

1 TRANSCRIPT OF PROCEEDINGS, held in the
2 above-entitled matter, at the South Dakota State Capitol
3 Building, Room 414, 500 East Capitol Avenue, Pierre,
4 South Dakota, on the 27th day of July, 2015.

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1 CHAIRMAN NELSON: One additional housekeeping
2 item. Very important. Whoever is going to be speaking,
3 please make sure you identify yourself by name prior to
4 speaking so that our court reporter can accurately
5 attribute your comments.

6 Late Friday we had two Motions to Reconsider by
7 Standing Rock Sioux Tribe. The first is a Motion to
8 Reconsider Order Granting Motion in Limine to Preclude
9 Kevin E. Cahill, Ph.D.

10 Mr. Capossela, you're on.

11 MR. CAPOSSELA: Thank you, Mr. Chairman,
12 Commissioner Hanson. I'm presuming it's acceptable to
13 sit at the table?

14 CHAIRMAN NELSON: Absolutely.

15 MR. CAPOSSELA: Thank you. And thank you for
16 scheduling our hearing on the Motions for Reconsideration
17 so we can get them adjudicated prior to the evidentiary
18 hearing.

19 The Commission obviously has a great deal of
20 discretion in managing and orchestrating hearings before
21 you and proceedings before you. The South Dakota Law
22 still applies, and in particular the Administrative
23 Procedures Act. The Commission's regulations
24 cross-reference the APA as the proper procedures for the
25 conduct of the hearing.

1 And Section 18 of the APA reads, briefly,
2 "Opportunity shall be afforded to all parties to respond
3 and present evidence on issues of fact." So there is a
4 right for participants in this process to testify.

5 Now obviously that right is qualified by the
6 Rules of Evidence. With respect to relevance, the Rules
7 of Evidence are fairly lenient, in particular with
8 respect to expert testimony.

9 And the historic barriers to expert opinion
10 testimony have been removed by the modern Rules of
11 Evidence that we operate under today.

12 The right of an Intervenor to testify is an
13 important right under South Dakota Law. Now three
14 witness -- Standing Rock proffered witnesses, were
15 challenged by TransCanada. Linda Black Elk, Dr. Linda
16 Black Elk, as well as Cahill and Waste Win Young, who is
17 the Tribal Historic Preservation Officer.

18 We did not file for reconsideration for
19 Ms. Black Elk because, as the Commission ruled, there was
20 a little bit of a technical -- their prefiled testimony
21 that -- the Q and A to establish the foundation was not
22 included in that. And we take responsibility for that,
23 and we did not ask for reconsideration of that.

24 The rules matter. South Dakota Law matters.
25 Standing Rock Sioux Tribe has tried earnestly to follow

1 the rules in this proceeding throughout.

2 Moreover, we didn't file anything pretrial to
3 exclude any of the witness testimony of either
4 TransCanada or the staff or any other party. We're ready
5 to go to hearing, and I think the Commission at this
6 point in the proceeding is ready to hear the testimonies
7 and concerns of South Dakotans and South Dakota Tribes.
8 And really that's all we're asking.

9 The rules of relevancy are fairly lenient
10 because of all the other procedural protections that are
11 included in the Rules of Evidence in the Administrative
12 Procedures Act. If Ms. Young or Dr. Cahill is permitted
13 to testify, TransCanada and any other party will have
14 every opportunity to cross-examine, to question, to
15 challenge anything they say that may not be admissible
16 evidence.

17 So the balance that's struck under South Dakota
18 Law is not to wholesale exclude witness testimony of
19 Intervenors that have followed the rules from the start.
20 The bounds that state law has established enables the
21 Commission to hear all the evidence that will be helpful
22 in reaching a decision. And if in the presentation of
23 that evidence something gets said or something gets
24 proffered that violates the rules, the counsel for the
25 parties can address that at the time.

1 And that's the way that the system is meant to
2 work. Not, as kind of TransCanada suggested in their
3 motion, to wholesale remove witnesses from the ledger of
4 Intervenors that have participated in this process
5 earnestly and in compliance with the rules from the
6 start.

7 It would be a difficult message for the public,
8 for the Indian Tribes, to come in here and try to do the
9 right thing from the get-go. Staff counsel, Commission
10 may not always agree with the testimony and arguments
11 that the Tribes or others present but we do have a right
12 to present those arguments and we're trying to do it
13 earnestly and in compliance with the law.

14 With respect to Dr. Cahill's testimony, I
15 respectfully submit that the proper test of rebuttal
16 testimony was not looked at sufficiently in the original
17 motion. That's why we asked for the reconsideration.

18 Rebuttal testimony need not fit perfectly into
19 an Amended Condition or Finding of Fact. What it needs
20 to do is be within the purview of some direct testimony
21 and to rebut that and provide reasons and not go too far
22 afield from that. And Cahill's prefiled rebuttal
23 testimony and expert report meets that test. It fits
24 that.

25 It quotes prefiled testimony proffered by staff

1 with respect to the efficacy of the Final Supplemental
2 Environmental Impact Statement of the State Department.
3 Testimony was proffered that those environmental review
4 reports sufficiently protect South Dakota's resources.

5 Dr. Cahill's testimony challenged that
6 conclusion and explained why that challenge may be
7 meritorious in the expert's opinion. But it's clearly
8 within the purview of prefiled testimony offered by
9 staff, and so it meets that test of relevancy not because
10 it discusses at length any Amended Condition but because
11 it discusses at length the contents of prefiled testimony
12 of staff. And for that reason it's relevant testimony.

13 Under South Dakota Law the Supreme Court has
14 articulated the lenient -- the comparatively liberal
15 standard for admissible testimony of expert witnesses,
16 and Cahill's prefiled testimony meets that standard. And
17 the Commission is obligated -- the Commission has
18 discretion to run this proceeding, obviously, but it is
19 obligated to follow South Dakota Law.

