 the current construction liaison for the Keystone  
18 Project, installed as the Commission's construction  
19 liaison for the XL project. I've supplied a copy of her  
20 resume to the Commission and filed it publicly for the  
21 people to see. And it would be my estimation and I think  
22 it's roundly shared that she's done a fantastic job in  
23 that role and should be moved over to the other -- or the  
24 new project in South Dakota.

25          It was my estimation that there were some

1 matters that cropped up. I think Ms. Gregg said that  
2 there were five contacts on the Keystone XL Pipeline.  
3 And it seems timely then to have someone for the  
4 Commission, for landowners, and for other affected people  
5 to contact in that role.

6 At this time we'd ask the Commission to go ahead  
7 and appoint her.

8 CHAIRMAN JOHNSON: With a large number of  
9 Interveners, we will pause and see if any of them want to  
10 make comment.

11 Hearing none, we will see if any other person  
12 wants to make comment.

13 Commission Staff.

14 MS. SEMMLER: This is Kara Semmler for Staff.  
15 Staff doesn't have much to add at this point. I think  
16 our conversations with you regarding -- in previous  
17 matters, Commissioners, has indicated Sarah has been easy  
18 to work with. She's dealt with all of -- any landowner  
19 issue in a very timely fashion. And we're pleased with  
20 the help she's given us and look forward to working with  
21 her in the future.

22 CHAIRMAN JOHNSON: Thank you. Questions?

23 I will make it -- one moment, please.

24 I want to make it clear that my comments and  
25 questions are not dealing with the merits of the request.

1 I can't -- I don't have any information to indicate that  
2 Ms. Metcalf has not done her job as liaison officer on  
3 the first pipeline. I think it has more to do with  
4 process.

5 I had a conversation with Mr. Roitsch yesterday.  
6 He made a filing to the Commission today expressing some  
7 interest. And I wonder and I'll ask this question out of  
8 ignorance because I just don't know what process you all  
9 used.

10 I mean, was there an opportunity for people to  
11 make their interest in the position known to the  
12 Applicant? And, if so, were there any kind of an  
13 interview process?

14 MR. KOENECKE: To the best of my understanding,  
15 Commissioner, there was not a process of any sort. Sarah  
16 was seen by the XL project people to be the person for  
17 the job.

18 CHAIRMAN JOHNSON: Yeah. So I've got concerns  
19 again not on the merits but on the process. I would have  
20 a little bit of concern with that process. I mean,  
21 obviously the Applicant is free to do whatever it wants  
22 to do with its own personnel.

23 But I think in this situation, which is a really  
24 unique overlap of, you know, a public and private issue,  
25 I would have felt more comfortable had the public and the

1 landowners and interested people had more confidence that  
2 the best person was hired because the best person had an  
3 opportunity to at least be interviewed by TransCanada.  
4 We don't know if that's the case. Maybe the best person  
5 has been suggested.

6 Do you have anything you can say to assuage my  
7 concerns, my nervousness, Mr. Koenecke?

8 MR. KOENECKE: About the only thing I can give  
9 you in that regard, Commissioner, would be what I  
10 consider to be a track record, being responsive to you,  
11 the other Commissioners, the Staff, of knowing the people  
12 and the processes, as well as her, I think, real command  
13 of the issues regarding soils and grasses and crops and  
14 those kind of things.

15 For myself I can't imagine that the process  
16 would come out differently, but I think the record is  
17 what speaks most clearly and loudly on her behalf.

18 CHAIRMAN JOHNSON: Other questions?

19 COMMISSIONER KOLBECK: I don't have so much a  
20 question. I understand TransCanada's reasoning. You  
21 stick with a proven thing. I think Ms. Metcalf has  
22 proven herself.

23 I do have the same concerns that Commissioner  
24 Johnson does, though. However, if it was opened up, if  
25 there's a lot more -- obviously, there's been a pipeline

1 through South Dakota already. If anything could have  
2 been gained, certain people that were involved in that.  
3 But that's not necessarily for me to say.

4 So I am comfortable with Ms. Metcalf, though.

5 CHAIRMAN JOHNSON: Other questions?

6 COMMISSIONER HANSON: Mr. Chairman, I will move  
7 that the Commission approve Sarah J. Metcalf as the  
8 Keystone XL public liaison officer.

9 CHAIRMAN JOHNSON: The Motion has been made.  
10 Any discussion on the Motion?

11 COMMISSIONER HANSON: Since my compatriots have  
12 made comment, I will state that I -- from my experience  
13 and from the experience that's been relayed to us by  
14 Staff, that she's done a good job, and certainly she'll  
15 have the opportunity to continue.

16 CHAIRMAN JOHNSON: And this is just for  
17 discussion sake. I mean, is there any value,  
18 Commissioners, in just saying, hey, listen, we don't have  
19 any problem with this person, but maybe you should take a  
20 couple of months just to see if other people contact you,  
21 just give some small number of them the benefit of an  
22 interview?

23 You just never know when you're going to come  
24 across somebody that's better. I know that nobody seems  
25 to think that's very likely, but I just hate to totally

1 preclude the opportunity.

2 Now that's not the pending Motion, but I just  
3 offer it up as one reason maybe I'm not quite as excited  
4 about the pending Motion as I otherwise could be.

5 COMMISSIONER KOLBECK: I guess waiting a few  
6 months -- I'd rather we okayed this. Because as the  
7 Applicant has stated, there are questions coming in. I  
8 know there was a subject of a letter that was a couple  
9 months ago -- or a month or so ago there was some  
10 confusion with the land leases. So I think there is  
11 value in having someone in there immediately.

12 I wouldn't be opposed to -- I hate to -- if  
13 someone was more qualified, I think that they should be  
14 hired and given the chance, but I just struggle with the  
15 time of it. I really don't think that waiting three,  
16 four months would be advantageous to the landowners.

17 COMMISSIONER HANSON: I just don't feel  
18 comfortable inserting myself and the Commission into the  
19 hiring practices of another business if, in fact, they're  
20 hiring people who are doing a good job. I wouldn't want  
21 to try and guess that there might -- I suppose there's  
22 better folks for every location. With the exception of  
23 our Staff, of course. There's certainly someone who can  
24 do a better job than I as Commissioner, but I don't want  
25 us to look for one.



1           COMMISSIONER KOLBECK: Well, and I would hope  
2           that if Ms. Metcalf was ever not performing her duties  
3           properly, she would be replaced. I trust that the  
4           Applicant would do that also.

5           CHAIRMAN JOHNSON: Yeah. And, indeed, I think  
6           our Order indicates that the Commission could proactively  
7           remove the person from that position.

8           I mean, this is not quite just a private  
9           employment situation. I mean, our Order does -- this  
10          is -- this is a complicated arrangement, and I just -- I  
11          would feel more comfortable if -- you know, I mean,  
12          Mr. Roitsch came in and he just -- he and I couldn't talk  
13          a whole lot. Obviously that's not an open meeting.

14          But he just said, well, you know, how was I to  
15          know? And if I'm saying anything incorrect, Mr. Roitsch,  
16          we'll certainly give you mic time to correct yourself.  
17          The guy drove to Calgary and sat in Robert Jones's outer  
18          office to wait for an opportunity to speak to the head of  
19          the project.

20          He never got the opportunity. I wouldn't have  
21          expected he would have been given an opportunity. It  
22          seems like you've got somebody who in good faith has  
23          tried to make clear that they're interested in the  
24          position and never was talked to.

25          And part of me feels like it would have been a

1 better process if he and others could have felt like they  
2 had an honest shot. And I don't feel like that's  
3 entirely not our business. Nor is it entirely our  
4 business. But those are my thoughts.

5 I have allowed a little liberality in discussing  
6 the pending Motion, no doubt you've noticed. So  
7 certainly feel free to respond, and then we'll proceed to  
8 vote.

9 MR. ROITSCH: Mr. Chairman, did you get a -- I  
10 wrote a letter --

11 CHAIRMAN JOHNSON: We need to make sure you're  
12 at a mic. And introduce yourself.

13 MR. ROITSCH: Jerry Roitsch. I gave Staff a  
14 letter this morning. Did you get a copy of it?

15 CHAIRMAN JOHNSON: Yes. That was the filing  
16 that was put on the internet, and it's there for the  
17 whole world to read.

18 MR. ROITSCH: Have you read it?

19 CHAIRMAN JOHNSON: Yes.

20 MR. ROITSCH: As long as you have that for  
21 consideration.

22 CHAIRMAN JOHNSON: Any other comments?

23 COMMISSIONER KOLBECK: I appreciate your  
24 thoughts, Commissioner Johnson. I do.

25 Let me ask the Applicant. Is there any way to

1 open up this job for anybody that's interested? And  
2 maybe not two to three months but within four to six  
3 weeks have this thing buttoned up?

4 MR. WHITE: Mr. Chairman, if I might, Jim White  
5 for TransCanada. I mean, it's certainly possible to post  
6 the position and open it up. I guess in our view the  
7 downsides of that are both the delay in having someone in  
8 the position and also the fact that the person who has  
9 served in that role has developed familiarity with the  
10 issues, has demonstrated her competence, and has  
11 satisfied the Commission Staff.

12 The likelihood of a general post of finding  
13 someone who could serve that position better than the  
14 current occupancy is highly unlikely. So if you weigh  
15 that against the downside of delaying having someone in  
16 that position, that in our view suggested to us that we  
17 should recommend Sarah Metcalf.

18 But to answer your question directly, if we were  
19 required to post the position and conduct interviews, we  
20 would certainly do that.

21 COMMISSIONER KOLBECK: Thank you for that. But  
22 definitely, Ms. Metcalf would be weighted in that, and no  
23 one else has the experience of walking through a pipeline  
24 in South Dakota but Ms. Metcalf as a liaison officer.

25 So I understand that. I also understand the

1 fact that we have positive comments from the landowners  
2 on the east side of the state for Ms. Metcalf. I do  
3 believe it may just be academic to open up the position,  
4 in my opinion.

5 CHAIRMAN JOHNSON: Yeah. I can't disagree with  
6 that. I mean, in good faith I can't sit here and tell  
7 you that she's done a lousy job and, you know, she  
8 shouldn't be hired or I think somebody out there is  
9 better.

10 I haven't done enough analysis of Mr. Roitsch's  
11 resume. But, you know, I don't have any reason to  
12 believe that he would be better at the job, with all due  
13 respect to both he and Ms. Metcalf.

14 So it may be academic, but I think my discomfort  
15 remains.

16 COMMISSIONER KOLBECK: Sure.

17 CHAIRMAN JOHNSON: Well, with that it appears we  
18 don't have anymore comment. The Hanson Motion is to  
19 approve the request. At this time we'll proceed to vote.  
20 Hanson.

21 COMMISSIONER HANSON: Aye.

22 CHAIRMAN JOHNSON: Kolbeck.

23 COMMISSIONER KOLBECK: Aye.

24 CHAIRMAN JOHNSON: Johnson votes nay. Again, I  
25 want to make a note that's not a lack of confidence in

1 Ms. Metcalf.

2 All right. That is taken care of. It passes on  
3 a 2-1 vote, and we'll proceed to the main question, which  
4 is shall the Commission grant the Applicant's Motion for  
5 Limited Reconsideration of Certain Permit Conditions?

6 Mr. Koenecke.

7 MR. KOENECKE: Good morning again, Commissioners  
8 and Staff. Brett Koenecke for TransCanada. We're --

9 MR. BLACKBURN: Commissioner Johnson, this is  
10 Paul Blackburn from Dakota Rural Action. Sorry for  
11 interrupting. I can barely hear counsel for TransCanada.

12 CHAIRMAN JOHNSON: That's a good reason to  
13 interrupt. Mr. Koenecke, why don't you pull that closer  
14 and we'll try to do some things on the volume on our end,  
15 Mr. Blackburn. Speak up if we're not coming through.

16 Go ahead, Mr. Koenecke.

17 MR. KOENECKE: Thank you, Commissioner. Again,  
18 Brett Koenecke for the Applicant. We're here seeking  
19 clarification and reconsideration of a limited number of  
20 the conditions in the Commission's Order and Permit  
21 granting permission to construct the Keystone XL project.

22 Keystone thinks it important to have this  
23 discussion at this particular time prior to construction  
24 in order to maximize everyone's understanding of the  
25 Commission's Order and conditions. The preconstruction

1 processes are continuing and ongoing, plans are being  
2 laid, and the Commission orders and conditions are a huge  
3 part of that.

4 The Commission process, as everyone knows, was a  
5 huge undertaking and so are the other processes, which  
6 are ongoing. There's a tremendous interplay of federal,  
7 state, tribal, local governments, and certainly not least  
8 of all landowners, people trying to achieve their  
9 understanding and give their permissions where  
10 appropriate to construct the project.

11 At least one party has challenged our right to  
12 be here today. And I must say that I think that party  
13 misses the mark in their objections to having this  
14 discussion at all.

15 I think the parties to this Docket do a  
16 tremendous service to affected people by having this  
17 discussion at this time rather than later on when  
18 construction is occurring when the cost and pressures of  
19 delay might be more substantial -- significantly more  
20 substantial than they currently are, a time when more  
21 parties would be affected by delay or Commission orders.

22 We think the time is now to consider these  
23 conditions in the interests of everyone concerned,  
24 certainly including landowners and others as well.

25 We do take note of the responses of the other

1 parties to the filings we've made. I think they tell us  
2 three things: The first thing they tell us is that  
3 there's some agreement that more clarity can be brought  
4 to the conditions.

5 An example of that would be the grouse leks.  
6 That's apparently been roundly agreed upon by commenters.  
7 Certainly there's not complete agreement, but there's  
8 round agreement I think on that condition.

9 Frankly, in some cases Staff and others have  
10 better ideas than we did. We'll talk about spill  
11 reporting in that. I think both the Staff and the DRA  
12 comments on that are well taken. And that's a good  
13 discussion to have: What is the most appropriate way to  
14 report spills.

15 And in some cases, quite frankly, the third  
16 thing is that we just flat missed the mark. You can't  
17 look at the responses to our discussion of the  
18 paleontological conditions and conclude much other than  
19 we simply weren't able to communicate very well what we  
20 were thinking in that regard.

21 But we've got some ideas that we think bear some  
22 consideration there, and I think the other parties do as  
23 well. I think it's a discussion worth having, and I'd  
24 like to see us go forward and do that in the spirit of  
25 cooperation to make this as best as can be for everybody.

1           My client has responsibilities to the  
2 Commissioners, to the Staff, to the State, and certainly  
3 again not least of all the landowners. And we want to  
4 get it right, and we're here asking for your help and the  
5 help of the other parties in doing so.

6           So we'd like to go forward with this discussion,  
7 not withstanding the legal arguments of DRA and see if we  
8 can make this better for everybody.

9           CHAIRMAN JOHNSON: I think in that spirit,  
10 Mr. Koenecke, and obviously we'll give everybody an  
11 opportunity to talk, I mean, would there be any  
12 objection -- to me it seemed from the filings that there  
13 was agreement on the Applicant's suggestions on 22A, 22C,  
14 22E, and 41.

15           And so maybe I would just pause and see if  
16 there's any objection to the Commission adopting the  
17 request by TransCanada on all of 22 and then 41.

18           And just some people are asking for greater  
19 specificity. So I will turn to as sort of a -- if you  
20 look at the Staff memo, paragraph 22, it deals with  
21 construction across or near wetlands.

22           A specifically deals with right of way and  
23 noncultivated wetlands. C deals with stream crossings of  
24 greater than 30 feet. E deals with 15-foot buffers for  
25 stream crossings. There seems to be unanimity on those



1 suggested changes. And then 41 deals with really who's  
2 in charge of some of these protection mitigation efforts  
3 and making that a little bit clearer, that the Department  
4 of State is.

5 Yeah. So does any party or person have an  
6 objection to that?

7 Hearing none, is there any Commission -- I'll  
8 make the Motion then that the Commission -- yes.  
9 Commissioner Kolbeck, go ahead.

10 COMMISSIONER KOLBECK: I just -- is this -- I  
11 got a problem with the flowing stream one, I guess,  
12 paragraph 22E. The 15-foot buffer is intended to protect  
13 the flowing streams. No benefit and instead adds  
14 construction burden, dry stream beds.

15 I guess I have a problem with some of that  
16 West River land that goes -- say we get 2, 3 inches of  
17 rain in a night. Does that turn a dry bed into a flowing  
18 stream? That's my one concern.

19 So I would rather you did it, put that 15-foot  
20 buffer in there.

21 CHAIRMAN JOHNSON: Mr. Kolbeck, is that dealing  
22 with paragraph 27, the 12 practices? And this is mostly  
23 my fault because I have -- what I want to do is kind of  
24 clear the deck on the things that are not contentious and  
25 just focus on those that are contentious. So I have

1       caused this confusion.

2               What I wanted to do is focus on those that  
3       nobody disagrees on. And I think paragraph 20 is the one  
4       that deals with the sediment control practices maybe  
5       you're talking about.

6               COMMISSIONER KOLBECK: Okay. I think you're  
7       right. Because I'm thinking of the 15-foot buffer on the  
8       stream crossings. I'm not thinking of the sediment.  
9       Yes. You're right. Sorry.

10              MR. SMITH: Can I ask a question on the 15-foot  
11       buffer thing?

12              And, again, because there's no specific  
13       language -- unless I'm remembering wrong because I don't  
14       have my page turned to that, but wasn't -- just clarity  
15       as to exactly what it is that we're agreeing to there, I  
16       guess, is --

17              What is the change that you want? That dry  
18       draws not be included? Is that the point?

19              MR. KOENECKE: We're asking that that condition  
20       be limited to flowing streams that are flowing I think  
21       during the construction.

22              I'll point out for the Commissioners and Staff's  
23       benefit that we brought Jon Schmidt and Steve Hicks from  
24       TransCanada and Trow, the consulting engineers, to help  
25       with our presentation and make these things clearer. So

1 to the extent you'd like, feel free to address questions  
2 to them.

3 If you look in our initial filing, you'll see  
4 that of 200 stream crossings in South Dakota less than 50  
5 are flowing streams. We don't understand -- I think it's  
6 fair to say that the purpose of maintaining a 15-foot  
7 buffer which requires the break in the construction for a  
8 stream that's not flowing at the time we're constructing  
9 through it.

10 And I'll certainly ask Mr. Hicks or Mr. Schmidt  
11 to help clarify that for you. But at that time the  
12 buffer would serve no purpose and causes construction  
13 difficulties.

14 CHAIRMAN JOHNSON: And let me do this. I didn't  
15 think there would be any questions on these. The Chair  
16 is in error.

17 Let's go back to the beginning. Let's start  
18 with paragraph 16. Let's hear from all parties who want  
19 to comment on 16, and we'll just work our way through.

20 Again, I was hoping to clear the deck because we  
21 do have a couple of controversial issues, but we want to  
22 make sure all these questions get heard if there are any  
23 questions.

24 Thanks, Commissioner Kolbeck, Mr. Smith, for  
25 making sure we get back to where we need to be.

1           Applicant, do you have comments you would like  
2 to make on paragraph 16 only?

3           MR. KOENECKE: Yes.

4           MR. LARSON: Excuse me a second. This is  
5 Pete Larson, and I don't have their thing right in front  
6 of me. Could you just briefly say what paragraph 16  
7 addresses?

