

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

0-0

IN THE MATTER OF THE APPLICATION	:	
BY TRANSCANADA KEYSTONE	:	HP 14-001
PIPELINE, LP FOR A PERMIT UNDER	:	
THE SOUTH DAKOTA ENERGY	:	
CONVERSION AND TRANSMISSION	:	APPLICANT’S OPPOSITION TO
FACILITIES ACT TO CONSTRUCT THE	:	THE YANKTON SIOUX TRIBE’S
KEYSTONE XL PROJECT	:	MOTION TO DISMISS
	:	
	:	

0-0

The Yankton Sioux Tribe seeks dismissal of the petition filed by TransCanada Keystone Pipeline, LP (“Keystone”) asking that the Commission accept its certification under SDCL § 49-41B-27. For the following reasons, the Tribe’s motion is without merit.

1. The logic of the motion is contrary to the statute.

The logic of the Tribe’s motion is that any post-permit change to a project, whether in the project itself or in circumstances related to the project, nullifies the permit and requires that the project get a new permit from the Commission. The Tribe does not identify any specific changes that it says require dismissal and a new permit proceeding.

Instead, the Tribe contends, without explanation, either that *any* change requires a new

{01800222.1}

permit, or that *numerous* changes require a new permit. The Tribe cites no statute or regulation supporting its interpretation of SDCL § 49-41B-27.

The Tribe's argument is not logical. The certification statute itself presumes that there can be changes to a project or to the circumstances related to a project between the date of a permit and the date construction begins if that happens more than four years after the permit was issued. The logic of SDCL § 49-41B-27 is that because some things might have changed in four years, an entity that has been granted a permit must certify that the project continues to meet the conditions on which the permit was granted. If any change related to the project were sufficient to require a new permit, then the only circumstance in which SDCL § 49-41B-27 would apply would be if there had been no change of any kind in four years related to the project. That is not consistent with the plain language of the statute, and it is not consistent with the logic of the statute. The statute anticipates changes to the project, but is meant to ensure that changes do not prevent the project from meeting the conditions on which the permit was granted.

2. The permit conditions themselves presume changes after the date of the permit.

Many of the permit conditions themselves presume that there will be changes between the date of the permit and the date of the project's construction. For instance:

- Condition No. 6 recognizes that “Keystone will continue to develop route adjustments throughout the pre-construction design phase” and requires that Keystone “will file new aerial route maps that incorporate any such route adjustments prior to construction.”
- Condition No. 8 requires period reporting to the Commission until construction is completed, including notice of “design changes of a substantive nature.”
- Condition No. 12 requires that Keystone report to the Commission “the date construction will commence,” recognizing that a specific starting date was not a condition of the permit when it was granted.
- Condition No. 13 recognizes that Keystone may modify its Construction Mitigation and Reclamation Plan, and that “the CMR Plan as so modified shall be filed with the Commission.”
- Condition No. 15 requires that “[p]rior to construction,” Keystone must develop construction/reclamation units, and Condition No. 16(e) requires that “Keystone shall draft specific crop monitoring protocols for agricultural lands.”
- Condition No. No. 28 requires that “Keystone shall, prior to any construction, file with the Commission a list identifying private and new access roads” and a “description of methods used by Keystone to reclaim those access roads.”
- Condition No. 34 requires that Keystone continue to evaluate high consequence areas and before commencing operation, must identify and add to the Emergency Response Plan and Integrity Management Plan HCAs “whether currently marked on DOT’s HCA maps or not.”
- Condition No. 36 requires that before beginning operation Keystone prepare and file with PHMSA an emergency response plan and an integrity management program.

All of these conditions, which acknowledge that there will be changes and that there are things that Keystone must do in compliance with the permit that were not clearly defined or specified when the permit was issued, are inconsistent with the Tribe's motion.

3. The changes indicated in the tracking table do not affect Keystone's ability to meet the permit conditions or establish a "new" project.