20 And when you look at Section 18 of the APA,
21 given the right of Intervenors, the right of participants
22 in a hearing to testify, and the contents of Cahill's
23 prefiled testimony directly addressing points that were
24 made by staff and in some respects by TransCanada also
25 but the expert report more directly addresses contentions

1 made by staff prefiled testimony and purports to rebut
2 it.

3 Now the Commission might find it right. The
4 Commission might find it wrong. That's why we're here.
5 But the Commission should let it in.

6 CHAIRMAN NELSON: Thank you.
7 TransCanada.

8 MR. MOORE: Thank you, Commissioner Nelson.
9 Good morning. James Moore on behalf of Keystone.

10 Just three points in response. The first is
11 that at issue is not anyone's good-faith compliance with
12 the rules or any question under South Dakota Law but
13 whether the proposed testimony is relevant to the issue
14 presented in the proceeding.

15 And the Commission previously determined that
16 Dr. Cahill's proposed testimony is not relevant, and I
17 think that determination was correct.

18 If you look at the motion and the testimony,
19 Mr. Capossela's argument is essentially that Dr. Cahill's
20 testimony is responsive to the testimony of Brian Walsh.
21 I think that what Mr. Walsh has testified to in his
22 prefiled direct and what Dr. Cahill is proposing to
23 testify to are different things.

24 What Brian Walsh has said is that in the process
25 of preparing the Final Environmental -- Supplemental

1 Environmental Impact Statement, the Department of State
2 was, in fact, responsive to concerns that the
3 South Dakota Department of Environment and Natural
4 Resources presented to the Department of State and that
5 those concerns were adequately addressed in the FSEIS.

6 What Dr. Cahill is saying is not that the
7 Department of State was not responsive but that the FSEIS
8 methodology with respect to socio-economic conditions was
9 in some way fundamentally flawed.

10 Those are two different things, and our position
11 and what I understood the Commission to rule is that
12 testimony about the methodology of the FSEIS is not
13 relevant to the issue in the proceeding.

14 And the last point that I have this morning is
15 with reference to a statement on page 3 of the Motion for
16 Reconsideration. Mr. Capossela's motion says that
17 "Compliance by TransCanada with Amended Condition 1
18 requires federal environmental reviews that properly
19 evaluate the potential impacts on South Dakota."

20 I do not agree with that statement. I think
21 it's an inaccurate statement. Again, TransCanada has no
22 direct control over the preparation of the FSEIS. There
23 was government-to-government consultation that was
24 involved in that process.

25 Testimony that in some way that process was

1 flawed is neither directly responsive to the testimony of
2 Brian Walsh, nor is it relevant to the ultimate issue in
3 the proceeding, and I think the motion should be denied
4 for those reasons.

5 Thank you.

6 CHAIRMAN NELSON: Thank you. Since staff's
7 witness is implicated in all of this, I will turn to
8 staff.

9 MS. EDWARDS: Thank you. Kristen Edwards for
10 staff.

11 Staff filed a brief and response to the
12 underlying motion on July 14, 2015, and we would stand by
13 the arguments in that brief.

14 Thank you.

15 CHAIRMAN NELSON: Mr. Capossela, any rebuttal?
16 And you can do it either from there or up here, whichever
17 you're more comfortable with.

18 MR. CAPOSSELA: Thank you, Mr. Chairman.

19 Counsel said the issue is not South Dakota Law.
20 That's a curious argument that does not need to be
21 addressed. The Commission needs to apply the law in its
22 rulings.

23 If the State Department messes up and Keystone
24 XL nevertheless gets built, the project is vulnerable
25 legally, and compliance with Amended Condition 1 is

1 vulnerable. And so the contents of the Final
2 Supplemental Environmental Impact Statement clearly are
3 relevant issues.

4 Now how much weight the Commission gives to
5 evidence and argument on that is within your sound
6 discretion, but it's clearly relevant evidence.

7 Now counsel suggested that the Walsh testimony
8 was limited to the intergovernmental relationship between
9 Department of State and the State of South Dakota. Did
10 they answer your calls, and did they respond to your
11 comments. It's much more than that, and that's a very
12 flimsy argument.

13 In your -- and I'm reading page 2, line 16 from
14 the prefiled testimony of Mr. Walsh. "In your opinion,
15 do the FSEIS and Conditions set forth in the PUC's
16 Amended Final Decision and Order adequately address the
17 protection of South Dakota's natural resources?"

18 Asks for an opinion about whether it protects
19 the resources of the state, whether the information in
20 the EIS meets that test. It's about the FSEIS. That's
21 what it's about. It's not about whether they answered
22 the phone and responded to their e-mails to sufficiently
23 address their comments. It's about whether the stuff in
24 the book protects the resources of the state.

25 Now that was an issue in the '09 proceeding.

1 The Amended Conditions brings the applicable law into
2 that. And so Keystone in this proceeding must certify to
3 the Commission that it's in compliance with applicable
4 law. And we don't dispute that.

5 We didn't dispute -- we made no motions to
6 exclude any of the testimony because it proffers
7 information along those lines. And so it's not outside
8 of the scope. I respectfully disagree with counsel. It
9 is not outside the scope of the Walsh testimony.

10 We're talking about the impact to the
11 South Dakota environment, as evaluated by the State
12 Department and their environmental reviews and whether
13 those environmental reviews adequately protect the
14 resources of the state.

15 Somebody of the staff proffered testimony, gives
16 an opinion. That's what we're asking for the Standing
17 Rock Sioux Tribe, to have the same right.