8           CHAIRMAN JOHNSON: Great suggestion. Paragraph  
9 16 deals with construction methods. And then do you need  
10 more information than that?

11          MR. LARSON: No. That's good.

12          CHAIRMAN JOHNSON: Okay. Go ahead.

13          MR. KOENECKE: Thank you again, Mr. Chairman.  
14 On 16 --

15          CHAIRMAN JOHNSON: And specifically dealing with  
16 spills.

17          MR. KOENECKE: This is dealing with spills of  
18 hazardous substances. The Commission Order was to -- we  
19 requested that notice requirement for landowners was  
20 limited to significant spills. The condition required  
21 Keystone notify landowners of any spill. And we are  
22 proposing that there be a definable standard there to  
23 give us more guidance of -- or it's clearly a different  
24 guidance.

25                 I mean, any spill is substantial amount of

1 guidance. Don't get me wrong. I'm not sure that  
2 landowners seek that much level of contact with the  
3 project construction efforts. Perhaps they do. But  
4 we're proposing the 5-gallon federal consideration.

5 We note that Dakota Rural Action proposed that  
6 if spills were required to be reported to another entity,  
7 a governmental entity for some reason, that we follow  
8 through and notify landowners at that level. That seemed  
9 to make a tremendous amount of sense to us as we prepared  
10 for this hearing today.

11 We would look to the Staff and the parties to  
12 provide a bit more guidance through their comments on  
13 this so that we can come up with something that we  
14 thought was workable for everyone.

15 CHAIRMAN JOHNSON: Okay. Comments by Dakota  
16 Rural Action, other Interveners?

17 MR. BLACKBURN: Yes. This is Paul Blackburn  
18 with Dakota Rural Action. Thank you, Mr. Chairman. And  
19 we're happy to hear that TransCanada is interested in  
20 supporting our proposal that spill reporting limits be  
21 set aside, reporting limits related to other government  
22 requirements, and that would be, of course, pertinently  
23 central to us.

24 And I'd like to take a step back and say that,  
25 you know, we aren't opposing all reconsideration of all

1 issues, but we did want to remind the Commission that its  
2 power here is not plenary, that there are certain kinds  
3 of issues here that probably should not hear again,  
4 should not open again, because there are legal limits on  
5 what the Commission can and should hear. And that's for  
6 the Commission's own protection as much as anything.

7 But on this matter we stand by our proposal and  
8 appreciate the support. Thank you.

9 CHAIRMAN JOHNSON: Thank you, Mr. Blackburn.

10 Any other Interveners wish to make comment?

11 MR. HARDER: Yes. My name is John Harder. I'm  
12 a farmer/rancher affected by the pipeline. And where it  
13 goes across my land I have a very shallow ground to water  
14 aquifer.

15 And it would be my request that we keep it as is  
16 because if I have a spill on my land, I've got cattle out  
17 in my pasture. It needs to be taken care of promptly,  
18 either move them while they're taking care of what's  
19 going on with the spill no matter how large or small it  
20 is. And I think just from a safety factor of our food  
21 sources going from pasture to plate that it don't matter  
22 what size of spill it is. It needs to be reported.

23 Thank you.

24 COMMISSIONER HANSON: May I, Mr. Chairman?

25 Mr. Harder, I really appreciate -- I'm sure we

1 all very much appreciate your testimony. The challenge  
2 in considering something of that nature, if there's a --  
3 I'll use the term a dribble of gas for some reason, a  
4 truck needs oil or something of that nature and there's a  
5 drip that comes down, do you really want them to notify  
6 you on something of that nature?

7 MR. HARDER: Well, if there's something that's  
8 going to leave a mark -- it doesn't take much fuel of  
9 any -- a dribble of gasoline will stop grass from growing  
10 in your pasture.

11 COMMISSIONER HANSON: Uh-huh.

12 MR. HARDER: And my understanding with the BQA,  
13 which is the Beef Qualification Assurance program, that  
14 if there's any amount of petroleum product that gets into  
15 your feed source while you're -- let's say I'm talking  
16 about like in a feed yard and you're feeding your cattle  
17 and you have a -- say a hydraulic hose break and it gets  
18 into your feed source, if you feed that to your animals  
19 and they ingest it and they go to slaughter -- and I  
20 believe that it stays in the system I'm thinking 90 days,  
21 but I'm not exactly sure on that. You can check that  
22 out. But it's quite a while.

23 And if they go to slaughter and that  
24 slaughterhouse for some reason tests that particular beef  
25 and it comes up with petroleum products in it, they got

1 to shut down the whole slaughter line and clean the  
2 system out is what I've been told through the BQA system.

3 So it is very temperamental from pasture to  
4 plate for, you know, getting safe beef, animals, and  
5 other food sources for human consumption.

6 So I think it -- and it's a very small area, you  
7 know, a little bit of oil can kill the ground in a very  
8 small oil (sic). So I think it -- within common sense,  
9 if there's enough that's going to kill the grass, then it  
10 needs to be taken care of one way or another.

11 COMMISSIONER HANSON: Thank you for your  
12 testimony. Appreciate it.

13 Thank you, Mr. Chairman.

14 MR. KOENECKE: Commissioner, if I might. We  
15 seek to avoid no requirement that we clean up the spills.  
16 We understand that is a requirement. It's part of being  
17 a partner in the process with landowners, and I just want  
18 to make it abundantly clear we don't seek to avoid any  
19 obligation to clean up.

20 CHAIRMAN JOHNSON: Let's hear if there are any  
21 comments from any other Interveners.

22 Okay. Hearing none, Staff.

23 MS. SEMMLER: This is Kara Semmler for Staff.  
24 Staff agrees that some added specificity to this  
25 condition may be necessary. Any spill is just so broad.



1 And, with that, we do support the language suggestion  
2 also by Dakota Rural Action, that if there's any  
3 reporting requirement by any sort of law, state, local,  
4 or otherwise, Staff also supports that. In addition, we  
5 offered some suggested language that if you have any  
6 questions, Staff could certainly answer.

7 CHAIRMAN JOHNSON: Thank you. Commissioner,  
8 advisor questions?

9 Commissioner.

10 COMMISSIONER KOLBECK: Do you see any legal  
11 ramifications to just leaving it the way it is? In the  
12 suggested by Dakota Rural Action it says if it's required  
13 by federal, state, or local law.

14 Does the word "any" conflict with that?

15 MS. SEMMLER: I don't see that there's legal  
16 complications. I think there's simply practical  
17 complications as to that dribble. And as Mr. Koenecke  
18 said, this request for clarification doesn't have  
19 anything to do with their obligation to clean it up. So  
20 certainly if that dribble occurs, they're still going to  
21 clean it up.

22 This is just how many letters have to go out and  
23 if they're at all useful for a landowner. You know,  
24 being inundated with mail isn't useful either.

25 CHAIRMAN JOHNSON: Just as a clarification, the

1     wording suggested by Dakota Rural Action would replace a  
2     reference to "any," not try to work in harmony but would  
3     replace it.

4             COMMISSIONER KOLBECK:   Yes.   My second question  
5     would be to the Applicant.   What's Mr. Harder's options?

6             Say he's one of many landowners along the way.  
7     Maybe he does want anything reported.   Is that something  
8     you can put in the conditional easement?

9             Are there any other options available to him  
10    other than placing the word "any" in this paragraph?

11            MR. KOENECKE:   Thank you for the question,  
12    Commissioner, and I'll maybe let my colleagues up here  
13    ponder that while I point out a couple of things for the  
14    Commission's consideration.

15            We'll have preconstruction activities where  
16    people are out there on foot, on four-wheelers, or  
17    however when the ground is in its current state.   They'll  
18    start to move dirt, push the soft soil off to the side  
19    and then some more, the trenching.

20            Animals aren't going to be in the right of way  
21    during the time that construction is ongoing.   And then I  
22    think from my understanding of the process, it's the most  
23    likely time to have a spill is when there's heavy  
24    equipment out there that's being refueled.   Not to  
25    minimize the other chances that occur.

1           And then we come back in and cover that, you  
2           know, back up after a time for remediation of any spills,  
3           which would be -- frankly, they're going to happen. When  
4           I go out and mow my yard I spill gas once in awhile.  
5           It's unfortunate, but that's the way it happens.

6           I don't know as I sit here what the options  
7           would be to have different standards for different  
8           landowners, and I don't know whether that would be  
9           advisable for Commission Staff or for us. I'll look to  
10          them to provide any other comment on that back to you,  
11          Commissioner.

12          COMMISSIONER KOLBECK: I guess if we were to  
13          take Dakota Rural Action's suggested changes, I was just  
14          wondering if Mr. Harder wanted to know about anything, is  
15          that something he can work out with TransCanada some way?

16          MR. WHITE: I would say if there was a  
17          particularly sensitive area, an off-right-of-way area,  
18          for example, for the most part we wouldn't be anyway but  
19          if it was a particularly sensitive area that a landowner  
20          specifically needed a report on any spill, that we could  
21          accommodate that on a case-by-case basis.

22          CHAIRMAN JOHNSON: Commissioner Hanson, did you  
23          have a comment?

24          MR. SMITH: Could I make one observation before  
25          we go ahead?

1           CHAIRMAN JOHNSON: Hold on just a second.  
2           Commissioner Hanson can feel free to yield but --

3           COMMISSIONER HANSON: Thank you, Mr. Chairman.  
4           And, yes, I am quite curious what Mr. Smith has to say,  
5           but I -- I'm really struggling with -- perhaps  
6           frightening myself here because I'm thinking that  
7           Dakota -- Dakota Rural Action is not going far enough.

8           And I need better clarification on that.  
9           Because, as I understand it, Dakota Rural -- what we are  
10          calling the Dakota Rural Action amendment or suggestion  
11          is that if -- if a spill is reportable to other -- any  
12          other entity, that that then would trigger a notification  
13          to the landowner; is that correct?

14          MR. KOENECKE: Yes.

15          COMMISSIONER HANSON: As I'm interpreting these?  
16          And I look at discharges exceeding 25 gallons as required  
17          and discharges of crude oil greater than 1 barrel as  
18          required by State DENR, and what's the -- at what level  
19          then?

20          Give me some examples. Are these all of the  
21          examples then that would trigger a notification?

22          It doesn't seem like there's enough notification  
23          here to me. Make me feel more comfortable with that, if  
24          you can. Because I'm seeing some pretty large spills  
25          that would trigger it, and, frankly, I think a quart -- a

1 liter, if we can look at measurements, if that's spilled  
2 on the ground, frankly I'd kind of like to know that if I  
3 were a landowner.

4 MR. KOENECKE: Thank you for the question,  
5 Commissioner. As I sit here, I didn't have time or take  
6 the time to do the research to find out what those  
7 other --

8 COMMISSIONER HANSON: Perhaps Staff could help  
9 me with that.

10 MR. KOENECKE: It would be my observation that  
11 maybe there is a way to combine the two proposals in a  
12 way that would be satisfactory. And I'll leave that to  
13 you to decide.

14 Final comment I'd make is I don't believe my  
15 client wants to withhold that information from somebody.  
16 What we've found out is there's some landowners who want  
17 extensive contact with the company and the contractors as  
18 they move through. And there's some that don't. And  
19 that's a line that we need defined, and we'd appreciate  
20 your help in trying to figure out what that is.

21 COMMISSIONER HANSON: How onerous is it as  
22 you're going through this country to have a central  
23 location where someone's -- gets on their mic -- I mean,  
24 you've got to have that anyway. You've got to have some  
25 central dispatching area where someone just marks down

1     when there's a spill and they just call in and mark it  
2     down and notify them?

3             You know, we're doing a lot of wrestling here  
4     with something that at least to me -- I haven't been on a  
5     construction crew digging and laying pipe so I don't know  
6     what the challenges are. But I suspect there are trucks  
7     that leak some oil when they're dropping things off just  
8     as they travel through the countryside. If you drive  
9     down highways, we see drips in the road. So we know  
10    that's taking place everywhere. I know that would be  
11    extremely difficult to go through that process and report  
12    it.

13            But there's got to be some amount that's less  
14    than 5 gallons or a gallon that -- or a barrel to notify  
15    and some easy way in which to let the landowner know  
16    that.

17            MR. WHITE: So I guess we're struggling with  
18    finding a threshold for reporting that makes sense. And  
19    our thought was that the DRA proposal captures the  
20    threshold that's established by agencies that have  
21    expertise in these issues. Therefore, we thought that  
22    was a reasonable threshold to use.

23            Otherwise, you're left with dealing with, well  
24    how do you distinguish a dribble from a drip from a very  
25    small leak, and for different substances, you know, how

1 do you establish a threshold by which you're not  
2 inundating landowners or annoying landowners with  
3 comments that they don't want to hear versus not advising  
4 them of leaks or drips that rise to the level that cause  
5 concern.

6 So we looked to the DRA response and said this  
7 looks reasonable because it's based on the expertise of  
8 agencies that deal with these issues.

9 Otherwise, we could be left with developing a  
10 series of thresholds in the Commission's Order which may  
11 or may not have any real basis in science.

12 COMMISSIONER HANSON: Forgive me. I don't have  
13 that information right in front of me that shows what all  
14 of these agencies require. And I don't -- I haven't seen  
15 that in any of the information. And that's where I --  
16 that ignorance on my part is just not -- not helping me  
17 to arrive at a decision here. Because if it's a gallon  
18 or if it's a barrel, that concerns me greatly.

19 CHAIRMAN JOHNSON: I'm headed the same place you  
20 are, Commissioner, so I might make the suggestion -- now  
21 it combines DRA's proposal with kind of where you're  
22 going plus some language that advisor Smith had offered  
23 up.

24 Why don't we say -- you said a liter. I had  
25 written a liter somewhere yesterday. Maybe a pint as an

1 English measure is better than a metric measure. I don't  
2 know. But the lesser of a pint, which is definitely more  
3 than a dribble. I mean, a pint or -- the lessor of a  
4 pint or volumes that are required by any federal, state,  
5 or local law or regulation or product license or label to  
6 be reported to a state or federal agency, manufacturer,  
7 or manufacturer's representative. And that gives you  
8 kind of two standards.

9 I mean, if you've got something that really is  
10 toxic, one liter may be a lot. But then the second half  
11 of that Motion would trigger it. And if we're dealing  
12 with something frankly environmental agencies say isn't  
13 very toxic, then a gallon has to be reported.

14 A gallon seems like a lot of product. 5 gallons  
15 seem like a lot of product. I think a liter and a pint  
16 are incidentally about the same.

17 COMMISSIONER HANSON: Actually a quart.

18 CHAIRMAN JOHNSON: Well, I could certainly go a  
19 quart if that's more convenient. I'm not making a  
20 Motion. I'm sort of throwing it open for discussion.

21 Mr. Harder, you had your hand up, and then I  
22 know Mr. Rislov and Mr. Smith want to get in on the fun  
23 too. We got to have you at the mic, Mr. Harder.

24 MR. HARDER: Sure. Okay. John Harder. A  
25 couple of things I had noticed is where we're really



1     stressing it seems like is on construction. And we need  
2     to watch whether our construction versus in-use time of  
3     the pipeline on this. Because the tar sands oil versus  
4     maybe some of the construction dribbles that we're  
5     talking about, we're talking about two different things  
6     here.

7             If we get let's say a quart of oil from this  
8     pipeline from a pinhole leak, we got a serious problem.  
9     So I think we need to look at both sides of this, not  
10    just construction time, use, when we're wording how this  
11    is going to go.

12            Because if we get this oil pipeline with a  
13    pinhole leak and we just got a quart out of the ground,  
14    well, we know there's going to be more than a quart  
15    coming out of the ground. So just the wording on that  
16    factor I'd like to stress.

17            And then I think with these trucks and this  
18    construction standard, our semis in South Dakota are held  
19    to a DOT standard. If you've got a drip of oil on that,  
20    you're going to get fined.

21            And I don't really see why going through this  
22    construction equipment with putting in this high-tech  
23    pipeline that it shouldn't be held to a same standard so  
24    that the landowners are not affected.

25            CHAIRMAN JOHNSON: Now, Mr. Harder, it would be,

1 at least with the Motion we've been discussing. Because  
2 I say any law that requires -- and I guess I don't know.  
3 I don't have enough fact basis to say whether or not  
4 there is a fine on any truck that drips any oil. But if  
5 that's the case and it has to be reported, then the  
6 Motion -- the DRA Motion would cover that.

7 MR. HARDER: Okay. But I'm just saying the DOT  
8 standards are pretty stringent standards for our semis  
9 running up and down our roads when you've got to get  
10 checked.

11 And so, you know, that factor to letting  
12 somebody come in and go on somebody else's land to put in  
13 a pipeline that they're going to make millions of dollars  
14 on, I think keeping their equipment up to a very high  
15 standard is not a problem. If it isn't up to standard,  
16 you pull it out, you fix it. That's what we have to do.  
17 So I guess --

18 CHAIRMAN JOHNSON: Well, and just so you --  
19 state law doesn't differentiate between a legal  
20 obligation from somebody who makes money and a legal  
21 obligation from somebody who doesn't. The law is treated  
22 very fairly.

23 Mr. Smith wanted in first and then we've got  
24 Mr. Rislov. Thanks, Mr. Harder.

25 MR. HARDER: Thank you.

1           MR. SMITH: I just wanted to know too, you know,  
2 with the DENR standards some of those are kind of  
3 qualitative but with respect to your location in the  
4 Sand Hills, for example, the DENR standard requires the  
5 reporting to DENR. So it would trigger under the  
6 Chairman's suggestion any release. It doesn't matter if  
7 it's a thimble that threatens or is in a position to  
8 threaten the waters of the state.

9           So with respect to like, for example, to that  
10 pinhole leak you're talking about in the pipe, to me I  
11 can't imagine a situation where that -- a company could  
12 ever argue that that didn't pose a threat to ground water  
13 in your location. So I think the DENR reporting  
14 standards have that covered, unless perhaps TransCanada  
15 would want to argue that the PHMSA reporting standard  
16 overrides that.

17           But at least with respect to any leaks, you  
18 know, at the construction phase where PHMSA hasn't kicked  
19 in those would certainly be covered by that.

20           CHAIRMAN JOHNSON: Mr. Rislov.

21           Commissioner Hanson, you kind of kicked us off  
22 on a volumetric --

23           COMMISSIONER HANSON: Thank you, Mr. Chairman,  
24 and I appreciate the discussion. I would like to have  
25 you repeat your suggested Motion.

1           CHAIRMAN JOHNSON: Sure. It would require the  
2 reporting of the lesser of any time there was a spill of  
3 the lesser of a quart or a pint or a liter or some small  
4 measure or any volume which is required by any federal,  
5 state, or local law or regulation or product license or  
6 label to be reported to a state or federal agency,  
7 manufacturer, or manufacturer's representative.

8           I mean, this makes it clear, you know, to  
9 Mr. Smith's comment that a drop of oil from a pipeline  
10 would likely trigger a reporting requirement. And so the  
11 landowner would find out too.