The changes indicated in the tracking table attached as Appendix C do not reflect, as the Tribe contends, that this is a new project. By identifying these changes, Keystone is not making a "veiled attempt," as the Tribe suggests, to substitute a new project for the one for which it received a permit. Rather, the changes identified in the tracking table do not affect Keystone's ability to meet the permit conditions, which is the issue before the Commission based on Keystone's certification under SDCL § 49-41B-27. The Tribe's motion does not consider the particulars in Keystone's tracking table, but a review of the tracking table establishes that nothing significant has changed. The overall project remains the same.

Some of the changes reflect that portions of what had been considered the Keystone XL Pipeline Project in 2009, when the permit application was filed, have already been constructed. (Tracking Table, Finding Nos. 15-16.) In South Dakota, however, the project remains the same, although the length of the pipeline in South Dakota is now 315 rather than 314 miles, and the maximum operating pressure will be

1,307 psig instead of 1,440 psig. (*Id.* Nos. 16, 18.) The pipeline passes through the same counties and has the same number of pump stations, although there will now be 20 valve sites in South Dakota instead of 16, and there will be three to five pumps initially installed at each pump station, instead of three with the prospect of five if future demand warrants, as stated in the original application. (*Id.* No. 20.)

A significant number of the changes relate to the fact that Keystone is no longer seeking a Special Permit. Keystone withdrew its request for a Special Permit from PHMSA, and instead must comply with the special conditions developed by PHMSA as set forth in the Department of State 2014 Final Supplemental Environmental Impact Statement, Appendix Z. (*Id.* Nos. 22, 60-62, 90, 107.) Keystone will present evidence that this change in federal permit requirements strengthens its ability to meet the permit conditions in South Dakota. These changes do not establish a different project than the one that was permitted.

Finding Nos. 24-29 indicate that there have been global changes in demand for crude oil since 2009, but market demand for the project remains strong, and the changes in demand do not affect Keystone's ability to meet the permit conditions. The changes in market conditions do not in any way establish that the proposed Keystone XL Pipeline constitutes a different project than was permitted.

With respect to environmental findings, Keystone has updated its CMR Plan (*id.* No. 32) as specifically contemplated in the permit conditions. (Condition No. 13.) Similarly, Keystone will update the soil type maps and aerial photograph maps as required by Condition No. 6. (Finding No. 33.) The pipeline will not cross any additional streams or rivers, but two additional rivers, the Bad River and Bridger Creek, will be crossed utilizing horizontal directional drilling rather than an open-cut crossing. (*Id.* Nos. 41, 83.) The total length of pipe with the potential to affect a High Consequence Area has decreased from 34.3 miles to 19.9 miles. (*Id.* No. 50.) These changes do not establish a different project than the one that was permitted.

Nothing in the tracking table of changes, which the Tribe's motion does not address in any detail, establishes that Keystone is attempting through its certification to accomplish some sort of "bait and switch," substituting a different project for the one that was permitted. The factual basis for the Tribe's motion is therefore directly contradicted by Keystone's earlier submission.

4. The permit has not expired.

The language of SDCL § 49-41B-27 does not indicate that a project permit expires if construction has not started within four years after the permit was granted. As Commissioner Hanson noted at the last hearing, this is not a new permit proceeding. The statute does not require that Keystone start over to secure a new permit or that it again

meet the burden of proof stated in SDCL § 49-41B-22. Ordering dismissal in this case based on the sort of changes indicated in Keystone's tracking table would be no different than holding that the permit has expired.

5. No authority supports the motion.

The Tribe cites two cases in its motion, but the case law addresses procedural issues. The Tribe cites no case law, no statute, and no regulation supporting its unique interpretation of SDCL § 49-41B-27.

Conclusion

The Tribe's motion is illogical, not consistent with the statute or the facts presented in Keystone's petition under SDCL § 49-41B-27, and not supported by any authority. Keystone respectfully requests that the motion be denied.