18 Thank you.

19 CHAIRMAN NELSON: Thank you.

20 Questions from the Commission?

21 Seeing no questions, is there a motion?

22 Commissioner Hanson.

23 COMMISSIONER HANSON: I'm debating whether I
24 have a question or not.

25 Mr. Capossela, you present some interesting

1 tightrope in your discussion here. You understand we've
2 said on numerous occasions that we're not here to debate
3 the nuances of those requirements that are set forth
4 through the multiple Federal Government and State
5 Government agencies that we have no jurisdiction over.

6 You understand that we have gone to great
7 lengths to explain that if the Applicant needs to meet
8 certain programs or other requirements that are set forth
9 by the Federal Government, that it's not up to us to
10 debate whether they meet those or not; it's up to the
11 Federal Government to decide whether they meet those.

12 And I think I'm -- I'm going to move to grant --
13 I don't know whether it would pass or not, but I'm going
14 to move to grant --

15 Mr. Chairman, I understand that I'm speaking
16 prior to the motion but I'll move to grant and then I'll
17 discuss the motion. I was working towards a question,
18 but I -- I think I talked myself out of it.

19 CHAIRMAN NELSON: Okay. We have a motion to
20 grant the reconsideration and, therefore, allow the
21 testimony of Kevin Cahill.

22 Discussion on the motion.

23 Commissioner Hanson.

24 COMMISSIONER HANSON: Mr. Chairman, I granted it
25 on just the -- we've always tried to be extremely lenient

1 to allow testimony from those parties who have asked to
2 have the opportunity to speak before us. But I want to
3 caution Mr. Capossela that as soon as there's any sort of
4 trespass towards our -- towards whether or not they need
5 a Department of Justice or any other department in the
6 Federal Government, that that will not be allowed in the
7 testimony.

8 So be careful on the questioning process.

9 CHAIRMAN NELSON: Additional discussion.

10 As I've reviewed this -- and, Mr. Capossela, I
11 will grant you made a new argument to us in this motion
12 that I don't think we heard last time. And as I
13 re-reviewed again the testimony of Mr. Walsh and the
14 rebuttal testimony of Dr. Cahill, I think you're right in
15 that without Dr. Cahill, you don't have somebody to rebut
16 what Mr. Walsh has said, and you have the right to have
17 somebody rebut his comments.

18 And so, Commissioner Hanson, I am plenty willing
19 to go as far as allowing Dr. Cahill's testimony as it
20 relates to the Walsh testimony. But it also appears to
21 me in his report that he goes far beyond that.

22 And so, I guess, Commissioner Hanson, would you
23 be amenable to a friendly amendment that would grant the
24 Motion for Reconsideration to allow rebuttal testimony
25 but only as it relates to the Walsh testimony?

1 COMMISSIONER HANSON: Certainly. That's not the
2 exact stream I was going in, but that's -- I wanted to
3 make certain that it was limited to the proper testimony.
4 So, yes, I would support that as part of my motion.

5 Thank you. With that, then I'm happy to support
6 our joint motion as it were.

7 Additional discussion.

8 Hearing none, all those in favor of granting the
9 reconsideration of the Order Granting Motion in Limine to
10 Preclude Dr. Kevin Cahill, but only as it relates to
11 rebuttal of the Walsh testimony, all those in favor will
12 say aye. Those opposed, nay.

13 Commissioner Hanson.

14 COMMISSIONER HANSON: Aye.

15 CHAIRMAN NELSON: And Nelson votes aye.

16 The motion carries.

17 That then brings us to the second Standing Rock
18 Motion to Reconsider and Modify Order Granting Motion in
19 Limine to Preclude Rebuttal Testimony of Jennifer Galindo
20 and Waste Win Young.

21 Mr. Capossela.

22 MR. CAPOSSELA: Thank you, Mr. Chairman.

23 I'm actually going to do this. Accompanying me
24 today and for this hearing is Ms. Phyllis Young of the
25 Standing Rock Sioux Tribal Council. I just wanted to

1 recognize her.

2 Ms. Waste Win Young is the Tribal Historic
3 Preservation Officer for the Standing Rock Sioux Tribe,
4 and that's Ms. Phyllis's youngest daughter.

5 With Cahill it was rebuttal testimony. It's a
6 little bit different. Ms. Young's testimony is direct
7 testimony. And so the relevancy test is more
8 straightforward for Ms. Young. It's not in rebuttal to
9 somebody else's testimony. The test is whether or not it
10 fits in with the direct. The test is whether or not it
11 fits in with the issues of the hearing.

12 When we were in the adjudication of the Cahill
13 reconsideration motion, counsel made an argument this
14 doesn't go to the ultimate issue in this case.

15 None of the testimony has to go to the ultimate
16 issue. That's not the test for relevance under South
17 Dakota Law. It has to go to any issue in the case, not
18 to the ultimate issue in the case. And the Supreme Court
19 has said that very eloquently in the Burley case, which
20 we cited in the Briefs.

21 But with respect to Ms. Young's actual
22 testimony, in the prefiled testimony it references and
23 discusses Amended Condition 43 on compliance with the
24 National Historic Preservation Act. And when I looked
25 back after the prior hearing, I think it's -- to read

1 Waste Win Young's testimony and to read Ms. Paige Olson's
2 testimony for the State Historic Preservation Office,
3 there's a tremendous consonance between those two
4 documents. Now they don't always reach the same
5 conclusion, but they speak the same language.

6 Both the prefiled testimony of Ms. Young and
7 Ms. Olson talk about -- address issues relating to
8 surveys, inventories, determinations of adverse effect,
9 resolutions of the determinations of adverse effect
10 relating to cultural resources in the path of the
11 pipeline.

12 So they talk that clearly these two women are
13 professional historic preservers. Both of them know what
14 they're talking about. And I'd venture to wager that
15 they did not consult with one another prior to filing the
16 prefiled testimony. Yet much of what they talked about
17 is the exact same thing, and they used the exact same
18 terminology.