12          COMMISSIONER HANSON: Thank you. I'm glad we  
13 had the discussion, and I appreciate that -- if that is a  
14 proposal for a clarification. Because I'm -- I just am  
15 very uncomfortable with the potential for a one-gallon or  
16 a five-gallon --

17          I keep reading 25 gallons and 5 gallons and  
18 things of that nature, and I just would not be pleased at  
19 all if I was a landowner and 3- or 4- or 5-gallon spills  
20 in different areas of hydraulic fluid or something,  
21 whatever it might be.

22          CHAIRMAN JOHNSON: Well, Commissioner Hanson, do  
23 you have a preference? I mean, we've heard pint, quart,  
24 and liter. And I don't know what is -- you know, maybe  
25 liter is more defensible. You know, I don't know.

1 Any thoughts?

2 What's your favorite measure?

3 COMMISSIONER HANSON: Quart or liter I'm  
4 comfortable with.

5 CHAIRMAN JOHNSON: To the Applicant, is there a  
6 measure that is more routinely used in spill reporting?

7 MR. WHITE: I'm not aware that either of those  
8 measures would be generically applied across a band of  
9 reporting requirements. So I don't want to say they're  
10 arbitrary, but they're not tied to a specific reporting  
11 requirement that we're aware of.

12 CHAIRMAN JOHNSON: Okay. Thanks, Mr. White.

13 MR. BINDER: I think Staff is a little reticent  
14 to assign any sort of volume -- I'm sorry. This is  
15 Tim Binder from Staff -- just because we don't on our  
16 Staff have the wherewithal or expertise to define whether  
17 a pint or quart is going to be enough to cause a harm or  
18 not enough to cause a harm.

19 So I think that's why Staff stands behind the  
20 position in the memo as well as with the support of  
21 Dakota Rural Action's memo. So I think if you're looking  
22 for us to find a volume, I think it's going to be hard  
23 for us just because we don't have the expertise on hand.

24 CHAIRMAN JOHNSON: Just to clarify, this really  
25 doesn't have to do with harm. You're right, if it's

1     harm, environmental standards will kick in. But, you  
2     know, this is really more about property rights.

3             And even if you walk across someone's yard,  
4     you're not causing harm. It's almost impossible walking  
5     across someone's yard or field to causing harm and but  
6     yet a good neighbor policy still indicates that you ask  
7     permission in advance, and if you didn't, then after the  
8     fact you indicate that you did it. So I think this is  
9     more about that than about environmental harm.

10            MS. SEMMLER: I was just going to indicate in  
11     this case the pipeline does have the permission to be  
12     there and the permission to conduct the sort of business  
13     that they are doing. And in conducting that business  
14     it's reasonable to assume that small dribble -- accidents  
15     may happen.

16            So I don't know if we can completely avoid some  
17     sort of a standard that includes harm to landowner.  
18     Because they're there doing the business they've been  
19     given permission to do.

20            CHAIRMAN JOHNSON: Well, and I guess my response  
21     would just be that, yes, they have a right to be there,  
22     and yet I think a good -- they have the right to be there  
23     based on two things: The permission granted by the  
24     landowner contractually and the siting permit granted by  
25     this Commission.

1           One of the requirements -- I mean, frankly, what  
2 we're talking about, the Commissioners are sort of  
3 kicking around, is less onerous than what's in the  
4 Commission's Order today. And so is more defensible I  
5 think than perhaps what we've got.

6           COMMISSIONER HANSON: Thank you for the  
7 clarifications and the -- appreciate Staff's challenge.  
8 They have to base theirs on evidence and their  
9 recommendations to us and certainly appreciate that.  
10 Ours is more of to an extent of philosophical position.

11           I -- you know, frankly, I am reaching when I --  
12 my level of comfort when I talk about even a quart.  
13 Because a quart is when you think of pouring a quart of  
14 oil into your -- in your crank case that's -- that's a  
15 pretty good size amount. And, frankly, I'm leaning  
16 towards less than that but look at a quart from a  
17 standpoint of what would be acceptable to the Commission.

18           And philosophically I just think that it's an  
19 amount that is obvious that a construction crew would be  
20 able to figure out and as opposed to a drop or two coming  
21 off the back of a hydraulic somewhere where you wouldn't  
22 even notice it. You wouldn't realize it. And we don't  
23 want to penalize folks for not being aware that something  
24 actually took place.

25           So I just -- that's where I am on it and

1 actually would be more comfortable with a smaller portion  
2 but offer the quart.

3 CHAIRMAN JOHNSON: Commissioner Hanson, then  
4 let's just pick a volume. I don't know that I care. I  
5 want to avoid the dribble. But let's just pick a volume  
6 then.

7 Because, frankly, I think most of the reporting  
8 will be triggered by the second because you're talking  
9 about the manufacturer and labels.

10 COMMISSIONER HANSON: Exactly.

11 CHAIRMAN JOHNSON: And so I think this volume is  
12 highly unlikely -- I think more likely the second half  
13 will trigger it. So what's your volume? Let's pick it.

14 COMMISSIONER HANSON: I'll say a quart.

15 CHAIRMAN JOHNSON: Okay. And I don't know,  
16 Commissioner Kolbeck, if you're more comfortable --

17 COMMISSIONER KOLBECK: I'm Irish so I like the  
18 pint. I think the pint is better only because I know  
19 there are different chemicals out there and they're  
20 probably going to be -- like you say, they're going to be  
21 under federal or state law. However, there could be  
22 herbicides out there. I don't know how much damage a  
23 pint of Roundup can do. I really don't.

24 But I think a quart -- because we've been  
25 talking about fuel spills, we've been talking about other



1 things. That's fine.

2 CHAIRMAN JOHNSON: I mean, if you want to make  
3 the argument that a pint of a dangerous chemical can do  
4 damage, nobody can disagree with you. So I think rather  
5 than come up with a volume that is so small as to  
6 incorporate all known products, we've got to kind of look  
7 to the second half of the Motion.

8 That being said, I mean, I don't know --  
9 Commissioner Hanson, I don't think I have a problem with  
10 the pint. If a pint makes you comfortable, Commissioner  
11 Kolbeck, I'm going to love it.

12 COMMISSIONER KOLBECK: It does.

13 COMMISSIONER HANSON: I'm part Irish, believe it  
14 or not, even with an S-O-N. Kolbeckson has my support on  
15 the pint.

16 CHAIRMAN JOHNSON: Okay. So we don't have a  
17 formal Motion, but let's try to cobble one together. And  
18 so we've got -- now I'm sort of -- I'm starting by  
19 working off DRA's suggestion. Keystone shall notify  
20 landowners prior to discharge of any saline water on  
21 their lands. That's in the current paragraph or  
22 Condition 16J.

23 So then we'll go Keystone shall notify  
24 landowners, and that's where I go over to -- or Keystone  
25 shall notify landowners after a spill of hazardous

1 materials of the lesser of one pint or any volume which  
2 is required by any federal, state, or local law or  
3 regulation or product license or label to be reported to  
4 a state or federal agency, manufacturer, or  
5 manufacturer's representative.

6 Any further discussion -- or the Motion has been  
7 made. Is there any discussion?

8 COMMISSIONER KOLBECK: That makes me much more  
9 comfortable. Actually I was very comfortable with the  
10 word "any" to start out with. Really didn't think I  
11 would come off of that. But it makes me comfortable to  
12 try to get rid of everything. I'm not totally  
13 comfortable with it, but I'll support it.

14 CHAIRMAN JOHNSON: You understand. I mean, even  
15 Dakota Rural Action is saying reporting a dribble creates  
16 an onus for the landowner.

17 COMMISSIONER KOLBECK: The only thing that I  
18 struggle with is the landowner that's here that says he  
19 wants to see everything. But I understand that.

20 CHAIRMAN JOHNSON: And in that instance, you  
21 know, Mr. Smith pointed out if you've got a little  
22 watershed, then the DENR rules say if you've got any  
23 chance of hurting the water bodies of the state, then  
24 that kicks in. I don't know if a dribble means that, but  
25 some small quantity probably would.

1           COMMISSIONER KOLBECK: And I understand that. I  
2 just thought that the language on the beginning was  
3 appropriate and fine.

4           CHAIRMAN JOHNSON: Fair enough. All right. If  
5 there's no further discussion, we'll proceed to vote.

6           Hanson.

7           COMMISSIONER HANSON: Aye.

8           CHAIRMAN JOHNSON: Kolbeck.

9           COMMISSIONER KOLBECK: Aye.

10          CHAIRMAN JOHNSON: And Johnson votes aye.  
11 Motion carries 3-0. Okay.

12          Next up we have Condition 20, which dealt with  
13 sediment control practices.

14          Applicant.

15          MR. KOENECKE: Thank you, Commissioner.  
16 Brett Koenecke for the Applicant.

17          Our initial filing displayed a lack of  
18 understanding as to what the Commission was asking us to  
19 do with respect to filling sediment curtains. Our  
20 understanding of the use of floating sediment curtains is  
21 that they be used downstream in flowing water uses, and  
22 the use in the existing condition where we talk about  
23 straw bales and silt fence installation, those are land  
24 uses to our understanding. So the combination in that  
25 sentence caused confusion in our minds as to what the

1 Commission was looking for.

2 We have proposed and we would ask you to fully  
3 consider our proposal that we use floating sediment  
4 curtains to maintain sediments downstream of the  
5 construction right of way and flowing streams if  
6 appropriate. On the construction right of way then silt  
7 fences may be used to augment straw bales in areas of  
8 high erosion potential. We'll use sediment curtains in  
9 nonflowing streams where appropriate.

10 So if you're looking at page 3 of our initial  
11 Motion is where you'll find set out in block what our  
12 proposal would be. And if you contrast that with the  
13 language of 20A, I think you'll see the differences and  
14 probably lead you appropriately to our conclusion.

15 I'm certainly looking forward to the other  
16 comments of parties on this as well. But we -- we really  
17 do think we've got it right here in our proposal.

18 CHAIRMAN JOHNSON: Thank you, Mr. Koenecke.  
19 Dakota Rural Action, comments.

20 MR. BLACKBURN: Thank you, Mr. Chairman.  
21 Dakota Rural Action believes that the best thing to do  
22 with this particular proposal is just to reject it.

23 We believe that the language that the Commission  
24 selected initially is entirely appropriate for this  
25 situation, and we would request that the existing

1 language be maintained.

2 In terms of, you know, if the Commission really  
3 wants to get into this -- and again the reason we're  
4 saying we don't think the Commission should consider this  
5 is that the Applicant hasn't raised sufficient grounds to  
6 reconsider this language.

7 You know, there was a dispute between Commission  
8 Staff and Applicant Staff. You know, the Commission  
9 considered that information, made a decision, and we  
10 believe it's appropriate for the Commission just to stick  
11 by its decision.

12 If the Commission really wants to get into what  
13 to do with this, we have some suggested language in there  
14 in our response that would try to help clarify, you know,  
15 how to use floating sediment curtains.

16 But we think that ultimately it's a practical  
17 matter that can be resolved in the field and that  
18 TransCanada should be required to use them where they're  
19 going to help. And so that's why we think the  
20 Commission's existing language does that.

21 So that's our comments. If we have more later,  
22 I will check in.

23 CHAIRMAN JOHNSON: Any other Intervener or  
24 person wish to make comment?

25 Commission Staff.

1 MS. SEMMLER: Staff sought assistance from our  
2 expert witness, Ross Hargrove, on this particular item.  
3 And we submitted with our filings some of his thoughts.

4 And he is on the phone so if you have any  
5 questions, he's available. Otherwise, we stand by the  
6 language suggestions made.

7 CHAIRMAN JOHNSON: Just a quick clarification  
8 question: You did have -- in your memo you did suggest  
9 the inclusion of a few words?

10 MS. SEMMLER: Correct.

11 CHAIRMAN JOHNSON: Okay. Good.

12 All right. Questions for any party?

13 Yes, Mr. Smith.

14 MR. SMITH: I guess my question is of  
15 Mr. Blackburn. You know, I don't find any recommended  
16 language in there. What am I not seeing in your thing?

17 Are you fine with Staff's suggestion?

18 MR. BLACKBURN: The only concern -- the only  
19 language we recommended is at the bottom of page 11 of  
20 our Brief.

21 And the concern we have is that the Staff  
22 language discussed using floating sediment curtains on  
23 either side of the right of way. And it is possible, for  
24 example, where the right of way would just graze a stock  
25 pond or reservoir or small lake that the floating

1 sediment curtain would need to be on one side, the water  
2 side, but the other side of the right of way might be on  
3 land. In that case you couldn't have the floating  
4 sediment curtain on either side of the right of way  
5 because one of them would be on the land.

6 That's why the land we had was in such --

7 (Discussion off the record)

8 MR. BLACKBURN: In such situations the floating  
9 sediment curtains shall be installed as a substitute for  
10 straw bales or silt fence along the edge or edges of the  
11 construction right of way that are under water at a depth  
12 greater than the top of a straw bale or silt fence.

13 CHAIRMAN JOHNSON: Okay. So, TransCanada,  
14 concerns with the language proposed by Staff and modified  
15 by DRA?

16 MR. KOENECKE: I'm told by my client that either  
17 is fine, that if you would combine the two or simply take  
18 Staff, that that's workable for us.

19 Thank you.

20 CHAIRMAN JOHNSON: To move us along then, does  
21 anybody have a problem taking DRA's suggested language?

22 So the first sentence would be the one that  
23 Staff has on page 2 of their memo, "Keystone shall use  
24 floating sediment curtains to maintain sediments within  
25 the construction right of way in open water bodies with

1 no or low flow when the depth of nonflowing water exceeds  
2 the height of straw bales for silt fence installation."

3 The second sentence would be that which is  
4 located on page 11 of DRA Brief, "In such situations the  
5 floating sediment curtains shall be installed as a  
6 substitute for straw bales or silt fence along the edge  
7 or edges of the construction right of way that are under  
8 water at a depth greater than the top of a straw bale or  
9 silt fence."

10 Any objection to that?

11 COMMISSIONER HANSON: Mr. Chairman, just for  
12 future reference, would it not be possible to simply  
13 phrase that Keystone shall install barriers, including  
14 straw bales, silt fence installations, floating sediment  
15 curtains, et cetera, to prevent the migration of any  
16 contaminants from their construction site and then just  
17 not have to worry about all the rest of that?

18 CHAIRMAN JOHNSON: So you're asking for a more  
19 general wording?

20 COMMISSIONER HANSON: Yeah. Just simply say  
21 they have to install barriers to prevent migration of any  
22 contamination. That way it leaves them -- it up to them  
23 as they're going through the construction to ascertain  
24 we're going through a marshy area here, we're going  
25 through a flowing stream here, we're going through a



1 potential -- it may not be flowing now in this stream,  
2 but if it rains, it's going to be flowing.

3 So they have to be able to change as they go  
4 through the process. Just a -- I hate to throw that out  
5 at this time, but I hadn't thought of it as we were going  
6 through it months or so ago.

7 But it just would seem to give them that --  
8 number one, the responsibility that they have to contain  
9 everything. Number two, the flexibility to do what's  
10 necessary at the time.

11 CHAIRMAN JOHNSON: The wording was originally  
12 suggested I believe by Staff witness. So, Staff, any  
13 comments or, Mr. Hargrove, any comments on that other  
14 option?

15 MR. HARGROVE: This is Ross Hargrove, Natural  
16 Resource Group. I cannot hear clearly what was said.  
17 Could you summarize the statement?

18 CHAIRMAN JOHNSON: I'll have Commissioner Hanson  
19 do that.

20 COMMISSIONER HANSON: Mr. Hargrove, I had  
21 suggested that a more general statement be made that  
22 would provide, number one, the responsibility of  
23 containment and at the same time provide flexibility for  
24 the construction crew to ascertain what is best for a  
25 particular area so that it was not necessary to attempt

1 to -- within our ruling to provide for every instance,  
2 just simply states something along the line -- and I  
3 don't have the verbiage, but something along the line  
4 that provide that it is the responsibility of Keystone  
5 to -- XL TransCanada for containment and for them to have  
6 the ability to ascertain in each instance how to do that.

7 MR. SMITH: Just an observation. And we're  
8 getting -- we're actually extremely close to  
9 TransCanada's proposal with what you've just said, I  
10 think. That's pretty much what they've suggested in  
11 their recommended change, Commissioner Hanson.

12 COMMISSIONER HANSON: Well, that --

13 MR. SMITH: They don't have the word  
14 "containment" in there. And I might note too with  
15 sediment control the idea of an absolute prevention is  
16 not achievable. Minimization is achievable, but the  
17 prevention of turbidity in water completely I don't think  
18 is an achievable objective. That can't happen. But  
19 minimization of sediment movement can happen.

20 Am I wrong in that, technical folks?

21 MR. HARGROVE: This is Ross Hargrove. You are  
22 correct. I don't think that there's a situation where we  
23 can quantify performance standards for all situations.

24 MR. SCHMIDT: This is Jon Schmidt with  
25 TransCanada. If you look back in our original

1 Construction Reclamation Management Plan it says exactly  
2 what Commissioner Hanson said, that we leave the option  
3 to use whatever's best suited for the situation at hand.

4 And so this whole issue came up with looking at  
5 one drawing in that CMR plan where it said use straw  
6 bales in nonflowing streams, and the suggestion was made  
7 use sediment barriers.

8 None of them stop sediment from moving  
9 downstream. Let's just make that point clear. We're  
10 obligated under 401 what quality to maintain and control,  
11 and so that's the way the plan is written. We put  
12 options in there with different types of materials,  
13 different types of measures. Each situation's going to  
14 be different.

15 And so that's the way the plan was written  
16 originally is exactly what you suggested.

17 COMMISSIONER HANSON: Well, Mr. Chairman, if I  
18 can, so what happens then when you put down straw bales  
19 in a nonflowing stream and they get a 3-inch rain?

20 MR. SCHMIDT: Most of the streams that we'll be  
21 crossing will be crossed late in the summer and if --  
22 what we do is we try and cross each water body within  
23 24 to 48 hours.

24 So, in other words, we make the pipe up first  
25 before we excavate the ditch. And so if that rain event

1 occurred the day before, then we'd suspend the work until  
2 that water passed. If it occurred while we were working,  
3 we'd get it done and put it back in.

4 The whole impetus is to get the construction  
5 done quickly to minimize impacts. Each step that we add  
6 adds time. And so if we're asked to build walls or  
7 barriers, then what happens if they don't hold and they  
8 fail.

9 You know, the whole key is to get in and out.  
10 So, you know, we've designed the plan to be written to  
11 have the flexibility to use the measures that are  
12 appropriate for the situations at hand.

13 COMMISSIONER HANSON: Thank you.

14 Mr. Chairman, I still like my proposal. Thank  
15 you.

16 CHAIRMAN JOHNSON: Dakota Rural Action, any  
17 comments?

18 MR. BLACKBURN: I would just comment that our  
19 concerns -- we understand that in a nonflowing stream  
20 that there actually is no water anywhere in the stream  
21 bed, that that, you know, would be a concern. You  
22 obviously couldn't use something that is floating where  
23 there's no water.

24 At the same time the requirement is broader than  
25 just simply in streams. It's also in stock ponds,

1     reservoirs, and other water bodies used by, you know,  
2     cattle producers and other agricultural interests. And  
3     those water bodies, if TransCanada crosses them, should  
4     be protected as much as possible.

