

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

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

ROSEBUD SIOUX TRIBE'S  
MEMORANDUM IN SUPPORT  
OF MOTION TO AMEND  
PROCEDURAL SCHEDULE

HP14-001

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The Rosebud Sioux Tribe, having submitted its Motion to Amend Procedural Schedule with the Public Utilities Commission on March 25, 2015 and the Commission having found that good cause exists to address the motion without requiring 10 day notice pursuant to ARSD 20:10:01:22.02 and the Commission further scheduling the requests put forth in the Motion for hearing at its regularly scheduled meeting on March 31, 2015, accordingly Rosebud hereby submits its Memorandum of Law in Support of Motion to Amend Procedural Schedule.

Procedural History

Rosebud refers to the procedural record on file with the Commission regarding this matter as maintained on the Commissions website at <https://puc.sd.gov/Dockets/HydrocarbonPipeline/2014/hp14-001.aspx> without need to restate the same.

Issue

The Motion specifically challenged the adequacy of the time permitted between March 10, 2015 "Responses to Final Discovery Served" and April 2, 2015 "Pre-filed direct testimony filed and served" to allow a meaningful period to respond, object, review and resolve discovery disputes arising from the discovery process prior to filing pre-filed direct testimony in a manner that is consistent with traditional notions of due process. The Motion asserts that this time period is not adequate for these purposes and the Order requiring direct testimony to be filed prior to the

resolution of discovery disputes is in violation of the Due Process rights protected under the Constitution and laws of the State of South Dakota and the United States.

### Argument

The matter before the Commission is considered a contested case under SDCL 1-26-1(2). Due process protections are required in contested cases pursuant to the Administrative Procedure Act. The South Dakota Supreme Court examined the meaning and application of the concept of due process in contested cases in, *In the Matter of the Application of Union Carbide Corporation for an Exploration Permit in Craven Canyon vs. South Dakota State Conservation Commission*, 308, N.W. 2d 753 (1981), when it found [t]he phrase “required by law”, found in SDCL 1-26-1(2), which establishes when the contested case hearing is necessary, includes constitutional requirements of fair play, due process and agency rules” citing *Valley Bank of Canton v. Farmers State Bank*, 87 S.D. 614, 621 (1973). The court in *Union Carbide* went on to say that “the requirements of the law then are that where there are adverse parties they are accorded procedural rights that are consistent with due process. The Constitutional guarantee applies to and must be observed in administrative as well as judicial proceedings.” *Union Carbide* at 758.

The *Union Carbide* Court further examined the SDAPA by looking at SDCL 1-26-18, stating: [T]he very terms of SDAPA, SDCL 1-26-18, provides that “opportunity shall be afforded all parties to respond and present evidence on issues of fact and argument on issues of law or policy. A party to a contested case proceeding may appear in person or by counsel, or both, may be present during the giving of all evidence, may have reasonable opportunity to inspect all documentary evidence, may examine and cross examine all witnesses, may present evidence in support of his interest and may have subpoenas issued to compel attendance of

witnesses and production of evidence in his behalf.” *Id* at 758. The Court held that “a party thereto is entitled to due process.” *Id* at 758.

ARSD 20:10:01:01.2 requires the Commission to “use the rules of civil procedure as used in the circuit courts of the state in its proceedings”. Accordingly, SDCL 15-6 applies in its entirety to this proceeding. Consistent with the Rules of Civil Procedure the commission has ordered discovery to take place in this case. The scheduling order results in requiring the Rosebud Sioux Tribe to submit pre-filed direct testimony prior to discovery actually being completed. The Standing Rock Sioux Tribe acknowledges similar discovery concerns in its March 27, 2015 Motion to Amend Order Setting Procedural Schedule.

Discovery is “the pre-trial process by which each party ascertains evidence the other party will rely upon at trial.” American Bar Association [http://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/glossary/glossary\\_d.html#discovery](http://www.americanbar.org/groups/public_education/resources/law_related_education_network/glossary/glossary_d.html#discovery) . There are many manners by which parties may engage in discovery including interrogatories, request for production of documents, depositions and request for admissions to identify a few.

The relief requested allows for a logical result – that testimony is filed and served following the actual close of discovery. Discovery should be considered closed when all motions are ruled on and all information required to be provided has actually been provided. Ideally, the date to file and serve pre-filed direct testimony would be reflective of due process considerations by permitting meaningful time to review all materials obtained through discovery. There is no dispute that discovery is not yet complete between the Rosebud Sioux Tribe and Keystone. Keystone and the Rosebud Sioux Tribe are engaged in continuing good faith attempts to resolve these disputes as contemplated by the rules of civil procedure. Clearly, the period

provided for discovery is not sufficient to actually complete discovery. It would be illogical to require the testimony to be submitted prior to the time that discovery is completed.

Constitutional due process considerations do not dictate how the Commission establishes its rules, but rather it addresses how they apply those rules once adopted. Even though due process will tolerate procedural variances from jurisdiction to jurisdiction that are “appropriate to the nature of the case”, *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 301 (1950), it is still possible to identify the core requirements and goals of due process.