19 And Ms. Young's prefiled testimony specifically
20 references Amended Condition 43 and discusses concerns
21 that she has that circumstances now and -- relating to
22 information that's available because of the State
23 Department publication, specifically the Programmatic
24 Agreement that's included there, that's the enforcement
25 document moving forward.

1 Ms. Olson in her testimony, while expressing an
2 opinion on the ultimate issue that if TransCanada
3 complies with the Programmatic Agreement, it does comply
4 with Section 106 of the National Historic Preservation
5 Act, excepting for that opinion based on her expertise,
6 their testimonies are very, very similar.

7 Now they reach a different conclusion, and
8 Ms. Young has some concerns articulated in her prefiled
9 testimony with the Programmatic Agreement.

10 For her part, Ms. Olson in her prefiled
11 testimony opined that if TransCanada, moving forward,
12 complies with that agreement, then they are in compliance
13 with the law. Ms. Young expressed some concerns with the
14 Programmatic Agreement.

15 But their testimonies otherwise are -- I
16 wouldn't call them consistent, but I would call them
17 consonant. They're talking about the same things, and
18 they're using the same language. I would never -- the
19 Standing Rock Sioux Tribe, this is a really important
20 issue to the Tribe. And the Tribe would not seek to
21 exclude Ms. Olson's testimony under these circumstances.
22 It's clearly relevant. Whether it's right or wrong,
23 we'll go there in this hearing perhaps.

24 Similarly, it was surprising that Ms. Young's
25 testimony was challenged. If TransCanada challenged

1 Ms. Young's testimony, I cannot understand why they did
2 not challenge Ms. Olson's testimony because they talk
3 about the exact same things. And if Ms. Olson's [sic]
4 testimony is to be excluded, then Ms. Olson's testimony
5 is, likewise, inadmissible evidence on grounds of
6 relevancy and it isn't and Ms. Olson's testimony is
7 relevant. They both are, and they both should be let in.

8 Thank you.

9 CHAIRMAN NELSON: Thank you.

10 Keystone.

11 MR. MOORE: Thank you. I can be very brief on
12 this.

13 I fundamentally disagree with Mr. Capossela that
14 Paige Olson and Waste Win Young are addressing the same
15 issue.

16 The testimony of Paige Olson is that TransCanada
17 can comply with the Programmatic Agreement. The proposed
18 testimony of Waste Win Young is that the Programmatic
19 Agreement is flawed. Those are two entirely different
20 subjects. They both relate to the Programmatic
21 Agreement, but they are not the same.

22 The Commission ultimately has no jurisdiction
23 over the content of the Programmatic Agreement. The
24 question is whether TransCanada can comply with it. And
25 Waste Win Young's proposed testimony does not address

1 that issue and, therefore, it's not relevant to the
2 proceeding. And I think that the Commission acted
3 appropriately in excluding it, and the motion can be
4 denied for that reason.

5 Thank you.

6 CHAIRMAN NELSON: Thank you.

7 Again, since staff's witness is implicated, I'll
8 turn to staff.

9 MS. EDWARDS: Thank you. Kristen Edwards for
10 staff.

11 Staff submitted a brief on the underlying motion
12 on July 17, and we would stand by the arguments in that
13 brief.

14 CHAIRMAN NELSON: Rebuttal, Mr. Capossela.

15 MR. CAPOSSELA: Briefly, Mr. Chairman.
16 Counsel's acknowledgment that they both relate to the
17 Programmatic Agreement should be -- (Inaudible).

18 CHAIRMAN NELSON: I'm just going to make an
19 overall comment. I think your problem back there is you
20 were a little too far away from the mic. So even if
21 you're -- counsel, if you're speaking from your table,
22 that's fine, but you've got to be close to the mic.

23 Go ahead.

24 MR. CAPOSSELA: I apologize, Mr. Chairman.

25 They both relate to the Programmatic Agreement,

1 and that should be the concession by counsel -- that
2 concession, that statement, necessitates the granting of
3 the motion.

4 CHAIRMAN NELSON: Thank you.

5 Questions from the Commission.

6 Seeing none, is there a motion?

7 Commissioner Hanson.

8 COMMISSIONER HANSON: Mr. Chairman, I move to
9 deny the motion by the Standing Rock Sioux Tribe for
10 Waste Win Young.

11 CHAIRMAN NELSON: Discussion on the motion.

12 COMMISSIONER HANSON: I agree with counsel that
13 although it would be interesting to listen to, I don't
14 believe it's germane. We've stated and reiterated on a
15 number of occasions that it's not up to us to decide the
16 points of federal agencies' requirements. It's up to the
17 Applicant to meet those requirements.

18 CHAIRMAN NELSON: Further discussion on the
19 motion.

20 I read through the testimony. I've read through
21 this testimony a number of times to try to figure this
22 out. And I will grant that the testimony has one very
23 brief reference to Condition 43, but, frankly, the
24 testimony itself doesn't get at Condition 43.

25 I've read through Condition 43, and it doesn't

1 reference that -- I mean, it might reference the
2 condition, but it doesn't speak to it. And so, given
3 that, I concur with Commissioner Hanson's motion to deny.

4 Further discussion?

5 Hearing none, all those in favor of the motion
6 to deny will say aye. Those opposed, nay.

7 Commissioner Hanson.

8 COMMISSIONER HANSON: Aye.

9 CHAIRMAN NELSON: Nelson votes aye. And the
10 motion is denied.

11 That, I believe, resolves the last of many,
12 many, many prehearing motions that the Commission has
13 dealt with. And with that, it is my pleasure to turn
14 over the proceeding to general counsel Mr. John Smith.

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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 27th day of July,
11 2015, and that the attached is a true and correct
12 transcription of the proceedings so taken.