5             And so we would stand by our proposal to leave  
6     this language alone, which I think was brought up let  
7     TransCanada work this out, or to support the  
8     modifications of Staff's suggested language.

9             CHAIRMAN JOHNSON: Commissioner Hanson, on --  
10    it's page 3 of the Applicant's. They've got specific  
11    wording there, but I don't know if you want to adopt that  
12    wording. We've been told that it is about the same. It  
13    looks about the same for me. But before I presume the  
14    Motion on your behalf, I wanted to check with you.

15            COMMISSIONER HANSON: I have not made a Motion.  
16    I will acquiescent to the two-to-three margin that we  
17    operate on. I'm looking to hear what the rest of you --  
18    rest of the body feels about the issue.

19            I guess I don't have -- I just don't have the  
20    total comfort with the way that it's been -- not that I  
21    have a lot of argument with Dakota Rural Action over this  
22    by any means. I just -- I don't know that it facilitates  
23    the process the way it should and assures us that the  
24    land is protected as well as it should.

25            Now if -- far be it for me to second-guess

1 Dakota Rural Action. If they believe that it's --  
2 they're known for being on the far end of protection, and  
3 if they think it's enough to protect, then I should be  
4 comfortable with it as well. But I -- I just still have  
5 that little bit of reticence on my part.

6 CHAIRMAN JOHNSON: On my part, I don't know that  
7 it matters a lot. I'm looking at both the language  
8 suggested by Dakota Rural Action, which is a mildly  
9 modified version of Staff's language, and then what you  
10 suggested and which sort of mimics what the Applicant  
11 suggested. And I think we're going to the same type of  
12 sediment control practices in place either way.

13 DRA's language is a little bit more instructive  
14 on specific mechanisms, whereas the Applicant's is  
15 perhaps a little more flexible.

16 COMMISSIONER HANSON: I agree with you entirely  
17 there. I just think that it -- when we start grocery  
18 listing all of the got to do this in this case, this in  
19 this case, this in this case, that there's going to be  
20 one that we miss. And that's basically left up to the  
21 construction crew anyway to ascertain the best route.

22 So that's fine. If folks are comfortable with  
23 this, I guess I'm going to assume, and I should not  
24 assume, that in an instance where this is not covered,  
25 some type of a situation that is not covered, that the

1 construction crew will figure that out as they go through  
2 that. But I -- I want to have that comfort zone that  
3 it's going to be taken care of.

4 CHAIRMAN JOHNSON: I do think we have some added  
5 value that our Order, if memory serves, requires an  
6 Adverse Weather Plan to be filed. And so these are not  
7 the only checks in the system.

8 Commissioner Kolbeck, did you have a preference?

9 COMMISSIONER KOLBECK: Well, I think I don't --  
10 I don't see much difference between what Staff has on  
11 page 2 of their filing and what Dakota Rural Action has  
12 on page 11 of their filing. I'm comfortable with either  
13 or. The combination as you first proposed is fine with  
14 me.

15 CHAIRMAN JOHNSON: And so specifically if the  
16 choices are the Dakota Rural Action language or the more  
17 flexible language suggested by the Applicant, do you have  
18 a preference?

19 COMMISSIONER KOLBECK: Dakota Rural Action's  
20 language, I think.

21 CHAIRMAN JOHNSON: Let's go ahead and move  
22 forward. I would move that we again use the language --  
23 the first sentence laid out in Staff's memo on page 2,  
24 modified by the second sentence -- or the second sentence  
25 being modified by page 11 of the DRA Brief. And we read

1       that earlier.

2               I'll make that Motion. Any discussion on the  
3 pending Motion?

4               MR. SMITH: I have a question, I guess, because  
5 of trying to make sure how to draft it.

6               Now Staff's proposal has a number of sentences.  
7 Are you talking about just taking the first sentence from  
8 Staff's or all of it and then adding to that the language  
9 proposed by -- or just substituting out Dakota Rural  
10 Action's for the last sentence of Staff?

11              CHAIRMAN JOHNSON: I'm only seeing two sentences  
12 suggested by Staff, the first which would remain intact  
13 and the second which would be changed as suggested by  
14 Mr. Blackburn on his Brief on page 11.

15              He says, "The second sentence of Staff proposed  
16 language could be modified to state," and then lists the  
17 sentence.

18              MR. SMITH: Okay. Thanks. I got you.

19              CHAIRMAN JOHNSON: We have a Motion. Any  
20 discussion?

21              Hearing none, let's proceed to vote.

22              Hanson.

23              COMMISSIONER HANSON: Aye.

24              CHAIRMAN JOHNSON: Kolbeck.

25              COMMISSIONER KOLBECK: Aye.



1           CHAIRMAN JOHNSON: Johnson votes aye. Motion  
2 carries 3-0.

3           With that, we'll proceed to 22. There are three  
4 subparts to 22. Paragraph 22A deals with the width of  
5 construction right of way in a noncultivated wetlands.

6           Applicant.

7           MR. KOENECKE: Commissioner, in this case we  
8 believe that the deference that's required to the U.S.  
9 Army Corps of Engineers as much as it pains me in this  
10 River city to talk about that, that's required is we  
11 think simply being realistic and at some level fair to  
12 the people who are going to read this so they have the  
13 complete understanding of what the boundaries are, the  
14 playing field.

15           We noticed that there was agreement we thought  
16 on that proposal and would put that for your  
17 consideration.

18           CHAIRMAN JOHNSON: So we'll pause and see if any  
19 party or person has an objection to the inclusion of the  
20 condition unless a different width is approved or  
21 required by the United States Army Corps of Engineers.

22           I'm not hearing any objection.

23           Any Commissioner questions or comments?

24           Hearing none, I would move the adoption of that  
25 suggestion.

1 Any discussion on the pending Motion?

2 Hearing none, we'll proceed to vote.

3 Hanson.

4 COMMISSIONER HANSON: Aye.

5 CHAIRMAN JOHNSON: Kolbeck.

6 COMMISSIONER KOLBECK: Aye.

7 CHAIRMAN JOHNSON: Johnson votes aye. Motion  
8 carries 3-0.

9 Mr. Koenecke, paragraph 22C requires that spoil  
10 from water body crossings of streams greater than 30 feet  
11 in width shall be stored in the construction right of way  
12 at least 10 feet from the water's edge.

13 MR. KOENECKE: Thank you, Commissioner. We  
14 noticed in the reviewing of this particular condition  
15 what we believe to be a typographical error.

16 It requires storage in streams of greater than  
17 30 feet of width twice and requires something different.  
18 We think it's a typographical error, and perhaps  
19 Mr. Smith would concur with that.

20 MR. SMITH: May I speak?

21 This was an editing error by me. In all of the  
22 versions I had on my screen -- and I just made plain an  
23 editing goof.

24 The first one is supposed to say -- originally I  
25 had language in there that said of 30 feet or less is

1       supposed to be the language in C. I don't have any  
2       problem with your "up to."

3               Otherwise, obviously this makes no sense. And  
4       my apologies to everyone for not catching that.

5               CHAIRMAN JOHNSON: Does any party or person have  
6       an objection to the Applicant's proposed wording change?

7               I'm not hearing any.

8               Are there any Commissioner questions or  
9       comments?

10              Hearing none, I will move that we adopt the  
11       Applicant's suggested wording change.

12              Is there any discussion on the pending Motion?

13              Hearing none, we'll proceed to vote.

14              Hanson.

15              COMMISSIONER HANSON: Aye.

16              CHAIRMAN JOHNSON: Kolbeck.

17              COMMISSIONER KOLBECK: Aye.

18              CHAIRMAN JOHNSON: Johnson votes aye. Motion  
19       carries 3-0.

20              Paragraph 22E, Mr. Koenecke, deals with 15-foot  
21       buffers for stream crossings.

22              MR. KOENECKE: Thank you, Commissioner. Again,  
23       I'm checking with Mr. White to help me understand what  
24       exactly our proposal is.

25              The problem, as I understand it, is that the

1 15-foot buffers for stream crossings would impose  
2 impracticalities and construction burdens due to the  
3 construction methods that have to be used as a necessary  
4 result. However, there's no benefit to them where  
5 there's not a current flow in place or where there's  
6 water that's actually being crossed.

7 I'll look to -- I'm sorry. I thought maybe you  
8 were addressing me. I apologize.

9 CHAIRMAN JOHNSON: No. I'm sorry. I was  
10 getting whispered to.

11 Go ahead.

12 MR. KOENECKE: I apologize, Commissioner. I'm  
13 going to turn the microphone over to Mr. White.

14 MR. WHITE: I'll speak to what our proposal is,  
15 and then Jon Schmidt can speak to the rationale for the  
16 proposal is simply to limit the applicability of this  
17 condition to flowing streams, whereas in the third line  
18 it actually says, "which for stream crossings." So the  
19 proposal would be to limit it to flowing streams. And,  
20 Jon, if you could.

21 MR. SCHMIDT: As explained in our Application  
22 for the construction procedures for dry streams or  
23 intermittent or ephemeral streams that don't carry water  
24 except in spring melts or during winter or rain events  
25 the construction procedure is that we clear the right of

1 way right up to the banks of that water body so that we  
2 get ready for pipe makeup.

3 And then we put all the erosion control measures  
4 in place, but if there's any vegetation, we get it out of  
5 the way so that when we are ready to cross that stream  
6 we're ready to cross it.

7 So that's why we added the language for  
8 perennial, we'll leave that vegetated buffer until we  
9 have the pipe made up and ready to go. And then we can  
10 cross it at that time.

11 CHAIRMAN JOHNSON: Okay. Let's pause and see if  
12 any party or person has an objection to suggestions made,  
13 the suggested wording changes by the Applicant.

14 I'm not hearing any.

15 Any questions or comments by any Commissioners  
16 or Staff or advisors?

17 COMMISSIONER KOLBECK: I just have one. As I  
18 mentioned earlier, you -- Jon, you had mentioned  
19 intermittent flow, rain. What's the protection against  
20 that if it looks like rain?

21 I mean, it's like we made the decision to go.  
22 Obviously, decisions are always -- incur trouble. What's  
23 the backup to that?

24 MR. SCHMIDT: Well, in the construction sequence  
25 they'll come through first with a crew that clear

1 vegetation so you can put a bridge access across the  
2 whatever it is, perennial, intermittent, could be a  
3 bridge, could be flume, culverts, could be a lot of --  
4 just depends on the size, depth, what kind of water may  
5 flow through that. It's designed on the spot.

6 Then the grading crew comes through, and they'll  
7 grade up to whatever we tell them to grade. So for  
8 perennial water bodies we leave the vegetative buffer so  
9 we just have vegetation except where the access is across  
10 that water body.

11 Then comes the pipe. The pipe is delivered to  
12 the right of way. And then if -- then if it's a  
13 perennial water body, they make up the pipe for that  
14 crossing. So if it's 50 feet wide, they make up the pipe  
15 stream, concrete coat weight it, whatever they need to  
16 do. Then they excavate the ditch. So the rest of the  
17 vegetation comes down. They lay the pipe in, backfill,  
18 and they start the restoration.

19 So what we're asking for in the clarification  
20 for perennial water bodies is that this measure stay for  
21 perennial water bodies. For intermittent or ephemeral  
22 streams we put in erosion control measures so if it rains  
23 before we get there to lay the pipe, those measures are  
24 protecting that water course, whatever it is.

25 CHAIRMAN JOHNSON: And we obviously want to take

1 time to do as much due diligence as we need to do. Our  
2 bridge does end at 1:30. We're working to secure another  
3 one. You did a good job of just answering the question  
4 and not more. Let's just --

5 COMMISSIONER KOLBECK: That's all I wanted to  
6 know. I guess my underlying concern is why the change,  
7 and if we do change it, is anything adversely effected.

8 I do have trouble with 3 inches of rain coming  
9 and all the sudden something dry is obviously flowing,  
10 but I don't see where this is going to affect that.

11 CHAIRMAN JOHNSON: Any other questions or  
12 comments?

13 Any action?

14 I would move that the Commission adopt the  
15 Applicant's suggested change.

16 Any discussion on the pending Motion?

17 Hearing none, we'll proceed to vote.

18 Hanson.

19 COMMISSIONER HANSON: Aye.

20 CHAIRMAN JOHNSON: Kolbeck.

21 COMMISSIONER KOLBECK: Aye.

22 CHAIRMAN JOHNSON: Johnson votes aye. Motion  
23 carries 3-0.

24 With that, we will proceed to paragraph 41. And  
25 this deals with protection and mitigation efforts,

1 specifically we're talking about the prairie chicken and  
2 sharp-tailed grouse.

3 Mr. Koenecke.

4 MR. KOENECKE: Thank you, Commissioner.

5 This is a condition that's near and dear to my  
6 heart, as a number of you know. Almost nothing more  
7 important than grouse in my life for a couple weeks in  
8 September every year.

9 We would seek the language that we've included  
10 on page 5 of our proposal, noting that the most recent  
11 information at the time construction occurs will be that  
12 that's found in the Final Environmental Impact Statement  
13 and the Biological Assessment and that we would comply as  
14 we are required to do with both of those.

15 So we're removing from the -- the Application  
16 was filed over a year ago. Those documents come later  
17 along the line, and we'd urge the Commission to push us  
18 in the direction of having to comply with those.

19 Thank you.

20 CHAIRMAN JOHNSON: More compliance is better.  
21 No person or party filed any objection to the change to  
22 paragraph 41. Let's see if anybody wants to register one  
23 now.

24 Hearing none, any Commissioner comments or  
25 questions?



1 Any Commissioner action?

2 COMMISSIONER KOLBECK: I'll Motion that we  
3 approve the changes to paragraph 41.

4 CHAIRMAN JOHNSON: Motion has been made. Is  
5 there any discussion?

6 Hearing none, we'll proceed to vote.  
7 Hanson.

8 COMMISSIONER HANSON: Aye.

9 CHAIRMAN JOHNSON: Kolbeck.

10 COMMISSIONER KOLBECK: Aye.

11 CHAIRMAN JOHNSON: Johnson votes aye. Motion  
12 carries 3-0.

13 Paragraph 43 deals with cultural resources.  
14 Mr. Koenecke.

15 MR. KOENECKE: Thank you again, Commissioner.  
16 On paragraph 43 or condition 43 we have a proposed  
17 condition found at page 6 of our initial document. We  
18 really do seek the inclusion for the benefit of everyone  
19 of the understanding that the Department of State has a  
20 substantial role and also the conclusion of the language  
21 regarding the Programmatic Agreement.

22 I will note that Mr. White has a substantial  
23 amount of experience in this area and would look to him  
24 to assist me in communicating as necessary, but really  
25 the Department of State and the government contact

1     between the tribes and the Federal Government is  
2     important to recognize for all the parties involved. And  
3     we would ask you to really take a good look at the  
4     inclusions that we've had and consider that for making a  
5     change.

6             Thank you.

7             CHAIRMAN JOHNSON: Mr. Koenecke, did you want to  
8     address the DRA concern about the omission of the words  
9     "affected landowners"?

10            MR. KOENECKE: I'll let Mr. White do that,  
11     perhaps.

12            MR. WHITE: So, Mr. Chairman, the rationale  
13     behind this was to make the determination as to what's a  
14     protectable resource fall within the ambit of the DOS,  
15     which is the responsible agency under the Section 106.

16            So our thought about notification was if there's  
17     a resource that appears it might be protectable, we  
18     should be notifying the agency who plays the role in  
19     making that determination.

20            We did include in the condition a provision that  
21     if ultimately we're required to avoid the resource with a  
22     new route, that that would be something that we would  
23     notify the landowner of. If it's the Commission's  
24     preference that at the same time we notify DOS that we  
25     think there might be a protectable resource and that we

1     also go ahead and notify the landowner of that, we don't  
2     have any objection to that.

3             CHAIRMAN JOHNSON: The Applicant has no  
4     objection. Let's just see if there's any objection to  
5     TransCanada's new wording, if "affected landowners" is  
6     returned to it.

7             MR. BLACKBURN: DRA has no objection.

8             CHAIRMAN JOHNSON: Thank you. Staff's  
9     indicating no objection.

10            So any questions or comments by Commissioners?

11            COMMISSIONER KOLBECK: So just to clarify,  
12     basically we're adding that the proper authorities are  
13     notified along with landowner?

14            MR. WHITE: Correct.

15            CHAIRMAN JOHNSON: Yes. I thought -- for this  
16     one I thought the DRA redline document was particularly  
17     helpful. If you look at 43, you'll see that on line 1,  
18     2, 3, 4, 5, 6, 7 "affected landowners" was struck.

19            This would just return "affected landowners" to  
20     the wording, leaving the other changes suggested by  
21     TransCanada intact.

22            COMMISSIONER KOLBECK: Yes. So basically --

23            CHAIRMAN JOHNSON: The landowners would get the  
24     same notice the government got.

25            COMMISSIONER KOLBECK: That's right. We'd be

1 adding notification to the landowners and the DOS. In  
2 effect, adding notification.

3 CHAIRMAN JOHNSON: Good. Any further -- any  
4 comments or questions by Commissioners?

5 Hearing none, is there any action?

6 COMMISSIONER HANSON: Mr. Chairman, I'll move  
7 that on paragraph 43 that the Commission adopt  
8 TransCanada's suggested language change that is approved  
9 by Staff and the Interveners, including the -- to include  
10 the language regarding "affected landowners."

11 CHAIRMAN JOHNSON: Perfect.

12 Any discussion on the Motion?

13 Hearing none, we'll proceed to vote.

14 Hanson.

15 COMMISSIONER HANSON: Aye.

16 CHAIRMAN JOHNSON: Kolbeck.

17 COMMISSIONER KOLBECK: Aye.

18 CHAIRMAN JOHNSON: Johnson votes aye. Motion  
19 carries 3-0.

20 With that, we'll proceed to condition 44, which  
21 deals with paleontological resources.

22 Mr. Koenecke.

23 MR. KOENECKE: Thank you again, Commissioner.

24 This is the one where I think we caused the most  
25 consternation and confusion amongst others as to what our

1 position is.

2 I'm going to look to use our Reply Brief in  
3 Support of Motion For Reconsideration as a much better  
4 statement of what we -- I believe our position to be on  
5 the issue.

6 Specifically, on page 5 I've underlined "thus,  
7 Keystone proposes that a landowner pays to recover a  
8 fossil discovered during construction, that the landowner  
9 owns and from which the landowner made profit, while  
10 Keystone bears all the expense of surveying, monitoring,  
11 mitigation, and avoidance if the route is changed because  
12 of a fossil discovered during construction." I really do  
13 want to make that clear.

14 It was our wish to tie the paleontological plan  
15 to definable standards, and we've provided that. It's  
16 been published by the Bureau of Land Management for  
17 everyone's consideration. And while I wouldn't confess  
18 at all to be anything approaching fluent with those  
19 documents, that's why we have Dr. Schmidt here. And  
20 anything I say about them would be subject to check.

21 I also note from the comments that no one seemed  
22 to see or comment on the references to "consultation  
23 with" and "reasonably acceptable to the landowner," which  
24 we had proposed, if you look on page 9 in the middle of  
25 that long paragraph. And it's a sentence that has caused

1 a substantial amount of just confusion.