Dated this 29th day of December, 2014.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ James E. Moore

William Taylor

James E. Moore

PO Box 5027

300 South Phillips Avenue, Suite 300

Sioux Falls, SD 57117-5027

Phone (605) 336-3890

Fax (605) 339-3357

Email james.moore@woodsfuller.com

bill.taylor@woodsfuller.com

Attorneys for Applicant TransCanada

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of December, 2014, I sent by United States first-class mail, postage prepaid, or e-mail transmission, a true and correct copy of Applicant's Opposition to the Yankton Sioux Tribe's Motion to Dismiss, to the following:

Patricia Van Gerpen
Executive Director
South Dakota Public Utilities Commission
500 E. Capitol Avenue
Pierre, SD 57501
patty.vangerpen@state.sd.us

Kristen Edwards
Staff Attorney
South Dakota Public Utilities Commission
500 E. Capitol Avenue
Pierre, SD 57501
kristen.edwards@state.sd.us

Brian Rounds
Staff Analyst
South Dakota Public Utilities Commission
500 E. Capitol Avenue
Pierre, SD 57501
brian.rounds@state.sd.us

Darren Kearney
Staff Analyst South Dakota Public
Utilities Commission
500 E. Capitol Avenue
Pierre, SD 57501
darren.kearney@state.sd.us

Tony Rogers, Director
Rosebud Sioux Tribe - Tribal Utility
Commission
153 South Main Street
Mission, SD 57555
tuc@rosebudsiouxtribe-nsn.gov

Cindy Myers, R.N.
PO Box 104
Stuart, NE 68780
csmyers77@hotmail.com

Jane Kleeb
1010 North Denver Avenue
Hastings, NE 68901
jane@boldnebraska.org

Byron T. Steskal
Diana L. Steskal
707 E. 2nd Street
Stuart, NE 68780
prairierose@nntc.net

Terry Frisch
Cheryl Frisch
47591 875th Road
Atkinson, NE 68713
tcfrisch@q.com

Lewis GrassRope
PO Box 61
Lower Brule, SD 57548
wisestar8@msn.com

Robert G. Allpress
46165 Badger Road
Naper, NE 68755
bobandnan2008@hotmail.com

Amy Schaffer
PO Box 114
Louisville, NE 68037
amyannschafter@gmail.com

Benjamin D. Gotschall
6505 W. Davey Road
Raymond, NE 68428
ben@boldnebraska.org

Elizabeth Lone Eagle
PO Box 160
Howes, SD 57748
bethcbest@gmail.com

John H. Harter
28125 307th Avenue
Winner, SD 57580
johnharter11@yahoo.com

Arthur R. Tanderup
52343 857th Road
Neligh, NE 68756
atanderu@gmail.com

Carolyn P. Smith
305 N. 3rd Street
Plainview, NE 68769
peachie_1234@yahoo.com

Jeff Jensen
14376 Laflin Road
Newell, SD 57760
jensen@sdplains.com

Louis T. (Tom) Genung
902 E. 7th Street
Hastings, NE 68901
tg64152@windstream.net

Nancy Hildring
6300 West Elm
Black Hawk, SD 57718
nhilshat@rapidnet.com

Paul F. Seamans
27893 249th Street
Draper, SD 57531
jacknife@goldenwest.net

Viola Waln
PO Box 937
Rosebud, SD 57570
walnranh@goldenwest.net

Peter Capossela
Peter Capossela, P.C.
Representing Standing Rock Sioux Tribe
PO Box 10643
Eugene, OR 97440
pcapossela@nu-world.com

Chris Hesla
South Dakota Wildlife Federation
PO Box 7075
Pierre, SD 57501
sdwf@mncomm.com

Jerry P. Jones
22584 US Hwy 14
Midland, SD 57552

Debbie J. Trapp
24952 US Hwy 14
Midland, SD 57552
mtdt@goldenwest.net

Douglas Hayes
Sierra Club
1650 38th St., Suite 102W
Boulder, CO 80301
doug.hayes@sierraclub.org

Duncan Meisel
350.org
20 Jay St., #1010
Brooklyn, NY 11201
duncan@350.org

Wrexie Lainson Bardaglio
9748 Arden Road
Trumansburg, NY 14886
wrexie.bardaglio@gmail.com

Harold C. Frazier
Chairman, Cheyenne River Sioux Tribe
PO Box 590
Eagle Butte, SD 57625
haroldefrazier@yahoo.com
mailto:kevinckeckler@yahoo.com