13 Dated at Onida, South Dakota this 30th day of
14 August, 2015.

15

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18 _____
19 Cheri McComsey Wittler,
20 Notary Public and
21 Registered Professional Reporter
22 Certified Realtime Reporter

23

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THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

= = = = =

IN THE MATTER OF THE PETITION HP14-001
OF TRANSCANADA KEYSTONE PIPELINE,
LP FOR ORDER ACCEPTING CERTIFICATION
OF PERMIT ISSUED IN DOCKET HP09-001
TO CONSTRUCT THE KEYSTONE XL
PIPELINE

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July 27, 2015 through August 5, 2015

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July 27, 2015
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BEFORE THE PUBLIC UTILITIES COMMISSION

CHRIS NELSON, CHAIRMAN
KRISTIE FIEGEN, VICE CHAIRMAN (not present)
GARY HANSON, COMMISSIONER

COMMISSION STAFF

John Smith
Kristen Edwards
Karen Cremer
Greg Rislov
Brian Rounds
Darren Kearney
Tina Douglas
Katlyn Gustafson

Reported By Cheri McComsey Wittler, RPR, CRR

1 TRANSCRIPT OF PROCEEDINGS, held in the
2 above-entitled matter, at the South Dakota State Capitol
3 Building, Room 414, 500 East Capitol Avenue, Pierre,
4 South Dakota, on the 27th day of July, 2015.

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9	8014 - Congressional Research Service, Report for Congress, Oil Sand and the	2034
10	Keystone XL Pipeline: Background and Selected Environmental Issues (2012)	
11	8024 - Letter of Cynthia Giles, US EPA to Jose Fernandez & Dr. Kerri-Ann Jones,	2032
12	US Dept. of State, Re: Deficiencies in Draft SEIS dated 6/6/11	
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1 CHAIRMAN NELSON: We will begin the hearing in
2 Docket HP14-001, In the Matter of the Petition of
3 TransCanada Keystone Pipeline, LP for Order Accepting
4 Certification of Permit Issued in Docket HP09-001 to
5 Construct the Keystone XL Pipeline.

6 The time is approximately 9 a.m. The date is
7 July 27, 2015, and the location of the hearing is
8 Room 414 of the Capitol Building, Pierre, South Dakota.

9 My name is Chris Nelson. I'm Chairman of the
10 Commission. Commissioner Gary Hanson is also present.
11 Commissioner Kristie Fiegen could not be present here
12 today due to medical procedures regarding a serious
13 health issue that was discovered recently.

14 I expect many of you have heard about this
15 through the media. Although Commissioner Fiegen will not
16 be present for the hearing, she will be participating in
17 the Commission's decision-making process.

18 SDCL 1-26-24 and a Supreme Court decision allow
19 a public official to participate in the decision-making
20 if they have read the record, which Commissioner Fiegen
21 intends to do.

22 I'd also like to welcome all of you who are in
23 the audience here today and listening online, and I thank
24 you for your interest in the matter today.

25 I want to begin with just a few housekeeping

1 items. We're going to be here for a number of days, and
2 I want to lay out some housekeeping items.

3 First of all, several thank yous are in order.
4 As those of you who have been in this room before know
5 that things have changed considerably in order to
6 facilitate the large number of parties that we have. And
7 a lot of folks had to come together to make this happen.

8 The Legislative Research Council was very
9 helpful in accessing the room and the technology. The
10 Bureau of Administration and Buildings and Grounds were
11 very helpful in getting things set up here for us.
12 Bureau of Information and Telecommunications assisted
13 with all of the technology that we're using today. South
14 Dakota Public Broadcasting is involved, and, believe it
15 or not even Game, Fish & Parks has a little part in
16 making this happen today. So I want to thank all of
17 them.

18 Also we have with us our court reporter,
19 Cheri Wittler, who will be with us through the entirety.
20 And what that means is we all need to speak clearly and
21 slowly, especially if we are reading something.

22 All of the hearing participants have access to
23 microphones at your seats. The mics. are push to talk.
24 If you are not using your mic. -- and this is extremely
25 important. If you're not using the mic., be sure it is

1 off. And you will notice that when it's on a green light
2 shines brightly at the base of the mic. And so if you're
3 not speaking, make sure that that green light is off.

4 Witnesses will be seated up here at the dais so
5 that they will be able to view the entire audience and
6 vice versa. Room cameras are being used to image the
7 person speaking from the dais or from the stand and will
8 be projected on monitors in the room.

9 People speaking from the tables will not have
10 their images displayed. And that's just because that's
11 the way the camera system works.

12 We do have Rooms 414 and 412. If we have any
13 overflow folks, if we get more folks that show up, we've
14 got additional seating available there.

15 Also the basement cafeteria area is going to be
16 open. It's set up with tables and chairs. There's no
17 food service other than the vending machines, but it is a
18 space that folks can hang out if they want a break from
19 this room.

20 I am presiding over the hearing. This hearing
21 was noticed pursuant to the Commission's Order for and
22 Notice of Evidentiary Hearing issued on July 2, 2015.

23 The issue at this hearing is whether
24 TransCanada's proposed Keystone XL Pipeline facility
25 continues to meet the conditions set forth in the

1 Amended Final Decision issued by the Commission on
2 June 29, 2010, in Docket HP09-001 in which the Permit to
3 construct was issued and the Commission shall, therefore,
4 accept TransCanada's certification as conforming to
5 SDCL 49-41B-27.

6 It is the Petitioner, TransCanada, that has the
7 burden of proof. And under SDCL 49-41B-27 that burden of
8 proof is to establish that the proposed facility
9 continues to meet the 50 Conditions set forth in the
10 Commission's Amended Final Decision.

11 I would like to stress again to all parties here
12 today that this case is about whether the project
13 continues to meet those 50 Conditions. It is not a
14 retrial of the original Permit proceeding.