2 But we have talked about in consultation with  
3 the landowner, reasonably acceptable to the landowner,  
4 and we don't wish to damage or take anything away from  
5 the landowner in that regard. However, it would be our  
6 position that we don't want to pay to recover something  
7 for that person. That's that person's property, and  
8 those decisions should be made in that regard.

9 We do ask for the requirement that there be a --  
10 excuse me. I want to look for the term of art here. A  
11 trained paleontologist whose training, education, and  
12 experience exceeds the training we would provide to a  
13 environmental monitor.

14 We were talking about an expert in  
15 paleontological resources. And we are also asking, of  
16 course, to drop the determination of economic  
17 significance and go back to that definable standard,  
18 scientific significance.

19 I recognize that this is going to be a condition  
20 that will foster a tremendous amount of discussion so I'm  
21 going to, I think, leave my comments at that higher level  
22 for now before we get further into language. And I do  
23 look forward to the comments of other parties. This is  
24 an important matter, and I look forward to working it  
25 through.

1           Thank you.

2           CHAIRMAN JOHNSON:  Interveners.

3           MR. BLACKBURN:  Thank you, Mr. Chairman.  Yes.  
4   This is quite a complicated issue now.  And it's going to  
5   take, I think, some discussion.  Also they're  
6   proposing -- TransCanada's proposing significant changes  
7   to the language that I think is going to be difficult to  
8   draft during the course of the hearing.  If that's what  
9   needs to be, then it will be.

10          I would reserve most of our comments for  
11   discussing each of the separate sub items separately due  
12   to the complexity.  And, as I said, at a higher level our  
13   concern is that landowner property rights be protected  
14   and that the Commission recognize that whether it's a  
15   drainage pipe or fence or some other item that has to be  
16   removed and then replaced, that, you know, removal of  
17   fossils, while it might be more expensive, is still in a  
18   way protecting property rights.

19          So I'll leave DRA comments to that, and I would  
20   like to reserve the right to comment as the Commission  
21   moves through the separate items that are proposed by  
22   TransCanada.

23          CHAIRMAN JOHNSON:  Thank you, Mr. Blackburn.  
24          Staff.

25          Oh, I'm sorry.  Go ahead, Peter.  My apologies.

1           MR. LARSON: Okay. No problem. This is  
2 Peter Larson from Black Hills Institute.

3           And just sort of again like Mr. Blackburn, I'd  
4 like to reserve the right to make comments on specifics.  
5 But just in general there's a couple of issues here.

6           One is that federal guidelines mandate that  
7 the -- whoever is doing the pipeline, the owner of the  
8 pipeline, bear all costs for the salvage and reclamation  
9 of fossil resources. And under federal law. And I think  
10 that the private landowners deserve no less than that.

11          The other thing is it is much more -- a much  
12 easier task to determine economic value in terms of  
13 dollars than it is to determine scientific value in terms  
14 of dollars. In fact, it's absolutely impossible to  
15 equate those two.

16          You may have a fossil that costs \$100,000 to  
17 excavate, to remove, or to put into a safe environment,  
18 and yet that fossil may have an economic value of only in  
19 the hundreds of dollars. So that something that is  
20 scientifically important isn't necessarily economically  
21 important.

22          And I can't imagine that the landowners, whether  
23 it's the State or the BLM who I think is really going to  
24 fight this -- whether it's the State or the BLM or a  
25 private landowner I can't imagine them having to bear the



1 cost of saving something of scientific value and then,  
2 you know, never being able to recoup those costs. It  
3 should be up to the person who wants -- the party who  
4 wants to dig that pipeline.

5 So that's just my general comment.

6 CHAIRMAN JOHNSON: Thank you, Mr. Larson.  
7 Commission Staff.

8 MS. SEMMLER: Staff doesn't have anything to add  
9 in addition to what we filed. Staff just does find it  
10 troubling that the pipeline would be responsible for  
11 excavating someone else's property, someone else's  
12 private property, when that person doesn't even  
13 necessarily have to excavate.

14 They can choose not to. They can leave it in  
15 the ground. And the company, as it said, has the  
16 responsibility to go around, to reroute, do what it needs  
17 to do to properly protect private property.

18 And as in our filed memo, Staff doesn't support  
19 the idea of the company having to launch an excavation  
20 site if they do come across something.

21 CHAIRMAN JOHNSON: Okay. Well, we do have a  
22 whole slough of issues. I wrote down at least seven that  
23 I think 44 deals with so I don't know quite the best way  
24 to do it. One of the easiest might be a discussion on  
25 economic versus scientific.

1           I'll just kick it off. I mean, TransCanada does  
2 propose removing the reference to economic significance.  
3 I find myself uncomfortable with that. And so perhaps we  
4 can begin there.

5           MR. LARSON: This is Pete Larson again.  
6 Certainly the difference in scientific value and economic  
7 value is a mess. I mean, you know, quite frankly,  
8 something of great scientific value might have virtually  
9 no commercial value. And conversely something of great  
10 commercial value may have little or no scientific value.

11           So you can't just eliminate that economic value.  
12 That's important as well. That's just part of the value  
13 of the land and it's -- and it's not something that  
14 should be taken really lightly. If damage is done to  
15 that, if those things are destroyed, the landowners  
16 should be compensated for it.

17           CHAIRMAN JOHNSON: Thanks, Mr. Larson.

18           Any Commissioner concerns or comments on --

19           COMMISSIONER KOLBECK: I would agree with you,  
20 Commissioner Johnson. I think economic value is  
21 something that definitely deserves a spot at the table  
22 here.

23           Most of all, I would say it's probably one of  
24 the larger things that we have to deal with, I mean, when  
25 we talk about landowners and the effect of the pipeline

1 on landowners. Economics is definitely something that's  
2 a concern.

3 CHAIRMAN JOHNSON: Any other comments?

4 COMMISSIONER HANSON: I think we can all agree  
5 on that. I think Staff's memo was very appropriate, and  
6 I agree 100 percent with the memo.

7 The economic portion of it I think that  
8 Mr. Larson makes a very good point that they are two  
9 different issues, and they need to be included.

10 CHAIRMAN JOHNSON: Okay. So let's just go  
11 ahead, and I'll make a Motion that we not allow further  
12 striking of economic value or significance.

13 Any further discussion?

14 Hearing none, we'll proceed to vote.

15 Hanson.

16 COMMISSIONER HANSON: Aye.

17 CHAIRMAN JOHNSON: Kolbeck.

18 COMMISSIONER KOLBECK: Aye.

19 CHAIRMAN JOHNSON: Johnson votes aye.

20 Another issue is sort of the discussion about  
21 what should be the location of and the training of these  
22 paleontologists. Or I guess I should say -- you know,  
23 monitors is a word used by TransCanada.

24 Let's -- I don't think we have all the  
25 information on that so let's go ahead and open that up.

1 You know, Applicant, anything specific you can say to  
2 that?

3 I mean, you do strike reference to an on-site  
4 monitor. You do include some language. Any other  
5 thoughts?

6 MR. SCHMIDT: Basically what we stated before  
7 subparagraph C in our Motion is that it's not going to be  
8 somebody we train to be a paleontologist. We're going to  
9 use paleontologists. So we clarified it was going to be  
10 a standard above what was in the condition.

11 CHAIRMAN JOHNSON: Yeah. I'm looking in C.  
12 It's probably located somewhere else. But where does it  
13 say that it will be a paleontologist rather than a  
14 monitor with proper training?

15 MR. SCHMIDT: Subparagraph C, "Keystone proposes  
16 that the monitoring requirement be tied to BLM standards  
17 and limited to a trained paleontologist whose training,  
18 education, and experience far exceeds the training that  
19 Keystone could provide to an environmental monitor."

20 CHAIRMAN JOHNSON: I think that's in your Brief  
21 perhaps but not in the actual proposed wording. I think  
22 that's part of the confusion.

23 And I will admit to working off the red-lined  
24 document filed by DRA. But I'm going to go back to your  
25 Brief and dig in.

1           MR. KOENECKE: Commissioner, we clearly said  
2 that in our Brief, and to the extent that the proposed  
3 language is not including that, we'd accept your  
4 inclusion of it in there.

5           As Dr. Schmidt said, we would -- we are  
6 proposing that the monitoring be limited to trained  
7 paleontologists, and you'll notice that we intend to file  
8 a Paleontological Resource Mitigation Plan, which will no  
9 doubt include some of that language as well.

10          But to the extent that you need further language  
11 to make yourself or the Commissioners comfortable with  
12 that, we would be accepting of it.

13          CHAIRMAN JOHNSON: Is the fix just as simple as  
14 under subpart -- and I'm looking under condition 44 on  
15 the red-lined version of DRA. 44C.

16          Is it just as simple as striking the word  
17 "monitors" and including trained paleontologists? I  
18 guess, plural, trained paleontologists?

19          MR. KOENECKE: Yes, Commissioner.

20          CHAIRMAN JOHNSON: Okay. Let's pause and see --  
21 yes, Mr. Smith.

22          MR. SMITH: Yeah. I hate to make this worse  
23 than it is here.

24          But in the Brief it seemed to me that you had  
25 a -- you referenced something to do with a BLM certified

1 or whatever your language was, Jon. I'm assuming that  
2 was your language.

3 MR. SCHMIDT: Yeah. BLM permitted. In other  
4 words, someone whose qualifications have been accepted by  
5 the Federal Government to do this kind of work.

6 MR. SMITH: And I'm not recommending that. I  
7 just wanted to ask because I know that was emphasized in  
8 your language. So I want your --

9 MR. SCHMIDT: We'd recommend that.

10 CHAIRMAN JOHNSON: Okay. So all right. Well,  
11 all right. Rather than a trained paleontologist, then  
12 let's for discussion sake talk about a BLM permitted  
13 paleontologist for placing monitors under 44C. Let's  
14 pause --

15 MR. LARSON: I think if you would make it a  
16 trained paleontologist or BLM permitted paleontologist  
17 and perhaps even as long as it was acceptable with the  
18 landowner, acceptable to the landowner too.

19 CHAIRMAN JOHNSON: Mr. Larson, does trained  
20 paleontologist mean anything other than paleontologist?

21 MR. LARSON: Well --

22 CHAIRMAN JOHNSON: I mean, presumably they're  
23 all trained in something.

24 MR. LARSON: There are very few people who  
25 actually have a degree in paleontology so trained

1 paleontologist is at least better than the word degreed  
2 paleontologist, for instance. A paleontologist is used  
3 to working in that area. You know, some -- a Pliocene  
4 paleontologist might not be as applicable as someone who  
5 works in Cretaceous paleontology. Basically the  
6 K-T boundary, which is Harding County we're talking  
7 about.

8 It's going to be hard to be specific. It's  
9 going to be really hard to be specific.

10 CHAIRMAN JOHNSON: Well, I'm not asking about  
11 being more specific. I'm asking about being more  
12 general. When I hear paleontologist I presume that  
13 person has been trained and received a degree in  
14 paleontology.

15 Does trained paleontologist mean something  
16 different than just paleontologist?

17 MR. LARSON: Trained paleontologist, I guess,  
18 means it's not an amateur paleontologist, someone who's  
19 received training at a university. You can't say degreed  
20 paleontologist again because there's like three in this  
21 country that have a degree in paleontology.

22 CHAIRMAN JOHNSON: Oh, okay. So, I mean, to me  
23 trained paleontologist, is that -- I don't know. I don't  
24 want to wordsmith this too much, but it just seems  
25 like --

1           MR. WHITE: Mr. Chairman, if I might, that's the  
2 ambiguity that we were struggling with. And so our  
3 thought was let's settle on a standard that has some  
4 solid meaning, which is BLM permitted.

5           So the agency which has the most expertise in  
6 the area of paleontology says this person is a trained  
7 paleontologist and signs off on that. That seems to be a  
8 standard that's enforceable.

9           MR. BLACKBURN: If I --

10          MR. LARSON: (Inaudible).

11          CHAIRMAN JOHNSON: Hold on. Mr. Blackburn got  
12 in first. Go ahead.

13          MR. BLACKBURN: If I may, Commissioner Johnson,  
14 what I would suggest maybe as a compromise here is that  
15 it be a BLM permitted paleontologist or a paleontologist  
16 qualified who could qualify. I'd have to be sure of the  
17 language but could qualify to under BLM standards.

18          I think one of the problems I would have with  
19 having it be just a BLM permitted paleontologist is that  
20 the very qualified paleontologist may not have decided to  
21 become BLM permitted.

22          At the same time the BLM has fairly flexible  
23 standards for what is appropriate for paleontology,  
24 either be training in academics or could be field  
25 experience. But I think that the standard of having



1       somebody who -- we all agree the standard is we would  
2       like somebody who is qualified to do this.

3               I'm just not sure it should be limited to those  
4       who are permitted by the BLM to do it because that may be  
5       too restrictive. So if we could use BLM qualifying  
6       standard as a standard, I hope that would work for  
7       Mr. Larson too.

8               MR. LARSON: That absolutely works. That's  
9       excellent.

10              COMMISSIONER HANSON: Mr. Chairman.

11              CHAIRMAN JOHNSON: Yes, Commissioner.

12              COMMISSIONER HANSON: This is very interesting  
13       because we passed our I'll call it regulation and  
14       TransCanada is coming before us and raising the bar  
15       essentially.

16              I don't see how in the world the Commission  
17       could object to them raising the bar and putting more  
18       specifics -- specificity. It just -- it's -- it's a  
19       strange situation. They're coming before us and saying  
20       we want to make it even more of an exclusive club, even  
21       more difficult so that we have even more expertise out  
22       there. I can't imagine we'd want to lower that bar.

23              MR. LARSON: Maybe I could address that for a  
24       second. The problem with a BLM permitted paleontologist  
25       is that again you're limited in who you can have. And

1 those people who choose to make their living by  
2 getting -- by working with the -- at mitigation and that  
3 might not be nearly as qualified as someone who does not  
4 do that.

5 For instance, there's a friend of mine who works  
6 at University of New Orleans, Dr. Craig Gersler. He's  
7 worked in the Lance and Hell Creek Formations for years  
8 and years and years, and he's been denied BLM permit  
9 because -- and it was only because of personality, not  
10 because of his qualifications.

11 His qualifications far exceed those of most BLM  
12 permitted paleontologists, but he was denied a permit.  
13 So as long as they meet up to the qualifications for a  
14 BLM paleontologist, that should be sufficient.

15 CHAIRMAN JOHNSON: You know, Mr. Larson the  
16 problem with going with your anecdotal evidence is I'm no  
17 lawyer, but, I mean, the government can't just deny  
18 somebody the right to work if they're otherwise properly  
19 qualified. And, you know, the standard based on  
20 personality, that would be a civil case waiting to  
21 happen. And so --

22 MR. LARSON: But it does happen in politics.  
23 It's politics, and it does happen.

24 CHAIRMAN JOHNSON: Well, I just don't know how  
25 we dive into that right now. We don't have any evidence

1 in the record that indicates that it is -- that the  
2 permitting of BLM paleontologists is arbitrary and  
3 capricious.

4 MR. BLACKBURN: Commissioner Johnson, there's  
5 also no evidence in the record that there are sufficient  
6 BLM permitted paleontologists available for the  
7 landowners. And that's why we wanted to go with a  
8 slightly broader but just as high standard for the  
9 qualification that would allow a BLM qualified  
10 paleontologist to participate.

11 And that's why DRA proposed the BLM qualified as  
12 the language the bottom of the page 17. We support and  
13 are happy to see that TransCanada wants to upgrade the  
14 bar, as Commissioner Hanson says, but we just want to  
15 make sure that it's not limited to those people who  
16 simply choose for whatever reason to get a BLM permit.

17 You know, if the BLM could certainly qualify and  
18 permit new people, the landowners should be able to, you  
19 know, find those same people and employ them, even if  
20 they chose not to work for the BLM. That's why we  
21 suggest the term BLM qualified paleontologist. It's a  
22 little broader in terms of who can do it. Same standard.

23 CHAIRMAN JOHNSON: Well, I do think that's not  
24 an unimportant point that we do have to -- I mean,  
25 landowners are going to want to hire these people too.

1     So you have to be able to trigger some of the issues here  
2     and the rest of C if they need to be BLM certified -- or  
3     permitted, rather.

4             You know, it talks about a discovery. And,  
5     again, that discovery becomes triggered by that  
6     particular paleontologist; is that right?

7             MR. SCHMIDT: That's correct.

8             MR. LARSON: But, again, there are so many  
9     paleontologists that don't have a BLM permit.

10            CHAIRMAN JOHNSON: Mr. Larson, what we're trying  
11     to get at is why do you care? And the reason you care is  
12     because there may be landowners who want to hire  
13     paleontologists that are not Bureau of Land Management  
14     certified who want to trigger some of the actions in  
15     paragraph C.

16            MR. LARSON: It's not a certification. It is  
17     receiving a permit. For instance, I have worked as --

18            CHAIRMAN JOHNSON: Mr. Larson, I'm going to  
19     interrupt you because I don't want to argue semantics.  
20     What I want to do and I think the Commissioners here is  
21     why does this matter?

22            And the reason this matters is you're saying a  
23     landowner might want to go out and hire a paleontologist  
24     who is not BLM permitted but is able to otherwise trigger  
25     the actions in paragraph C.

1           MR. BLACKBURN: No. That's not what we're  
2 saying, Commissioner Johnson. What we're -- that's not,  
3 in fact, what we're saying. We're saying we're not going  
4 that far. You're making a logical leap that we are, in  
5 fact, not making.

6           We are saying that we would like to be able to  
7 employ a BLM qualified paleontologist to make that  
8 decision. And we believe also that according to  
9 TransCanada's language that they want to have their BLM  
10 qualify -- or permitted. It's a matter of process --  
11 their BLM permitted paleontologist to make that decision.  
12 Whereas, what we're saying is a matter of process, we  
13 would like to have the landowners have a say in that  
14 initial determination with -- but through their own BLM  
15 qualified paleontologist.

16          CHAIRMAN JOHNSON: Well, no landowner needs the  
17 Commission's blessing to hire a paleontologist. The  
18 reason this matters is that under the wording  
19 suggested -- this is my presumption. Tell me if I'm  
20 right.

21          The reason this matters is that there is some  
22 authority that is given to a BLM permitted paleontologist  
23 that is not allowed to a nonpermitted paleontologist  
24 under the proposed wording.

25          Is that right?

1           MR. BLACKBURN: There is -- well, they wouldn't  
2 say it's for a nonBLM paleontologist. Basically, the  
3 language says that requires that that decision be made by  
4 a BLM -- just looking at the language that specifically  
5 TransCanada has, that it's a qualified and BLM permitted  
6 paleontologist is what -- the language they use.

7           And, again, it's not that anybody's opposing the  
8 idea that a qualified person do this. That's what  
9 TransCanada is, in fact, saying. It's just that it  
10 doesn't need to be limited to only a permitted -- the  
11 participation in the process, the negotiation agreement  
12 with the landowner and the Applicant would be not limited  
13 to only permitted BLM paleontologists.

14          CHAIRMAN JOHNSON: Okay. Commissioners, other  
15 thoughts?

16          COMMISSIONER HANSON: Mr. Chairman, I move that  
17 we accept the verbiage as provided by XL.

18          CHAIRMAN JOHNSON: Okay. And so BLM permitted  
19 paleontologists?

20          COMMISSIONER HANSON: That's correct.

21          CHAIRMAN JOHNSON: Okay. Motion has been made.  
22 Any discussion on the pending Motion?

23          COMMISSIONER KOLBECK: Other than, this is --  
24 this does not affect a landowner from hiring a nonBLM  
25 permitted paleontologist.