Some of those core requirements and goals of due process in a contested case such as this are embodied in law at SDCL 1-26-18 ( the right to appear in person or by counsel, or both, to be present during the giving of all evidence, having the reasonable opportunity to inspect all documentary evidence, examining and cross examining all witnesses, presenting evidence in support of his interest and having subpoenas issued to compel attendance of witnesses and the production of evidence in his behalf) and at SDCL 15-6-26 through 37 (Discovery) and ARSD 20:10:01:01.2 (use of the rules of civil procedure), ARSD 20:10:01:15 (Opportunity for hearing), ARSD 20:10:01:22.02 (Notice of hearing) and ARSD 20:10:01:34 (Petition for declaratory ruling).

A complete discovery period that provides ample time for the parties to meaningfully respond to, review, object, resolve concerns and file appropriate motions related to discovery prior to filing pre-filed testimony is required in order to ensure that constitutional due process protections are afforded to all parties. A schedule that allows for a process that is consistent with fundamental notions of fair play and justice will ultimately assist the Commission in reaching a decision on the merits of TransCanada’s Petition for Certification.

Additionally, it is worthy to note at this time that there are other discovery related motions pending before the Commission. Standing Rock Sioux Tribe's Motion to Amend Order Setting Procedural Schedule has also been scheduled for March 31, 2014 along with the Staff's Motion to Amend Procedural Schedule. Keystone's Motion to Preclude Certain Interveners from Offering Evidence or Witnesses at Hearing and Motion to Compel (both seeking an order overruling Yankton Sioux Tribe's objections to Keystone's Discovery Requests and to order one intervener to disclose additional expert witness information) and Standing Rock Sioux Tribe's Motion for Discovery Sanctions or to Compel against Keystone are scheduled for hearing on April 14, 2015. To date, no parties have responded to any of these motions.

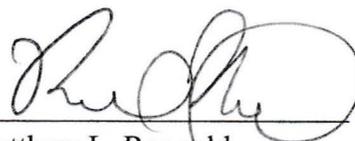
As the Commission is aware, these motions are on the Commission's agenda for hearing scheduled April 14, 2015 and will not be resolved until after the date to file pre-filed testimony has passed. All of the motions directly relate to each of the parties ability to file testimony and basis of that testimony; including the applicant.

#### Conclusion

Enforcement of the schedule as it stands currently would mandate an illogical result that offends constitutionally protected notions and concepts of due process, fundamental fairness and fair play. Based on the foregoing, the Rosebud Sioux Tribe requests the Commission to amend the Scheduling Order to include a date certain that allows the parties to resolve discovery disputes consistent with the Rules of Civil Procedure and to re-schedule the date to file and serve direct testimony which is consistent with constitutionally mandated due process requirements.

Dated this 28<sup>th</sup> day of March, 2015.

RESPECTFULLY SUBMITTED:



Matthew L. Rappold

Rappold Law Office

816 Sixth Street

PO Box 873

Rapid City, SD 57709

(605) 828-1680

[Matt.rappold01@gmail.com](mailto:Matt.rappold01@gmail.com)

CERTIFICATE OF SERVICE

I certify that on this 28<sup>th</sup> day of March, 2014, the original of this Memorandum of Law in Support of Motion to Amend Procedural Schedule on behalf of the Rosebud Sioux Tribe in Case Number HP-14-001 was filed on the Public Utilities Commission of the State of South Dakota e-filing website and also that on this day and a true and correct copy was sent via email and/or U.S. Mail first class postage prepaid to the following persons, as designated:

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

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

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

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

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

(605) 336-3890 - voice  
(605) 339-3357 - fax

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

Mr. Paul F. Seamans  
27893 249th St.  
Draper, SD 57531  
[jacknife@goldenwest.net](mailto:jacknife@goldenwest.net)  
(605) 669-2777 - voice

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

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

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

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

Ms. Jane Kleeb  
Bold Nebraska

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

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

Mr. Byron T. Steskal & Ms. Diana L. Steskal  
707 E. 2nd St.  
Stuart NE 68780  
[prairierose@nntc.net](mailto:prairierose@nntc.net)  
(402) 924-3186 - voice

Ms. Cindy Myers, R.N.  
PO Box 104  
Stuart, NE 68780  
[csmyers77@hotmail.com](mailto:csmyers77@hotmail.com)  
(402) 709-2920 - voice

Mr. Arthur R. Tanderup  
52343 857th Rd.  
Neligh, NE 68756  
[atanderu@gmail.com](mailto:atanderu@gmail.com)  
(402) 278-0942 - voice

Mr. Lewis GrassRope  
PO Box 61  
Lower Brule, SD 57548  
[wisestar8@msn.com](mailto:wisestar8@msn.com)  
(605) 208-0606 - voice