15 All parties have the right to be present and to
16 be represented by an attorney. All persons testifying
17 will be sworn in and subject to cross-examination by the
18 parties. The Commission's final decision may be appealed
19 by the parties to the State Circuit Court and State
20 Supreme Court.

21 I'd like to remind everyone that parties
22 represented by counsel must have their attorneys conduct
23 their cross-examination.

24 Also I would remind everyone that the Commission
25 has issued a number of prehearing procedural and

1 evidentiary rulings, and we expect the parties to comply
2 with those rulings.

3 John Smith, the Commission's counsel, will act
4 as the Hearing Examiner and will conduct the hearing
5 subject to the Commission's oversight. He may provide
6 recommended rulings on procedural and evidentiary
7 matters. The Commission may overrule its counsel's
8 preliminary rulings throughout the hearing. If not
9 overruled, Mr. Smith's preliminary rulings will become
10 final rulings.

11 Prior to turning this over to Mr. Smith, two
12 motions for reconsideration were filed late Friday that
13 we will need to first resolve.

14 (A recess is taken at which time the motions are heard.)

15 MR. SMITH: Okay. Chairman Nelson has covered
16 the business of logistics in here, I think.

17 Do any of you have any additional questions
18 about that related to the mic. systems and all of that?

19 I'm not seeing anything.

20 Okay. Let's begin by taking the appearances of
21 the parties. And I'll tell you, you can make your
22 appearance either from the mic. at your desk, or if you
23 choose to do so, you can walk up to the front -- it's up
24 to you -- and sit at the podium up here, whichever you
25 like.

1 And I think what I'll do, just to put some order
2 into this, I'm going to start with parties represented by
3 counsel. And so I'm going to start with TransCanada as
4 the Applicant or Petitioner. I'm going to start with
5 TransCanada.

6 Mr. Taylor, would you put in the appearance for
7 TransCanada, please.

8 MR. TAYLOR: General Counsel Smith, for
9 TransCanada, William Taylor, James Moore, James White --

10 CHAIRMAN NELSON: I'm going to interrupt. I
11 don't think -- is your green light on?

12 MR. TAYLOR: It is.

13 CHAIRMAN NELSON: Try it again. I'm going to
14 turn it over to our tech expert, Mr. Rounds.

15 MR. ROUNDS: This is Brian Rounds for Commission
16 Staff. So all of the microphones that are in the
17 audience are only coming out the two speakers you see up
18 on stands. And so to the extent that --

19 It is coming through the webcast, and it is
20 coming through those two speakers so they can probably
21 hear okay in the audience. If we have an issue up here,
22 we might grab another speaker at some point.

23 CHAIRMAN NELSON: I can hear him fine. It's
24 just I wasn't hearing him come through the speaker
25 system. So I want to make sure that was good. So thank

1 you for that. I apologize.

2 MR. TAYLOR: For TransCanada, William Taylor,
3 James Moore, James White, Stacey Van Camp.

4 MR. SMITH: Thank you. And now we'll turn to
5 Intervenors, and we'll take Intervenors represented by
6 counsel first. And because I didn't know what other
7 order to do, I'm going to take them in alphabetical
8 order.

9 And we'll start then with Bold Nebraska.
10 Mr. Blackburn.

11 MR. BLACKBURN: Thank you, Commissioners. Paul
12 Blackburn representing Bold Nebraska. Unfortunately, my
13 clients were not able to be here today due to a conflict.

14 Thank you.

15 MR. SMITH: Next, Cheyenne River Sioux Tribe. I
16 think it's Mr. Clark because I don't see Ms. Zephier here
17 today.

18 MR. CLARK: Travis Clark on behalf of the
19 Cheyenne River Sioux Tribe. Ms. Zephier was not able to
20 be here today, but she will be here starting tomorrow
21 throughout the hearing.

22 MR. SMITH: Okay. Thank you. Next we have
23 Dakota Rural Action. And I think -- who's going to take
24 that?

25 MR. MARTINEZ: Robin Martinez and Mr. Ellison

1 here on behalf of Dakota Rural Action.

2 MR. SMITH: Thank you. And next we have
3 Indigenous Environmental Network. Ms. Craven.

4 MS. CRAVEN: Good morning. Kimberly Craven
5 appearing on behalf of Indigenous Environmental Network.
6 And my client is not here either.

7 MR. SMITH: Okay. Next is InterTribal Council
8 on Utility Policy, or we call it COUP for short here.

9 MR. GOUGH: We call it COUP.

10 MR. SMITH: Oh, COUP. Part me. I'm sorry.

11 MR. GOUGH: Just like Pierre.

12 And I represent the InterTribal Council on
13 Utility Policy, Bob Gough as secretary. And I will be
14 joined with our treasurer who's also law trained,
15 William Schumacher.

16 MR. SMITH: Okay. Thank you.

17 Next we go to Rosebud Sioux Tribe. Mr. Rappold.

18 MR. RAPPOLD: Matthew Rappold on behalf of the
19 Rosebud Sioux Tribe.

20 MR. SMITH: Thank you. Rosebud Sioux Tribe
21 Tribal Utility Commission. Is Ms. Turgeon Wynne here?

22 I'm not seeing or hearing.

23 Do you have any knowledge?

24 MR. RAPPOLD: I don't believe that she's here,
25 and I don't have any knowledge as to whether or not she's

1 planning on attending.

2 MR. SMITH: Okay. Then we'll move on to
3 Standing Rock. Mr. Mr. Capossela or Mr. Iron Eyes.

4 MR. CAPOSSELA: Peter Capossela for Standing
5 Rock Sioux Tribe. With me today is, as mentioned
6 earlier, Ms. Phyllis Young of the Standing Rock Sioux
7 Tribal Council.