Cody Jones
21648 US Hwy 14/63
Midland, SD 57552

Gena M. Parkhurst
2825 Minnewsta Place
Rapid City, SD 57702
GMP66@hotmail.com

Joye Braun
PO Box 484
Eagle Butte, SD 57625
jmbraun57625@gmail.com

The Yankton Sioux Tribe
Robert Flying Hawk, Chairman
PO Box 1153
Wagner, SD 57380
robertflyinghawk@gmail.com
Thomasina Real Bird
Attorney for Yankton Sioux Tribe
trealbird@ndnlaw.com

Bruce Ellison
Attorney for Dakota Rural Action
518 6th Street #6
Rapid City, SD 57701
belli4law@aol.com

RoxAnn Boettcher
Boettcher Organics
86061 Edgewater Avenue
Bassett, NE 68714
boettcherann@abbnebraska.com

Bonny Kilmurry
47798 888 Road
Atkinson, NE 68713
jackiekilmurry@yahoo.com

Robert P. Gough, Secretary
Intertribal Council on Utility Policy
PO Box 25
Rosebud, SD 57570
bobgough@intertribalCOUP.org

Dallas Goldtooth
38731 Res Hwy 1
Morton, MN 56270
goldtoothdallas@gmail.com

Cyril Scott, President
Rosebud Sioux Tribe
PO Box 430
Rosebud, SD 57570
cscott@gwtc.net
ejantoine@hotmail.com

Chastity Jewett
1321 Woodridge Drive
Rapid City, SD 57701
chasjewett@gmail.com

Bruce Boettcher
Boettcher Organics
86061 Edgewater Avenue
Bassett, NE 68714
boettcherann@abbnebraska.com

Ronald Fees
17401 Fox Ridge Road
Opal, SD 57758

Tom BK Goldtooth
Indigenous Environmental Network (IEN)
PO Box 485
Bemidji, MN 56619
ien@igc.org

Gary F. Dorr
27853 292nd
Winner, SD 57580
gfdorr@gmail.com

Paula Antoine
Sicangu Oyate Land Office Coordinator
Rosebud Sioux Tribe
PO Box 658
Rosebud, SD 57570
wopila@gwtc.net
paula.antoine@rosebudsiouxtribe-nsn.gov

Thomasina Real Bird
Representing Yankton Sioux Tribe
Fredericks Peebles & Morgan LLP
1900 Plaza Dr.
Louisville, CO 80027
trealbird@ndnlaw.com

Frank James
Dakota Rural Action
PO Box 549
Brookings, SD 57006
fejames@dakotarural.org

Tracey A. Zephier
Attorney for Cheyenne River Sioux Tribe
Fredericks Peebles & Morgan LLP
910 5th Street, Suite 104
Rapid City, SD 57701
tzephier@ndnlaw.com

Matthew Rappold
Rappold Law Office
on behalf of Rosebud Sioux Tribe
PO Box 873
Rapid City, SD 57709
matt.rappold01@gmail.com

Kimberly E. Craven
3560 Catalpa Way
Boulder, CO 80304
kimecraven@gmail.com

Sabrina King
Dakota Rural Action
518 Sixth Street, #6
Rapid City, SD 57701
sabinra@dakotarural.org

Robin S. Martinez
Dakota Rural Action
Martinez Madrigal & Machicao, LLC
616 West 26th Street
Kansas City, MO 64108
robin.martinez@martinezlaw.net

Paul C. Blackburn
4145 20th Avenue South
Minneapolis, MN 55407
paul@paulblackburn.net

April D. McCart
Representing Dakota Rural Action
Certified Paralegal
Martinez Madrigal & Machicao, LLC
616 W. 26th Street
Kansas City, MO 64108
april.mccart@martinezlaw.net

Joy Lashley
Administrative Assistant
SD Public Utilities Commission
joy.lashley@state.sd.us

Case Number: HP 14-001

Name of Document: Applicant's Opposition to the Yankton Sioux Tribe's Motion to Dismiss

Mary Turgeon Wynne
Rosebud Sioux Tribe - Tribal Utility
Commission
153 S. Main Street
Mission, SD 57555
tuc@rosebudsiouxtribe-nsn.gov

Eric Antoine
Rosebud Sioux Tribe
PO Box 430
Rosebud, SD 57570
ejantoine@hotmail.com

/s/ James E. Moore
One of the attorneys for TransCanada