Ms. Carolyn P. Smith  
305 N. 3rd St.  
Plainview, NE 68769  
[peachie\\_1234@yahoo.com](mailto:peachie_1234@yahoo.com)  
(402) 582-4708 - voice

Mr. Robert G. Allpress  
46165 Badger Rd.  
Naper, NE 68755

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

(402) 832-5298 - voice

Mr. Jeff Jensen

14376 Laflin Rd.

Newell, SD 57760

[jensen@sdplains.com](mailto:jensen@sdplains.com)

(605) 866-4486 - voice

Mr. Louis T. Genung

902 E. 7th St.

Hastings, NE 68901

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

(402) 984-7548 - voice

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

Attorney at Law

PO Box 10643

Eugene, OR 97440

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

(541) 505-4883 - voice

Ms. Nancy Hilding

6300 W. Elm

Black Hawk, SD 57718

[nhilshat@rapidnet.com](mailto:nhilshat@rapidnet.com)

(605) 787-6779 - voice

Mr. Gary F. Dorr

27853 292nd

Winner, SD 57580

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

(605) 828-8391 - voice

Mr. Bruce & Ms. RoxAnn Boettcher

Boettcher Organics

86061 Edgewater Ave.

Bassett, NE 68714

[boettcherann@abbnebraska.com](mailto:boettcherann@abbnebraska.com)

(402) 244-5348 - voice

Ms. Wrexie Lainson Bardaglio

9748 Arden Rd.

Trumansburg, NY 14886

[wrexie.bardaglio@gmail.com](mailto:wrexie.bardaglio@gmail.com)

(607) 229-8819 - voice

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

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

Ms. Paula Antoine  
Sicangu Oyate Land Office Coordinator  
Rosebud Sioux Tribe  
PO Box 658  
Rosebud, SD 57570  
[wopila@gwtc.net](mailto:wopila@gwtc.net)  
[paula.antoine@rosebudsiouxtribe-nsn.gov](mailto:paula.antoine@rosebudsiouxtribe-nsn.gov)  
(605) 747-4225 - voice

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Ronald Fees  
17401 Fox Ridge Rd.

Opal, SD 57758  
(605) 748-2422 - voice

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

Mr. Robert P. Gough  
Secretary  
Intertribal Council on Utility Policy  
PO Box 25  
Rosebud, SD 57570  
[bobgough@intertribalCOUP.org](mailto:bobgough@intertribalCOUP.org)  
(605) 441-8316 - voice

Mr. Terry & Cheryl Frisch  
47591 875th Rd.  
Atkinson, NE 68713  
[tcfrisch@q.com](mailto:tcfrisch@q.com)  
(402) 925-2656 - voice

Ms. Tracey Zephier - Representing: Cheyenne River Sioux Tribe  
Fredericks Peebles & Morgan LLP  
Ste. 104  
910 5th St.  
Rapid City, SD 57701  
[tzephier@ndnlaw.com](mailto:tzephier@ndnlaw.com)  
(605) 791-1515 - voice

Mr. Robin S. Martinez - Representing: Dakota Rural Action  
Martinez Madrigal & Machicao, LLC  
616 W. 26th St.  
Kansas City, MO 64108  
[robin.martinez@martinezlawn.net](mailto:robin.martinez@martinezlawn.net)

Ms. Mary Turgeon Wynne, Esq.  
Rosebud Sioux Tribe - Tribal Utility Commission  
153 S. Main St  
Mission, SD 57555  
[tuc@rosebudsiouxtribe-nsn.gov](mailto:tuc@rosebudsiouxtribe-nsn.gov)  
(605) 856-2727 - voice

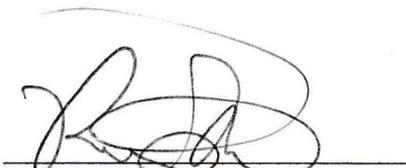
Mr. Matthew L. Rappold - Representing: Rosebud Sioux Tribe  
Rappold Law Office

816 Sixth St.  
PO Box 873  
Rapid City, SD 57709  
[Matt.rappold01@gmail.com](mailto:Matt.rappold01@gmail.com)  
(605) 828-1680 - voice

Ms. April D. McCart - Representing: Dakota Rural Action  
Certified Paralegal  
Martinez Madrigal & Machicao, LLC  
616 W. 26th St.  
Kansas City, MO 64108  
[april.mccart@martinezlawn.net](mailto:april.mccart@martinezlawn.net)  
(816) 415-9503 - voice

Mr. Paul C. Blackburn - Representing: Bold Nebraska  
Attorney  
4145 20th Ave. South  
Minneapolis, MN 55407  
[paul@paulblackburn.net](mailto:paul@paulblackburn.net)  
(612) 599-5568 - voice

Ms. Kimberly E. Craven - Representing: Indigenous Environmental Network (IEN)  
Attorney  
3560 Catalpa Way  
Boulder, CO 80304  
[kimecraven@gmail.com](mailto:kimecraven@gmail.com)  
(303) 494-1974 - voice



Matthew L. Rappold