8 MR. SMITH: Thank you. Now we'll go to Yankton
9 Sioux Tribe. Ms. Real Bird.

10 MS. REAL BIRD: Thomasina Real Bird on behalf of
11 the Yankton Sioux Tribe. I'm joined by counsel Jennifer
12 Baker, and we also have with us Jason Cooke, a
13 representative from the Yankton Sioux Tribe Business and
14 Claims Committee.

15 MR. SMITH: Thank you.

16 With that, I think we've got all the counsel
17 represented intervenors.

18 With that, we'll go to staff. Ms. Edwards.

19 MS. EDWARDS: Thank you. Kristen Edwards
20 representing Staff. With me today is Karen Cremer, my
21 co-counsel, and we are joined by Staff analysts
22 Brian Rounds and Darren Kearney.

23 MR. SMITH: Thank you. Now we're going to go to
24 Individual Intervenors. And I'm going to take those
25 again in alphabetic order, lacking any other rationale,

1 order to it.

2 We'll start by 350.org. Is anyone here from
3 350.org?

4 I'm not seeing or hearing anything.

5 Robert G. Allpress.

6 Not seeing or hearing anything.

7 Bruce Boettcher.

8 Not seeing or hearing anything.

9 Roxanne is it Boettcher or Boettcher? Does
10 anybody know how to pronounce that?

11 At any rate, Roxanne Boettcher.

12 Not seeing or hearing anything.

13 Joye Braun.

14 Not seeing or hearing anything.

15 Gary Dorr.

16 MR. DORR: Gary Dorr.

17 MR. SMITH: Thank you, Gary.

18 Ronald Fees.

19 Not seeing or hearing anything.

20 Cheryl and Terry Frisch.

21 Not seeing or hearing anything.

22 Louis T. Genung.

23 I see no response.

24 Dallas Goldtooth.

25 I'm not seeing or hearing anything from

1 Mr. Goldtooth.
2 Lewis Grassrope.
3 MR. GRASSROPE: Lewis Grassrope here.
4 MR. SMITH: Thank you. John Harter.
5 MR. HARTER: John Harter here.
6 MR. SMITH: Thanks, John.
7 Nancy Hilding.
8 I don't see her in the room at this point. I
9 would expect she'll probably be here at some point, but
10 okay. She's not here now. No response.
11 Chastity Jewett.
12 Not seeing or hearing from Ms. Jewett.
13 Cody Jones.
14 I don't see or hear any response.
15 Jerry D. Jones.
16 Not seeing or hearing anything.
17 Wrexie is it Bardaglio or Bardaglio?
18 I don't see a response.
19 Elizabeth Lone Eagle.
20 MS. LONE EAGLE: Elizabeth Lone Eagle here.
21 MR. SMITH: Okay. Thank you.
22 Cindy Myers.
23 MS. MYERS: Cindy Myers here.
24 MR. SMITH: Thank you. Gena Parkhurst.
25 I don't see or hear a response.

1 Amy Schaffer.
2 I do not see a response.
3 Paul Seamans.
4 MR. SEAMANS: Paul Seamans here.
5 CHAIRMAN NELSON: Thanks, Mr. Seamans.
6 Carolyn P. Smith.
7 I don't see or hear a response.
8 Diana Steskal.
9 Okay. I don't see or hear a response from
10 Ms. Steskal.
11 Byron Steskal.
12 I see no response or hear a response from
13 Byron Steskal.
14 Arthur Tanderup.
15 I hear nothing from Mr. Tanderup.
16 Debbie Trapp.
17 I do not see or hear a response.
18 And, lastly, Viola Waln.
19 And I see or hear no response from Ms. Waln.
20 Oops. I missed one that the Chairman noted.
21 Bonnie Kilmurry. Ms. Kilmurry, are you here?
22 I do not see or hear a response from
23 Ms. Kilmurry.
24 I noticed some people enter the room recently.
25 Is there any additional -- Joye Braun, are you here now?

1 MS. BRAUN: Yeah. I'm here.

2 MR. SMITH: Okay. Thank you.

3 Are there any other parties that have entered
4 the room since I began the roll -- the appearance
5 rollcall here?

6 I don't see anybody indicating that.

7 So I think we'll move on now.

8 MR. RAPPOLD: Excuse me. Mr. Smith.

9 MR. SMITH: Yes.

10 MR. RAPPOLD: Sorry to interrupt you. Is there
11 any way anyone could do anything to check on the air
12 conditioner and the ventilation in here? It's pretty
13 stuffy.

14 MR. SMITH: You know, that's a chronic problem.
15 We talked to them, and I think we heard from -- I don't
16 know. Is the security person back there? I thought they
17 said --

18 Yes. Our staff person here has just told me
19 that she just e-mailed Buildings and Grounds and has
20 requested that they turn down the temperature in the
21 room. So I guess that's probably about all we can do at
22 this point, but we're going to try to achieve that.

23 MR. RAPPOLD: Thank you.

24 MR. SMITH: Sure. Thanks for that suggestion,
25 Matt.

1 First of all, I'm going to cover the order of
2 the parties' testimony. And the order that the
3 Commission has consistently used throughout the 15 years
4 that I've been here is pretty much what you see in the
5 courtroom. And that is first the plaintiff -- and we
6 don't usually call them that here.

7 In this case it's the Petitioner. Direct
8 testimony is first. And that's, of course, followed by
9 respondents. In this case we have no respondents. In
10 the absence of respondents, the next is Intervenors'
11 direct testimony. And then next we go to Staff's direct
12 testimony. And last comes Petitioner's rebuttal
13 testimony.

14 MR. ELLISON: Mr. Smith, excuse me. I had
15 understood we had discussed this matter in May and that I
16 had understood that as a resolution of that discussion,
17 that the order that had been decided upon was the
18 Applicant and then staff and then Intervenors.