1           COMMISSIONER HANSON: That's correct. And that  
2 is what the Interveners have said is not their problem.

3           MR. LARSON: But what it does do is it does take  
4 away a --

5           COMMISSIONER HANSON: We have a Motion, sir.  
6 Thank you.

7           COMMISSIONER KOLBECK: Now if -- we're just  
8 dealing with paragraph C; correct?

9           CHAIRMAN JOHNSON: Yes. That's what we're  
10 looking at.

11          COMMISSIONER KOLBECK: Okay. I have a question  
12 for the Applicant then.

13          Why was the "Hell Creek Formation" wording --  
14 why would you take that out and put in "areas underlined  
15 by rock formations of moderate sensitivity"?

16          MR. SCHMIDT: The whole formation is considered  
17 a high probability area. It would follow under PFYC  
18 Class 5 so it's covered in the language. So this is  
19 three or four formations. So instead of specifically  
20 stating a formation we used the methodology that BLM has  
21 approved.

22          COMMISSIONER KOLBECK: So instead of a proper  
23 name you actually went with a classification that would  
24 probably --

25          MR. SCHMIDT: Covers the whole state.

1           MR. SMITH: And note, Commissioner Kolbeck, turn  
2 the page backwards to A. And if you look at the last  
3 sentence I think is where you got it. Am I wrong on  
4 that?

5           MR. SCHMIDT: That's correct.

6           CHAIRMAN JOHNSON: Okay. I do want -- I'm  
7 sorry. I do -- Mr. Larson, what I want is a very simple  
8 answer hopefully.

9           Let's say the Commission passes the pending  
10 Motion. TransCanada will have their BLM permitted  
11 paleontologists. Let's say the landowner wants to hire  
12 their own paleontologist.

13           What will that paleontologist be unable to do or  
14 say or be involved with if the Commission were to pass  
15 the BLM permitting language?

16           MR. LARSON: The second paleontologist would  
17 have absolutely no power in saying who got stuck with the  
18 construction.

19           MR. BLACKBURN: Commission Johnson, I think  
20 there needs to be some clarification here because it's  
21 not clear to me whether you're talking about the language  
22 in Subsection C or D.

23           Subsection D is the place that should require  
24 it. And I think that was earlier discussed,  
25 clarification that the Applicant would be using a BLM



1 qualified and permitted paleontologist up in Subsection C  
2 because it strikes the word "trained" up there, "trained  
3 outside monitor" and says "monitors."

4 So I think Subsection C needs to have a language  
5 change there to have TransCanada expressly agree that  
6 they'll use a qualified BLM trained permitted  
7 paleontologist.

8 Now Subsection D relates to not necessarily the  
9 BLM paleontologist that -- qualified paleontologist that  
10 TransCanada would employ but any paleontologist that the  
11 landowner might consult with.

12 And so to the extent that Subsection D really  
13 talks about that, that relates more to what kind of  
14 paleontologist the landowner has to have.

15 So I'm not at all clear what exact language is  
16 proposed because if it's proposed as in Applicant's  
17 provided, it effectively would strike Applicant's  
18 required to have any BLM trained paleontologist because  
19 it does require in Subsection D that TransCanada use the  
20 BLM trained paleontologist, not what the language said.

21 CHAIRMAN JOHNSON: Thank you, Mr. Blackburn.  
22 This is becoming clearer to me finally.

23 Commissioner Hanson's Motion, which we need to  
24 move forward on, deals with 44C. And specifically the  
25 "monitors," the word that the Applicant chose, there's

1     been some discussion about changing "monitors" to "BLM  
2     permitted paleontologists."

3             That's the Motion. I think you bring up a  
4     different issue with D which we can address after we move  
5     forward on this.

6             So we've got the Hanson Motion. Let's proceed  
7     to vote.

8             Hanson.

9             COMMISSIONER HANSON: Aye.

10            CHAIRMAN JOHNSON: Kolbeck.

11            COMMISSIONER KOLBECK: Aye.

12            CHAIRMAN JOHNSON: Johnson votes aye. Motion  
13     carries 3-0.

14            Now let's go down to D, and now we're talking a  
15     little bit more about the landowner's paleontologists,  
16     perhaps. If you go halfway through D, "If a qualified  
17     and BLM permitted paleontologist in consultation with the  
18     landowner, BLM, or SESM determines that a scientifically  
19     significant," which now says economic or scientifically  
20     significant, paleontologist resource is present then that  
21     sort of triggers a series of actions.

22            The real question is should a landowner's  
23     paleontologist who is not BLM permitted be allowed to  
24     begin that chain of events? I will tell you I think so.

25            COMMISSIONER HANSON: Mr. Chairman, I have a

1 concern at this point when we talk about that. What then  
2 do we have as a measure of a -- am I a paleontologist?  
3 Because I am quite interested in trilobites and I dig  
4 them up and I check all these different things and I --  
5 who is? Who is the measure?

6 And who do we want to have as a person before us  
7 as whom we would have to consider is an expert?

8 CHAIRMAN JOHNSON: Perfect question. Let's get  
9 an answer.

10 Mr. Blackburn, Mr. Larson, we want to make sure  
11 we've got real experts out there. What verbiage would  
12 one use?

13 MR. BLACKBURN: The verbiage is the verbiage  
14 included in the record by TransCanada where the BLM  
15 actually describes the qualifications of what it means to  
16 be qualified to get a BLM paleontological permit. And  
17 that language is quite precise.

18 And essentially what TransCanada has already  
19 proposed is that their own paleontologist qualified -- or  
20 satisfied that language. So we would propose satisfying  
21 exactly the same language but just not have it be that  
22 the paleontologist actually ended up getting a permit  
23 from BLM.

24 So back to the same standards that TransCanada  
25 is proposing for itself. The standards are clear.

1 They're in the federal guidelines TransCanada's now  
2 presented as evidence to the Commission, and so as long  
3 as those standards are complied with, they're quite  
4 detailed and they're very clear and --

5 CHAIRMAN JOHNSON: My apologies.

6 MR. LARSON: I would concur with that.

7 CHAIRMAN JOHNSON: So to get to specific  
8 wording, are you suggesting if a qualified and BLM  
9 qualified paleontologist, as opposed to permitted?

10 MR. BLACKBURN: That's correct. That's what  
11 we're proposing.

12 CHAIRMAN JOHNSON: Okay.

13 MR. WHITE: Mr. Chairman, if I might, that's not  
14 our proposal, as you can clearly see.

15 Our proposal is to take the ambiguity out and to  
16 establish a known standard that doesn't require the  
17 Commission or anyone else to make a determination as to  
18 whether a paleontologist is BLM qualified. That's  
19 something within the purview of the BLM.

20 That's why they have the permitting program. So  
21 you could look to an objective standard and say this  
22 paleontologist who has significant authority underneath  
23 the condition is actually BLM qualified.

24 CHAIRMAN JOHNSON: Okay. We have a new call-in  
25 number, which we will tell everybody right now. We're

1 going to take a 5-minute break. The new call in number  
2 will be 773-2343. The password is 163#.

3 (Discussion off the record)

4 (A short recess is taken)

5 CHAIRMAN JOHNSON: I had originally thought that  
6 we wanted broad discretion, to allow a whole slough of  
7 trained paleontologists. It is becoming increasingly  
8 clear, though, that we can disagree on what's a qualified  
9 paleontologist and what's a trained paleontologist.

10 It does seem that the safe harbor lies in a  
11 permit issued by a governmental agency. So my thought  
12 would be adopt Commissioner Hanson's language from 44C  
13 also into 44D. Or I suppose actually just leave what the  
14 Applicant has suggested, rather.

15 MR. LARSON: May I interject here?

16 CHAIRMAN JOHNSON: If it's something new,  
17 Mr. Larson.

18 MR. LARSON: A BLM permitted paleontologist --  
19 and let me say there are only two of them in the State of  
20 South Dakota. I have worked under a BLM permit and  
21 Jim Martin, School of Mines, worked under a BLM permit.  
22 That's all that's in the state.

23 All that means is you have been granted  
24 permission to collect a specific fossil on BLM land. It  
25 has nothing to do with your qualifications, except that

1     you have to meet those qualification standards.

2             So what you're doing is you're eliminating a lot  
3     of people who are very well-qualified to do this work as  
4     well. In fact, you know, like I say, there's two in the  
5     State of South Dakota.

6             CHAIRMAN JOHNSON: The issue, you know,  
7     Mr. Larson, is that by changing the wording to what  
8     Mr. Blackburn has suggested, which is BLM qualified --

9             MR. LARSON: Yes.

10            CHAIRMAN JOHNSON: I mean, if there are other  
11    people out there qualified they can get permitted. I  
12    mean, construction is not beginning in 2010.

13            MR. LARSON: No. But you can't get a permit  
14    unless you're going to dig a fossil on BLM land. That's  
15    how you get a permit.

16            MR. BLACKBURN: Right. It wouldn't be possible  
17    to go to BLM and get certified to do that without having  
18    any intent to do so. So this is not like a license.  
19    This is a permit to do a specific action.

20            So somebody who's new could not go get a BLM for  
21    the sake of going on private land. BLM would say why are  
22    you bothering us.

23            COMMISSIONER HANSON: Well, that's information  
24    we should have had about a year ago, I mean, a discussion  
25    like this. Because how are we in the Commission to

1       ascertain who is qualified and who isn't?

2               What do we do --

3               MR. LARSON:   You just let the Federal  
4       Government --

5               COMMISSIONER HANSON:   Excuse me.   Please don't  
6       interrupt continually.   I just don't like that at all.

7               MR. LARSON:   Sorry.

8               COMMISSIONER HANSON:   How are we within the  
9       Commission to set up a situation where we have a  
10      completely separate department or we have to rely on  
11      someone else to provide that information to us?

12              And if -- if there is some methodology to do  
13      that, we've got to have a standard somewhere.

14              MR. BLACKBURN:   Commissioner Hanson, just so you  
15      know, a point of information, the standard is contained  
16      within the BLM paleontological guidelines, Section 4,  
17      B2.   And those are provided by TransCanada.   They're in  
18      the record.   And they're very specific about what a  
19      trained -- what a BLM qualified paleontologist will be or  
20      not be.   And that's on page 3 of attachment -- or  
21      Exhibit A that TransCanada provided.

22              COMMISSIONER HANSON:   Thank you.   I'm aware of  
23      that.

24              The challenge is that means that within the  
25      Commission then we have to set up a process by which we

1 go through the qualifications for everyone who -- to  
2 decide who can and who cannot operate on the pipeline.

3 MR. BLACKBURN: Or TransCanada could just object  
4 to somebody they didn't think was qualified and bring a  
5 Complaint.

6 COMMISSIONER HANSON: Then we go through the  
7 hearing process to ascertain that.

8 There has to be some standard so that we don't  
9 have a situation where someone who is not qualified  
10 stands on some land 150 miles from here and says, oh,  
11 you've got to stop construction and then we have to go  
12 through an entire hearing process with notification and  
13 on and on and on to ascertain whether someone's  
14 qualified.

15 This has to be simplified. It has to work.

16 MR. BLACKBURN: That's presuming there would be  
17 conflicts.

18 CHAIRMAN JOHNSON: I don't want to be too flip,  
19 but I just think given our experiences with pipelines in  
20 the last three years in this state, I mean, it's not an  
21 outlandish presumption. That's not to say anything of  
22 the operator. I'm just saying the nature of what we've  
23 seen with these hearings.

24 MR. BLACKBURN: The question I think we have to  
25 face is if there are, in fact, only two BLM permitted



1 paleontologists in South Dakota and presuming that  
2 perhaps Applicant hires one of those or brings one from  
3 outside or hires the other one, we are already having our  
4 BLM paleontologists locally conflicted out as having any  
5 role in this.

6 COMMISSIONER KOLBECK: You lost me there,  
7 Mr. Blackburn.

8 MR. BLACKBURN: If there are only two and  
9 TransCanada hires one or both of them, then are there --  
10 is there a pool of private paleontologists to allow  
11 landowners to have access to them in South Dakota?

12 MR. LARSON: And, for instance, the Geological  
13 Survey, the State Geological Survey, has a number of  
14 paleontologists working for them who have never gotten a  
15 BLM permit, and they are certainly qualified.

16 CHAIRMAN JOHNSON: So what's it mean to be a  
17 paleontologist?

18 MR. LARSON: It means that you study  
19 paleontology. That you have -- and that's the basic  
20 meaning of it.

21 CHAIRMAN JOHNSON: But that term does not carry  
22 with it any -- there's no professional certification?  
23 There's --

24 MR. LARSON: No. There's no --

25 CHAIRMAN JOHNSON: Please. So that law carries

1 no force of law in South Dakota? I mean, you can't call  
2 yourself a doctor without having done A or B or C.  
3 That's not true for being a paleontologist?

4 MR. LARSON: Well, you may have a Ph.D. You may  
5 have a master's. But there certainly are qualifications  
6 that are spelled out in the BLM guidelines that everyone  
7 is agreeing with.

8 MR. SCHMIDT: Commissioner, if I may, we have  
9 done some other projects in other states where BLM has  
10 been the lead federal agency and has required us to do  
11 paleontological surveys on private property as well as  
12 public lands. And we had -- worked hard to use BLM  
13 permitted archeologists even on private property.

14 And the reason they did that is because I'm a  
15 biologist by training. Biologists covers a huge variety  
16 of areas, just like paleontology. You can have a degree  
17 in it, but they wanted to have people that had worked on  
18 their properties to understand their standards and their  
19 guidelines. And they extended that onto private  
20 property.

21 And we're asking the same standards be  
22 carried here. That way everybody has the same  
23 qualifications.

24 COMMISSIONER KOLBECK: Jon, is a BLM certified  
25 paleontologist substandard in any way?

1 MR. SCHMIDT: No.

2 COMMISSIONER KOLBECK: Are they -- are they the  
3 elite of the career field?

4 MR. SCHMIDT: Not necessarily, but they  
5 understand the processes that have been laid out in BLM  
6 guidelines, yes.

7 COMMISSIONER KOLBECK: So if we're debating --  
8 the decision that I have to make is I have to -- we're  
9 trying to form a team, and obviously there's some people  
10 that probably play on the minors baseball but then the  
11 major leaguers. Not to say that one is more qualified  
12 than the other. But how do you make that determination?

13 I guess I'm leaning towards the fact of the  
14 permit. Without the PUC going through whoever thinks  
15 they're a paleontologist and whether they are or not,  
16 that's what the debate is going to be.

17 Whereas, this BLM permit may not be the best in  
18 the crop or the worst in the crop, but at least it's a  
19 starting point. Do I understand the BLM permit  
20 correctly?

21 MR. SCHMIDT: Correct. And everybody would be  
22 working from the same experience base as far as they've  
23 worked on BLM property. They understand the processes  
24 and the technique.

25 COMMISSIONER KOLBECK: What is the novelty of

1 BLM property? Anything?

2 MR. SCHMIDT: No. It's just whatever BLM got  
3 from the states that they didn't want. But they have the  
4 most experience of any federal agency because they have  
5 more property with this issue on it.

6 COMMISSIONER KOLBECK: Okay. So then the  
7 requirements that are spelled out, who checks those? The  
8 Federal Government?

9 MR. SCHMIDT: The regional BLM people will check  
10 those.

11 COMMISSIONER KOLBECK: Okay. And in  
12 South Dakota that would be where? Minneapolis?

13 MR. KOENECKE: The document talks about a  
14 state --

15 MR. SCHMIDT: Yeah. There's State BLM  
16 paleontologists. I can't remember. Dave. I can't  
17 remember his last name, but he's the one who approved the  
18 permits for our people.

19 COMMISSIONER KOLBECK: Okay. So there is  
20 someone within State Government.

21 MR. SCHMIDT: Yes. And they don't have to be  
22 South Dakota permitted. They can be from Montana. They  
23 can be from Wyoming. They all work from the same  
24 regional BLM office.

25 COMMISSIONER KOLBECK: Okay. That answers my

1 questions. The trouble that we have is to figure out 0,  
2 the starting point, and that helps me understand that.  
3 Thank you.

4 CHAIRMAN JOHNSON: Mr. Harder, come on down.

5 MR. HARDER: John Harder. What I'm gaining out  
6 of this is that you're saying -- and I agree with you --  
7 go get a permit if you don't have one. But if you can't  
8 get one because it's not on BLM land, then you're not  
9 being fair to the landowners' side, in my view.

10 You know, if you could go get a permit to be on  
11 this job site and do this job, I would agree with you.  
12 But if it's not attainable because you're not on BLM  
13 land, then it's not fair.

14 CHAIRMAN JOHNSON: I mean, Mr. Larson, are you  
15 saying that it is unattainable? I mean, I know you're  
16 saying that the permit would not be for this purpose, but  
17 are you suggesting that BLM would deny a permit to  
18 someone who's otherwise qualified?

19 MR. LARSON: Well, it has happened. But that's  
20 not my big concern.

21 My concern is that you're really limiting your  
22 pool of people who are more than qualified by just saying  
23 it's only the people who work on this particular  
24 government agency's land that are qualified to do  
25 something. They're not.

1           CHAIRMAN JOHNSON: I asked the question  
2 incorrectly. I guess what I'm asking is if somebody who  
3 the BLM would be happy to permit to go out and get a  
4 fossil and recover a fossil on a federal land -- that's  
5 what the permit is for. The BLM --

6           MR. LARSON: Right.

7           CHAIRMAN JOHNSON: -- would turn that person's  
8 permit down if they did not have a request of a specific  
9 fossil at a specific location on a specific BLM parcel?  
10 Can you be generally permitted?

11          MR. LARSON: No. You have to be -- it has to be  
12 very specific. There is a reconnaissance permit that,  
13 you know, maybe it can be so much as a square mile, but  
14 an excavation permit, which is I'm sure what you want to  
15 have, not just reconnaissance, and excavation people are  
16 used to not just reconnaissance but actually removal of  
17 the fossils. So for specific sites --

18          CHAIRMAN JOHNSON: Mr. Larson, I'm sorry. We're  
19 trying to keep this tight. We spent a lot of time on  
20 this, and we just -- we're trying to get to the right  
21 answer here.

22          So the answer is, no, you may not receive a  
23 general BLM permit?

24          MR. LARSON: Correct.

25          CHAIRMAN JOHNSON: Thank you.

1           Mr. Harder, something new and enlightening?

2           MR. HARDER: No. I was just going to step back.

3           CHAIRMAN JOHNSON: Okay. Great. Okay. So  
4 Applicant, there are only two in the state. It is  
5 difficult for somebody to go get one, without a specific  
6 purpose.

7           Really? Is that what we want to do? Do we want  
8 to have the pool just be two people in the state?

9           MR. SCHMIDT: It's more than two people in the  
10 state. You can be a paleontologist practicing in Montana  
11 and get a permit in South Dakota. They don't have to be  
12 from South Dakota.

13          CHAIRMAN JOHNSON: Do we know how many are in  
14 Wyoming, Montana, and South Dakota?

15          MR. SCHMIDT: In the past five years there's  
16 been at least four pipeline projects that employed  
17 60 paleontologists. Probably 15 that I know of were  
18 permitted to do that.

19          CHAIRMAN JOHNSON: All right. That's a bigger  
20 number.

21          Mr. Smith.

22          MR. SMITH: Do you agree with the assertion that  
23 has been made by Mr. Larson, I guess, that you cannot get  
24 a permit for a BLM permit unless it's with respect to a  
25 particular excavation on BLM land?

1           Is that really the way it works?

2           MR. SCHMIDT: Like I said before, we've done  
3 projects that crossed private land that BLM gave us  
4 permits not specifically for private land but the entire  
5 project. We gave them the footprint of the entire  
6 project.

7           So my suggestion is that we go to the regional  
8 BLM person here and ask them to qualify these people.

9           CHAIRMAN JOHNSON: And that has been done in the  
10 past?

11          MR. SCHMIDT: Yes.

12          CHAIRMAN JOHNSON: Okay. Well, all right.  
13 Let's close to Commissioner comments here, unless -- I'm  
14 sorry.

15          Do you have a question, Commissioner?

16          COMMISSIONER KOLBECK: No. I just want to make  
17 sure I understand Mr. Schmidt that the person who would  
18 issue the BLM permit would be the State BLM coordinator.

19          MR. SCHMIDT: That's correct.

20          COMMISSIONER KOLBECK: The person in State  
21 Government would go through those -- not a State  
22 Government --

23          MR. SCHMIDT: It's a BLM person who works in  
24 this region.

25          COMMISSIONER KOLBECK: Oh. That would go



1 through the qualifications, as Mr. Blackburn had stated,  
2 to see if they are BLM --

3 MR. SCHMIDT: Correct.

4 COMMISSIONER KOLBECK: -- certified and give  
5 them a BLM permit.

6 MR. BLACKBURN: And just to be clear it's  
7 obviously a federal agency so it wouldn't be state.

8 COMMISSIONER KOLBECK: Yeah. I was corrected on  
9 that. Thank you.

10 MR. LARSON: One thing I might add. There's  
11 a -- the certification does not exist. This is -- and if  
12 it did, it would be great because that would solve the  
13 problem.

14 CHAIRMAN JOHNSON: Right. We understand we're  
15 talking about permitted. Thank you.

16 Okay. I will make a Motion that the Commission  
17 accept the language suggested by the Applicant in 44D to  
18 make it very clear that would allow only BLM permitted  
19 paleontologists the ability to trigger sort of the chain  
20 of events listed in D.

21 Any discussion by Commissioners on that pending  
22 Motion?

23 COMMISSIONER KOLBECK: I have a question that I  
24 was going to ask and I forgot. Is that okay?

25 CHAIRMAN JOHNSON: Yes.

1           COMMISSIONER KOLBECK: How long does it take to  
2 get permitted? Is it a one-day, two-day, six-month  
3 process?

4           MR. SCHMIDT: Depends on how busy it is, but it  
5 doesn't take very long.

6           COMMISSIONER KOLBECK: Okay. That was my only  
7 question.

8           CHAIRMAN JOHNSON: Okay. Just to be clear what  
9 prompted my Motion on this was two facts. Number one,  
10 that we now have -- granted this is not evidence but we  
11 have representation from the company at least in pipeline  
12 projects in recent years as many as 60 paleontologists  
13 have been hired that have BLM permits.

14           COMMISSIONER HANSON: 15 of those 60, I believe,  
15 is --

16           CHAIRMAN JOHNSON: 15.

17           MR. SCHMIDT: Yeah. About 15 between the four  
18 projects. Basically you go in and apply for the  
19 footprint that you're going to go to work on.

20           CHAIRMAN JOHNSON: Okay. And, secondly, that  
21 BLM has permitted paleontologists for similar situations  
22 in the recent past. That's what's driving my decision.

23           Any further discussion?

24           COMMISSIONER HANSON: Excuse me. I'm also  
25 influenced by the statement that they were -- that BLM

1 permitted for paleontologists who were I'll use the word  
2 excavating on land that was not BLM land.

3 MR. SCHMIDT: It was private land, that's  
4 correct. For surveying and eventual mitigation.

5 COMMISSIONER HANSON: Thank you.

6 MR. SMITH: Can I ask one follow-up question  
7 there, Jon? And that is in those situations you had  
8 stated that the BLM was the lead agency. Is that a  
9 critical component of their willingness to permit even if  
10 the person will only be offering opinions on private  
11 land?

12 Do you know whether that's true or not?

13 MR. SCHMIDT: I don't think it affects -- it  
14 just is their policy to do that on their projects. Last  
15 year last March Section 106 was modified to include  
16 paleontology because it hadn't been in any federal  
17 regulation.

18 So the lead federal agency has to make a  
19 decision on what to do about paleontology.

20 CHAIRMAN JOHNSON: Okay. We have a pending  
21 Motion.

22 Further discussion?

23 Hearing none -- go ahead.

24 COMMISSIONER KOLBECK: I do have a little bit.  
25 It would be our -- if we do accept this -- I guess this

1 is for Mr. Smith. If we do accept this, that means a  
2 qualified BLM person still would not be able to trigger  
3 those -- trigger that sequence of events; is that  
4 correct?

5 MR. SMITH: If you decide it has to be a BLM  
6 permitted person, that would be correct.

7 COMMISSIONER KOLBECK: Okay. I'm glad I asked  
8 that question because I was wondering if we go -- I was  
9 wondering if the state BLM permitted person who's going  
10 to be giving these permits, is that a resource that's  
11 available to the Commission if we went with just  
12 qualified BLM?

13 MR. SMITH: I'm not sure I'm understanding the  
14 question.

15 COMMISSIONER KOLBECK: In other words, the  
16 dilemma Commissioner Hanson had spelled out, say we get  
17 someone who says they're qualified and then we would be  
18 in the position to qualify them, is that BLM person  
19 available as a resource to us to do that qualifying?

20 MR. SMITH: To help you if you were to retain it  
21 at the Commission level to make that decision if it came  
22 to that?

23 COMMISSIONER KOLBECK: Right.

24 MR. SMITH: I would have to say the answer to  
25 that for me is I don't know. I would assume so. But if

1     you go with BLM, I mean, they're -- they're the Federal  
2     Land Management agency is the bottom line. Public land,  
3     you know. And they -- they don't do the National  
4     Grassland because that's under the Department of  
5     Agriculture.

6             But almost every other inch of public land in  
7     the American West is under the management of the BLM.  
8     The only thing I can say is it would probably be subject  
9     to their time constraints, et cetera.

10            COMMISSIONER KOLBECK: Sure.

11            CHAIRMAN JOHNSON: The kicker for me was the  
12     central determining factor who is the best arbiter of  
13     whether or not the paleontologist has met the BLM  
14     standards. The PUC or the BLM? And ultimately I come  
15     down to deciding BLM.

16            Other discussion?

17            COMMISSIONER KOLBECK: I just wanted to answer  
18     that. Yes. I understand that, that the BLM is the one  
19     who would do that.

20            I just am wondering if that would alleviate  
21     Commissioner Hanson's concern that all the sudden now  
22     we're in this situation where someone has said that  
23     they're a paleontologist and we have to discover if they  
24     are or not, how much of a resource the Federal Bureau of  
25     Land Management is to the PUC.

1           And it sounds to me, which limits my options,  
2   that the Federal Land Management is going to go down one  
3   road, the PUC is going to have to travel down another.

4           Without being assured that that is going to  
5   intermix or work together, I think I'm going to have to  
6   vote for this Motion. Because, otherwise, I just don't  
7   see how we can determine if someone is just fresh out of  
8   Yankton and wants to stop the construction on the  
9   pipeline or if they truly are paleontologists.

10          CHAIRMAN JOHNSON: Okay. I understand. Thanks.

11          COMMISSIONER KOLBECK: And that's no reference  
12   to the town of Yankton.

13          CHAIRMAN JOHNSON: Any further discussion?

14          Hearing none, we'll proceed to vote.

15          Hanson.

16          COMMISSIONER HANSON: Aye.

17          CHAIRMAN JOHNSON: Kolbeck.

18          COMMISSIONER KOLBECK: Aye.

19          CHAIRMAN JOHNSON: Johnson votes aye. Motion  
20   carries 3-0.

21          It seems to me that there is full agreement on  
22   the reroute and avoidance costs.

23          So I'll ask the Applicant, are there ways in  
24   which we need to change your suggested wording so that we  
25   make it crystal clear that rerouted avoidance costs would

1 not be borne by landowners?

2 MR. WHITE: I'll try. My thought, Mr. Chairman,  
3 was that the way the sentence is written in our suggested  
4 language, which has the term "at the expense of the  
5 landowner" in the middle of the page on page 9 of our  
6 Motion, we might all be better served by taking that "at  
7 the expense" phrase out and then crafting a new sentence  
8 which explicitly addresses cost responsibility in the  
9 various circumstances that can arise.

10 CHAIRMAN JOHNSON: And before we go there -- it  
11 may be that we need to go there. I mean, if the  
12 Commissioners -- if the Commissioners don't feel like the  
13 landowners should have either reroute expense or recovery  
14 expense, we may not need a rewrite.

15 So maybe we should open that conversation first  
16 and hear from each party. If a paleontological resource  
17 is uncovered, to whom should the costs of recovery fall?

18 Now and --

19 MR. WHITE: My thought would be the following:  
20 In the event of a reroute or mitigation of that sort --

21 CHAIRMAN JOHNSON: Let's focus just on direct  
22 recovery expenses of that resource.

23 MR. WHITE: Understand. Understand. So I think  
24 the determining factor ought to be at whose behest is the  
25 resource being excavated and salvaged. If it's a matter

1 of the Applicant's election or the Applicant's being  
2 directed by BLM or another governing agency to do salvage  
3 and excavation, that ought to be at the cost of the  
4 Applicant.

5 If, on the other hand, avoidance is an option  
6 but the landowner prefers or wants to have the resource  
7 salvaged, that ought to be at the election -- that out to  
8 be at the cost of the landowner.

9 CHAIRMAN JOHNSON: Dakota Rural Action.

10 MR. BLACKBURN: Well, the initial observation,  
11 since we're working with language, I would note that the  
12 Commission doesn't have any authority to control what the  
13 BLM does in this circumstance and by having the  
14 requirement that BLM has to accept the plan if it's  
15 reasonably acceptable to BLM is not something within the  
16 Commission's legal authority.

17 That being said, I don't fully understand what  
18 the Applicant is saying there. Because on the one hand  
19 they're saying that, you know, if there's an election  
20 between avoidance and recovery, that the landowner  
21 shouldn't be allowed to decide, you know, whether they  
22 prefer avoidance or recovery and that Applicant should be  
23 not allowed to make that decision all on their own, you  
24 know. And that's not -- I'm not sure that's exactly the  
25 issue here that's important.



1           But I think in terms of the broader question  
2 about who should pay for this, the landowners firmly and  
3 strongly believe that if fossils up to the point of the  
4 boundary with federal lands that TransCanada is required  
5 to pay for all mitigation costs, you know, including  
6 recovery of fossils on federal land.

7           As soon as they cross over to private land  
8 there's no obligation to pay the exact same costs, that  
9 that's not fair, and it's the same standard that applies  
10 on federal land for what TransCanada should pay for  
11 mitigation should simply apply on private land too.

12           CHAIRMAN JOHNSON: Are there Interveners or  
13 interested persons?

14           MR. LARSON: This is Pete Larson.

15           CHAIRMAN JOHNSON: Yes. Go ahead, Mr. Larson.

16           MR. LARSON: And I certainly agree with  
17 Mr. Blackburn. That cost should not be borne by the  
18 landowners. They aren't even the ones deciding and have  
19 no input on deciding what is to be salvaged or what is  
20 not, by the wording that has been put in the previous  
21 section. That's determined by the BLM paleontologist.

22           Now that BLM paleontologist is going to be very  
23 interested in the science, and they want to salvage the  
24 fossil at a great cost to the landowner where the  
25 landowner could never recover a penny from. And it seems

1 just insane that the landowner would have to pay for  
2 that.

3 CHAIRMAN JOHNSON: Okay. Thank you. Staff.

4 MS. SEMMLER: The one comment I will make is I  
5 don't think it's a fair comparison to compare what must  
6 happen on public property with what does happen on  
7 private property.

8 If there's a resource discovered on public  
9 property, it is all of ours. It is our resource. So,  
10 therefore, it makes sense that the public agency can  
11 force that excavation and that the Applicant must pay for  
12 it. There's a big distinction there, and I don't think  
13 we should muddy that -- the waters there.

14 CHAIRMAN JOHNSON: Questions or comments from  
15 Commissioners or advisors?

16 COMMISSIONER KOLBECK: I guess this goes back to  
17 Mr. Larson's comment. If -- no one can force a landowner  
18 to excavate, if it's not something where like burial  
19 grounds or archaeological. If it's paleontological -- I  
20 don't even know if that's a word.

21 But if it's a dinosaur, that does not fall under  
22 federal requirements and does not have to be excavated.  
23 If it's cultural and it's an Indian burial grounds or  
24 something to that effect, that has to be; correct?

25 Mr. Larson, is that under -- your understanding?

1           MR. LARSON: The BLM guidelines are very  
2 specific. And I think as long as we follow the BLM  
3 guidelines including the part where the proponent of the  
4 pipeline has to pay to -- bear the expenses, I think  
5 everybody's cool with that.

6           You know, we followed the BLM before, and I  
7 think it's a good standard to go by.

8           MR. BLACKBURN: And, Commissioner Kolbeck, if I  
9 could add, what you're asking, I believe, is whether they  
10 would be required to excavate a fossil or not.

11           And under this language, in fact, they would be  
12 required to excavate the fossil because it's only the BLM  
13 trained paleontologists who decide which fossils would be  
14 excavated and which would not.

15           And, as Mr. Larson said, you know, that is  
16 the -- the language here says they would decide what that  
17 would be. They would set up a plan, and they would  
18 consult with the landowners. But consult doesn't mean  
19 get a landowner's approval on whether or not that fossil  
20 should be excavated here.

21           So, in fact, here the BLM paleontologist could  
22 require excavation of a scientifically significant fossil  
23 on private land that then there was no economic benefit  
24 to the landowner to acquire. And that's what your  
25 language -- or the proposed language of the Applicant

1 says here. That's different from saying that under  
2 Section 106 for archaeological. That's a totally  
3 different situation, doesn't apply to this.

4 COMMISSIONER KOLBECK: Thank you.

5 CHAIRMAN JOHNSON: Yes, Commissioner. Go ahead.

6 COMMISSIONER HANSON: I would like to ask my  
7 legal counsel whether or not that's an accurate reading  
8 since we're talking about law there.

9 I'm going to ask actually Sarah -- Kara. Excuse  
10 me. Ms. Semmler, can a -- in this type of situation, an  
11 example, an excavation is taking place, a paleontologist  
12 is on site, and they say you have to excavate that?

13 MS. SEMMLER: That's not how I understand the  
14 language. How I understand it, that paleontologist on  
15 site would trigger the protections in the proposed  
16 language and what was previously just adopted.

17 That would trigger those protections which,  
18 therefore, would require the Applicant to properly  
19 mitigate, go around, whatever needs to happen from there.  
20 But I don't believe that person on site has the  
21 jurisdiction beyond what's in the language of the  
22 potential Order.

23 COMMISSIONER HANSON: Exactly. The Order just  
24 provides that they would have to reroute and if the  
25 landowner chose to do the excavation, then that's --

1 MS. SEMMLER: They can proceed. They can hire  
2 their own Staff and proceed.

3 COMMISSIONER HANSON: Okay. Thank you. Thank  
4 you, Mr. Chairman.

5 MR. LARSON: May I ask a question?

6 CHAIRMAN JOHNSON: Mr. Smith's in cue and then I  
7 am and then you, Mr. Larson.

8 MR. LARSON: Okay.

9 MR. SMITH: Well, I'm in cue. I don't really  
10 care, Mr. Larson. I'm sorry. I can't see you so I  
11 didn't know you were about to say something.

12 On this issue, though, of the BLM and even its  
13 procedures, Mr. Blackburn or Mr. Larson, whomever, and  
14 maybe Mr. Schmidt as well, on page 24 at the top of the  
15 page where it talks about costs --

16 MR. BLACKBURN: Page 24 of what, Mr. Smith?  
17 Sorry.

18 MR. SMITH: Of Dakota Rural Action's Answer --  
19 or Response.

20 And that doesn't -- I mean, I just don't read  
21 the language the way it's being presented. That says  
22 we'll pay all the costs directly related to mitigation of  
23 the project's anticipated impacts.

24 It doesn't say necessarily that a person has to  
25 perform excavation that's beyond what its construction

1 activities will directly impact. At least that's what  
2 the language seems to say.

3 MR. SCHMIDT: That's correct. And please note,  
4 as Kara has pointed out, on BLM they wrote their guidance  
5 in this manner, and it is a public find. All of these  
6 costs are to curate and put those resources in a museum,  
7 not for BLM to sell and fund their, you know, budget for  
8 the year.

9 They're public resources so the public has  
10 required that applicants that come on public land are  
11 responsible for, you know, getting this resource out of  
12 the footprint. As you just pointed out, it's just the  
13 footprint of the project. Nothing more. Nothing less.  
14 In this case it would be the trench. And putting it into  
15 curation and putting it into a museum.

16 MR. BLACKBURN: Mr. Smith, it's a little bit  
17 broader than that, but we're not contesting that issue  
18 directly impacted. BLM can go out a bit further than  
19 just the trench, if it would threaten or endanger the  
20 fossil.

21 That doesn't mean to say as a standard that  
22 would let them go anywhere within the right of way but  
23 it's a little bit broader than simply in the trench.  
24 But, you know, we haven't argued specifically that this  
25 should be much broader, but at the same time we are

1 talking about mostly direct impacts.

2 MR. SMITH: Okay. Well, that clarifies a lot  
3 for me. Thank you.

4 CHAIRMAN JOHNSON: This is Dusty Johnson. I  
5 understand all the discussion. I still feel as though --  
6 and I don't have it in front of me, but Mr. Blackburn's  
7 comments in the Brief about, you know, this was really  
8 foisted upon the landowner, this is not at the time or  
9 nature of their choosing to me does make a difference.

10 I will just say to my colleagues that I am  
11 probably most comfortable from having the Applicant pay  
12 for these recovery costs of uncovered finds. Before we  
13 go any further with any additional information or  
14 opinions, I guess I just thought I would gauge your  
15 thoughts on that.

16 COMMISSIONER KOLBECK: This is Commissioner  
17 Kolbeck. The only thing that I would want to clarify is  
18 that the landowner was given options. If the  
19 landowner -- if the --

20 The way I understand this is the pipeline is  
21 going to go one way. There was a paleontological find.  
22 Okay. If the landowner refuses or doesn't want the  
23 pipeline on any other part of their land and it needs to  
24 be excavated, TransCanada would want the landowner to pay  
25 for that.

1 Am I understanding correctly?

2 MR. WHITE: I think I understand your statement,  
3 and I think that that's a different way of saying what I  
4 was saying before, which is to the extent that we're  
5 directed by the agency to excavate, we bear the cost.

6 To the extent that the landowner is insistent  
7 upon excavation when there is another option available,  
8 that that would be at that landowner's cost.

9 COMMISSIONER KOLBECK: Would the option be the  
10 landowner's option, or would it be TransCanada's option?

11 MR. WHITE: If it's on private land and if the  
12 BLM permitted paleontologist who's engaged to direct the  
13 development of a plan in consultation with the landowner  
14 and with the company ultimately decide -- if that BLM  
15 permitted paleontologist ultimately decides that  
16 excavation is the proper mitigation, that would be at  
17 TransCanada's cost.

18 If there was, say, an open discussion and the  
19 BLM permitted paleontologist said excavation is one  
20 option, rerouting is another, and avoidance was a more  
21 beneficial mitigation methodology and yet the landowner  
22 wanted excavation, that would essentially be an election  
23 on his part, and that in our view ought to be at the  
24 landowner's cost.

25 It's probably an unlikely scenario.



1           COMMISSIONER KOLBECK: Thank you. And that's  
2 kind of what I was -- what my -- I understood the  
3 consequences. And I guess that leads me back to agree  
4 with Commissioner Johnson.

5           I mean, this is something that -- other than  
6 moving that pipeline, the alternate route would be off  
7 the landowner's property. I don't think that the  
8 landowner should have to bear that cost.

9           That pipeline's going to be on their land.  
10 Whether it be where the fossil is or where the fossil  
11 isn't, I think should be their decision. And if it's  
12 where the fossil is, I don't think they should bear the  
13 brunt of the cost.

14          CHAIRMAN JOHNSON: I think Mr. Smith indicated  
15 that he thinks perhaps I went a little far. So I'll give  
16 him an opportunity to add in his two cents, maybe  
17 redirect us a little more closely to where he thinks we  
18 should be headed.

19          MR. SMITH: Well, again, you know, I think the  
20 point -- I guess I think I think Mr. White, if you were  
21 listening to him, just did a pretty good job of  
22 explaining sort of what I think is probably reasonable,  
23 and that is --

24          And to me it's in complete accord with the BLM  
25 rule, which is being cited by DRA and Mr. Larson as the

1 basis for their position.

2 And, Mr. Blackburn, if I understood correctly,  
3 basically stated -- under the BLM -- I've got a bad mic  
4 here, you guys. I'm sorry.

5 But it's only the portion that the project is  
6 directly affecting that the project is responsible for.  
7 Which means if you make an accidental strike and --  
8 you've obviously already done something; right?

9 And that's kind of the way I wrote -- why I  
10 wrote my original language. To the extent that that  
11 original strike, the area you've already disturbed --

12 No. It's the mic. This is completely  
13 different.

14 To the extent that -- well, maybe not. To the  
15 extent that you have already disturbed something; right?  
16 To the extent of that disturbance and to the extent that  
17 disturbance could reasonably be said to threaten the  
18 resource beyond that, that, as I understand it, is your  
19 excavation and preservation obligation under that BLM  
20 regulation.

21 Is that correct?

22 MR. SCHMIDT: Yes, sir.

23 MR. BLACKBURN: I believe it's a little bit --  
24 it's somewhat broader than that because if a fossil, for  
25 example, is discovered by a preconstruction survey,

1     that's right in the way of the trenching and the trench  
2     can't be moved, for example, for topographical reasons,  
3     then, you know, in that case the fossil needs to be  
4     removed before any kind of construction excavation is  
5     started. So it's a little bit broader.

6             MR. SMITH: No. And I agree with that. But  
7     that's a situation where the election is being made by  
8     the project to continue and there -- the disturbance,  
9     both the direct disturbance and the peripheral associated  
10    affected area, is at the election of the project; right?  
11    That's at the election of the Applicant?

12            MR. SCHMIDT: That's correct.

13            MR. SMITH: This doesn't make the Applicant  
14    responsible for excavating things that the project would  
15    never have disturbed.

16            CHAIRMAN JOHNSON: Mr. Smith -- this is  
17    Dusty Johnson here -- I guess my interest is -- and I  
18    understand -- Ms. Semmler's point about public and  
19    private lands is well taken by me. I don't know that I  
20    care as much as I should about it.

21            I mean, I will tell you that I would want  
22    landowners to be treated the same way that the Federal  
23    Government would be treated.

24            Now if we need to nuance, you know, particular  
25    wording, or my understanding, I'm fine with that. As

1 long as you can tell me the landowner's not going to get  
2 treated any worse than the Federal Government, I'm okay  
3 with it.

4 MR. SMITH: Well, I think that's my point in  
5 asking these questions is there was an assumption here  
6 there's a dramatic difference in the way it works with  
7 the Federal Government.

8 I don't think there's any difference in terms of  
9 that, like we had in our first Order and what I think --  
10 as long as we get that language out of there, you know,  
11 that deals with at the landowner's cost that doesn't  
12 recognize those things that are as a result direct  
13 disturbance -- of disturbance and threatened due to the  
14 project and we don't go beyond that, I mean, that's all  
15 the protection the public gets.

16 CHAIRMAN JOHNSON: Well, and perhaps I'd feel  
17 more comfortable, you know, mimicking some of the wording  
18 that BLM operates under as opposed to the verbiage that  
19 Mr. White laid out.

20 It's not that I take great umbrage with his  
21 wording. I just feel like our safest ground is mimicking  
22 already established legal standards.

23 MR. SMITH: Yeah. I mean, I don't necessarily  
24 dispute that. Mr. White, Mr. Schmidt, do you have --  
25 and, again, the language I was looking at for the

1        comments I made -- and I don't think anyone said I'm  
2        wrong -- is the paragraph on the top of page 24.

3                And maybe there's more to it than that. If  
4        there is, that's fine.

5                CHAIRMAN JOHNSON: While they're looking at  
6        that, Mr. Blackburn, I mean, does Dakota Rural Action  
7        have any objection to treating landowners the same way  
8        that BLM is treated?

9                MR. BLACKBURN: No, we do not.

10               CHAIRMAN JOHNSON: Okay. Thank you.  
11        Mr. Larson, do you have any objection?

12               MR. LARSON: I would be very happy with that.

13               CHAIRMAN JOHNSON: Okay. Thank you.

14               MR. WHITE: So looking at the language on the  
15        top of 24, I guess we wouldn't have an objection to the  
16        language. This, as I understand it, relates to fossils  
17        that are then being curated and turned over to the museum  
18        pursuant to BLM requirements.

19               Would that also then apply in the case of  
20        excavated materials that are excavated at the cost of the  
21        project on private lands?

22               MR. SMITH: You mean, would it be turned over to  
23        the museum?

24               MR. WHITE: Yes.

25               MR. SMITH: No. Because in the other sections

1 of -- I think we've stated that to the extent the project  
2 elects to proceed with disturbance or to the extent you  
3 have had an accidental hit and you've already disturbed,  
4 the project would be responsible for the mitigation of  
5 that strike or any intended additional disturbance that  
6 could not be avoided. And for, you know, the -- for  
7 whatever is required to mitigate.

8 Now to the extent that it goes beyond that and  
9 additional excavation is at the election of somebody --  
10 of the landowner, then the landowner would bear that  
11 cost. But, no, it wouldn't be turned over to the museum.  
12 If it's on landowner property, it's his property.

13 MR. WHITE: Well, the reason I ask is the  
14 language also refers to curation costs.

15 CHAIRMAN JOHNSON: Then I would suggest the  
16 addition of "if applicable" behind that phrase. I mean,  
17 I would still want the Applicant to pay for those  
18 costs -- you know, BLM -- just because it gets turned  
19 over to the museum doesn't mean there isn't some value  
20 that accrues to BLM, to the museum, to humanity.

21 Just I would echo Mr. Smith, and I think the  
22 same rules apply even if it doesn't go to the museum.

23 Commissioner discussion on where we're headed?

24 COMMISSIONER KOLBECK: It's going exactly where  
25 I would want it to.

1           CHAIRMAN JOHNSON: I would move that instead of  
2 wording proposed by the Applicant, that we revise the  
3 Commission's Order to make it clear that the same legal  
4 framework that BLM operates under and the Applicant has  
5 to operate under on BLM lands would apply between the  
6 landowner and the Applicant.

7           Now I'm willing to give Mr. Smith an opportunity  
8 to properly wordsmith that. Obviously we'll all get to  
9 read the Order prior to us signing it.

10           Do you believe you have sufficient direction,  
11 Mr. Smith, to draft an Order?

12           MR. SMITH: I think so. I mean, this is a big  
13 enough deal too it would maybe not be totally ridiculous  
14 either that I would draft something and that it be  
15 circulated to the parties and come back to the Commission  
16 for the ability of everyone to look at exactly what we've  
17 come up with before we make a final vote on the finished  
18 product.

19           CHAIRMAN JOHNSON: Well, instead let's do this.  
20 I mean, I think everybody seems to have an understanding  
21 of where we're going.

22           Let's allow you to draft the Order. Let's  
23 instruct you to circulate to the parties. I believe  
24 you're going to do a good enough job of getting us to yes  
25 that it can come before the Commission, and we can

1 individually sign it. But, I mean, it's not unusual for  
2 us to give you specific direction with regard to  
3 drafting.

4 MR. SMITH: It is not. And I will do my best to  
5 do that. And let's just do that, and when we do the  
6 circulation -- and, again, this is just such a -- this is  
7 such an area that's beyond our normal area of dealings  
8 that, you know, some liberality, I think, on the parties  
9 to be able to react to what we do because of the  
10 contextual issues. For example, we're dealing with a  
11 huge set of BLM guidelines, et cetera. That might be  
12 appropriate.

13 CHAIRMAN JOHNSON: Let me put it this way. If  
14 during drafting Mr. Smith believes that he doesn't have  
15 proper specific direction from the Commission on this  
16 vote, does anyone object to him bringing it back for us  
17 for further clarification?

18 Okay. No Commissioner has indicated any  
19 objection to that.

20 So, with that, I would move -- I have a Motion.  
21 Any discussion on the Motion?

22 Hearing none, we'll proceed to vote.

23 Hanson.

24 COMMISSIONER HANSON: Aye.

25 CHAIRMAN JOHNSON: Kolbeck.



1 COMMISSIONER KOLBECK: Aye.

2 CHAIRMAN JOHNSON: Johnson votes aye. Motion  
3 carries 3-0.

4 I believe that that addresses the major issues  
5 identified in condition 44. Let's pause and see if any  
6 party wants other specific wording or issues -- I guess I  
7 should say this.

8 So my thought would be to accept all other  
9 changes suggested by the Applicant in condition 44. They  
10 made a number of other minor tweaks that were not  
11 objected to. Let's pause and see if there are problems  
12 that anyone wants to address.

13 MR. BLACKBURN: Thank you, Chairman Johnson.  
14 This is Paul Blackburn.

15 I have a list of bullet points. I'm not going  
16 to go through all of them. Actually I think that we are  
17 moving along through those bullet points.

18 Anyway but the last bullet point I have on  
19 page 26 is that the location for sensitive and valued  
20 resources be considered to be confidential. And to limit  
21 access by the public to that information to ensure that  
22 landowners have access to it.

23 Just because, you know, there are rock hounds.  
24 There are people who will come onto the land and steal  
25 valuable fossils. So I think it's just prudent that the

1 Commission have that, you know, resulting paleontological  
2 study confidential on private land.

3 CHAIRMAN JOHNSON: Good suggestion,  
4 Mr. Blackburn. Does the Applicant have any comments on  
5 that suggestion?

6 MR. KOENECKE: I don't know that it's -- we  
7 don't -- I don't think we disagree, I should say. We  
8 might come at it differently and have more of a  
9 requirement that we not tell somebody other than put a  
10 burden on us to maintain the confidentiality.

11 There will be a number of people who find out in  
12 the course of an event. We can't be responsible for all  
13 of them. If they're under our control, I think we can do  
14 that.

15 But if you see where I'm going with that,  
16 Commissioner.

17 CHAIRMAN JOHNSON: So wording like the Applicant  
18 will take appropriate steps to guarantee the  
19 confidentiality?

20 MR. KOENECKE: I think so.

21 CHAIRMAN JOHNSON: Okay. Is appropriate steps  
22 acceptable to you, Mr. Blackburn?

23 MR. BLACKBURN: Yes. Thank you.

24 CHAIRMAN JOHNSON: Okay. Any other Intervener  
25 or interested person wish to make comment on the DRA

1 suggestion?

2 Staff, any concerns?

3 MS. SEMMLER: No.

4 CHAIRMAN JOHNSON: Commissioner questions or  
5 comments?

6 Hearing none, is there a Motion?

7 COMMISSIONER KOLBECK: I'll Motion to accept  
8 DRA's Application of the treatment of the location of  
9 sensitive and valuable resources.

10 CHAIRMAN JOHNSON: With the wording we've --

11 COMMISSIONER KOLBECK: With the --

12 CHAIRMAN JOHNSON: Appropriate steps.

13 COMMISSIONER KOLBECK: Appropriate steps taken  
14 by the Applicant to maintain confidentiality.

15 CHAIRMAN JOHNSON: Motion has been made. Is  
16 there any discussion?

17 Hearing none, we'll proceed to vote.

18 Hanson.

19 COMMISSIONER HANSON: Aye.

20 CHAIRMAN JOHNSON: Kolbeck.

21 COMMISSIONER KOLBECK: Aye.

22 CHAIRMAN JOHNSON: Johnson votes aye. Motion  
23 carries 3-0.

24 Mr. Blackburn, did you have something else?

25 MR. BLACKBURN: No, Commissioner. Thank you.

1           CHAIRMAN JOHNSON: Thank you very much.

2           Mr. Larson, anything else?

3           MR. LARSON: Not at this time. Thank you.

4           CHAIRMAN JOHNSON: Mr. Harder, did you have  
5 something else on this issue?

6           MR. HARDER: No.

7           CHAIRMAN JOHNSON: Mr. Harder says no.

8           Staff, before we move along, any other concerns  
9 on condition 44?

10          MS. SEMMLER: No.

11          CHAIRMAN JOHNSON: Okay. I will move the  
12 Commission adopt the rest of the wording changes  
13 suggested by the Applicant.

14          Any discussion -- for condition 44.

15          Any discussion?

16          Hearing none, we'll proceed to vote.

17          Hanson.

18          COMMISSIONER HANSON: Aye.

19          CHAIRMAN JOHNSON: Kolbeck.

20          COMMISSIONER KOLBECK: Aye.

21          CHAIRMAN JOHNSON: Johnson votes aye. Motion  
22 carries 3-0.

23          With that, we will move to condition 45. This  
24 deals with damage liability.

25          Mr. Koenecke.

1           Mr. White.

2           MR. WHITE: I'm sorry. Our thought here was  
3 that because of the difficulties that we discussed  
4 previously about establishing economic viability for  
5 paleontological resources, we're concerned about calling  
6 that out as a specific item of liability.

7           As Staff mentioned in their Brief, we generally  
8 are liable for damages that are caused by us during  
9 construction. That would apply here. Frankly, if you  
10 want to keep the reference in to damages to paleo, we'll  
11 have to deal with valuation disputes if they arise,  
12 whether it's in the condition or not in the condition.

13          So I'm not too fussed about it. As long as it's  
14 clear that it's damage that's caused by Keystone during  
15 construction or salvage operations.

16          CHAIRMAN JOHNSON: Mr. Blackburn, Mr. Larson,  
17 other than stating that you would be opposed to the  
18 removal of that word, is there anything else that you  
19 would like to state?

20          MR. BLACKBURN: I'm sorry. Could you repeat  
21 your question. I didn't quite understand it.

22          CHAIRMAN JOHNSON: Now that I think about it, I  
23 don't think DRA addressed paragraph 45 in your Brief.

24          So let me just say does DRA have any comments on  
25 paragraph 45?

1           MR. BLACKBURN: We have comments. We  
2 incorporated them within the comments on 44. I think  
3 starts there. 44, 45. It's the last couple of  
4 paragraphs of our Briefs discussed it.

5           Our only comment is similar to what Applicant  
6 just said, which is that they're liable for destruction  
7 of personal property regardless of whether it's a fence  
8 or a road or a fossil and that leaving it in there  
9 doesn't make any difference.

10          Taking it out may not make any difference  
11 either, except that it could be implied by a court that  
12 it's no longer covered. But leaving it in there doesn't  
13 change the fact that -- their liability for that kind of  
14 damage.

15          And I think that -- so, you know, we would  
16 request that that language be kept in there. And we'd  
17 leave it at that for now.

18          CHAIRMAN JOHNSON: Thank you, Mr. Blackburn.  
19 Any other party?

20          MR. LARSON: Yes, this is Pete Larson again. I  
21 think I would agree with Mr. Blackburn to leave that  
22 language in.

23          And it is relatively easy to establish economic  
24 value and economic loss. There are people who actually  
25 appraised those situations that are actually certified

1 appraisers. So it's something easy to do, establish  
2 economic value or economic loss.

3 MR. BLACKBURN: If I may, Mr. Blackburn again,  
4 and, obviously, there are difficult valuations for lots  
5 of things related to the project, including, for example,  
6 loss of crops, which is certainly not a simple  
7 calculation, or loss to land value, certain kinds,  
8 certain ways, or other kind of economic injury.

9 You know, but that -- I think the fact that it  
10 may be some circumstances difficult to value, even as  
11 Mr. Larson says it usually isn't, the difficulty of  
12 valuing property doesn't mean there's no obligation to,  
13 in fact, pay for it.

14 CHAIRMAN JOHNSON: Okay. Thank you. Any other  
15 Intervener or interested person?

16 Hearing none, Staff.

17 MS. SEMMLER: Staff simply stands by what it had  
18 in its memo.

19 CHAIRMAN JOHNSON: Thank you. Commissioner  
20 questions or comments?

21 Hearing none, I would move that the Commission  
22 deny the request to change paragraph 45.

23 Any discussion on the pending Motion?

24 Hearing none, we'll proceed to vote.

25 Hanson.

1 COMMISSIONER HANSON: Aye.

2 CHAIRMAN JOHNSON: Kolbeck.

3 COMMISSIONER KOLBECK: Aye.

4 CHAIRMAN JOHNSON: Johnson votes aye. Motion  
5 carries 3-0.

6 I believe, Mr. Koenecke, Mr. White, that those  
7 were the -- we've addressed each of the issues or changes  
8 you requested.

9 (The proceedings concluded at 2:32 p.m.)

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1 STATE OF SOUTH DAKOTA )

2 :SS CERTIFICATE

3 COUNTY OF SULLY )

4

5 I, CHERI MCCOMSEY WITTLER, a Registered  
6 Professional Reporter, Certified Realtime Reporter and  
7 Notary Public in and for the State of South Dakota:

8 DO HEREBY CERTIFY that as the duly-appointed  
9 shorthand reporter, I took in shorthand the proceedings  
10 had in the above-entitled matter on the 4th day of May,  
11 2010, and that the attached is a true and correct  
12 transcription of the proceedings so taken.

13 Dated at Onida, South Dakota this 20th day  
14 of May, 2010.

15

16

17

18 Cheri McComsey Wittler,  
19 Notary Public and  
20 Registered Professional Reporter  
21 Certified Realtime Reporter

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24

25

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