19 MR. SMITH: Well, I remember the discussion, but
20 I don't remember me saying that -- I just noted that you
21 requested that. I mean, you're welcome right now to make
22 that argument if you wish.

23 MR. ELLISON: I just think it's appropriate, if
24 I may, Mr. Smith and Commissioners. Those two parties
25 seem to be very much aligned. They also -- staff has

1 been reviewing TransCanada's submissions, and it would
2 seem that the flow of our responses would be much more --
3 not consistent but systematic if both the Applicant and
4 Staff went and then the Intervenors were able to respond
5 to that.

6 I think it might save a lot of rebuttal that
7 would become evident, and that would be -- as I said, I
8 thought it had been decided. If I'm mistaken, I would so
9 request that to occur at this point.

10 MR. SMITH: Okay. Are there any other people
11 who want to comment on --

12 MR. CREMER: Thank you, Mr. Smith. This is
13 Karen Cremer of Staff. And Staff would disagree that
14 Staff and TransCanada are in any way aligned.

15 Staff, as a party, we check compliance. And we
16 are the most neutral party here probably. We don't have
17 a position that we advocate. And so, as you noted, Staff
18 always goes last for that very reason.

19 We hear what everybody's testimony is. Yes,
20 we've read it, but many times it becomes much smaller
21 when people testify. So Staff always goes last so that
22 we can offer the most neutral recommendation and opinion.
23 And so we would greatly disagree with DRA -- I don't know
24 the parties yet, but I believe that's DRA. And Staff
25 would -- we would ask that Staff go last as we always

1 have.

2 Thank you.

3 MR. SMITH: Applicant? TransCanada, do you have
4 a position?

5 MR. TAYLOR: TransCanada is content with the
6 order that you proposed, Mr. Smith.

7 MR. SMITH: Well, again, I'm going to request
8 Commission input on this, if you wish to have any.

9 I mean, my feeling is I guess that we just go
10 with our normal order of presentation. It's worked in
11 hundreds and hundreds of cases I've been involved with
12 here, and we've had many cases similar to this in which
13 we have Intervenors who are opposed to whatever is being
14 presented. And I guess over the years I've seen that
15 order of presentation work well, and I've actually
16 observed generally the kind of Staff participation that
17 Ms. Cremer just explained.

18 Yes, sir. Mr. Gough.

19 MR. GOUGH: Yes. Thank you. Just a question.

20 I do recall that discussion in May, and it
21 seemed appropriate for that change because this is not a
22 normal proceeding in the sense that it is a
23 recertification process. It's not an open docket, a new
24 docket of any sort, and that there is a standing order,
25 Permit, that the PUC and Staff have in place.

1 So I think that this is somewhat of a different
2 proceeding than the usual so I think that the opportunity
3 for changing that was appropriate in the discussions in
4 May and based on that sort of understanding.

5 Thank you.

6 MR. SMITH: Thank you, Mr. Gough.

7 Commissioner Hanson, do you have --

8 COMMISSIONER HANSON: Yes. Mr. Smith, I agree
9 wholeheartedly with Ms. Cremer's statement. They have
10 historically always been -- in the 12 years that I have
11 been a Commissioner here, 12 years plus, the Staff has
12 always been the neutral party. They have always looked
13 out for -- from the standpoint of balancing everything
14 that we hear from both parties.

15 The adversarial portion of this is between the
16 Applicant and those parties who have applied and oppose
17 it. The Staff is a neutral party, always have been a
18 neutral party. I have never seen them choose sides.

19 I have seen people think they choose sides
20 simply because of the decision they make and the
21 presentation, but they have always articulated a position
22 that has been to the benefit of the law of the State of
23 South Dakota.

24 MR. SMITH: With that, I think, unless the
25 Commissioners have an objection, I think we'll go with

1 our normal order of presentation.

2 Like I said, it's worked well for many, many
3 years, and it's our standard.

4 MR. ELLISON: We would then just advise the
5 Commission that one of our witnesses, Dr. Davis, will not
6 be available to testify before Monday.

7 MR. SMITH: And I'm going to get to that in a
8 minute, Mr. Ellison.

9 MR. ELLISON: Thank you.

10 MR. SMITH: My intent here is to get all parties
11 to agree that parties -- for various reasons, we've got
12 many of that situation. For various reasons. We don't
13 know how long this thing's going to take. It could go
14 faster than we think.

15 And I'm going to suggest a little bit later on
16 that we go with all parties agreeing that for parties who
17 need a specific time that we all agree to that. And even
18 if it seems to be somewhat outside the normal order of
19 testimony. Okay?

20 MR. ELLISON: Thank you, Mr. Smith.

21 MR. SMITH: Yes, sir.

22 Okay. With that, now I'm going to move on to
23 the next issue, which is Intervenor's order of testimony.
24 Okay. And maybe we'll start with -- and I don't know
25 which Intervenor maybe to call on, but just anybody out

1 there. Have you -- and I don't remember, was it
2 Mr. Rappold or somebody -- or Capossela had kind of
3 talked to me about you having had some form of conference
4 among yourselves. And I just don't have a clue.

5 Ms. Real Bird.

6 MS. REAL BIRD: Mr. Smith, were you complete in
7 your order of parties' testimony?

8 MR. SMITH: Well, Intervenors. Next is
9 Respondents. Intervenors' direct testimony. And then
10 next is Staff's direct testimony. And last comes
11 Petitioner's rebuttal testimony. Yeah.

12 MS. REAL BIRD: Thank you.

13 MR. SMITH: Last comes Petitioner's testimony.
14 They're last. That's the way it always is.

15 Anything else on that? Otherwise, I'm going to
16 move on to --

17 MR. RAPPOLD: Mr. Smith. Then would we do our
18 rebuttal at the same time we do our direct? Is that how
19 that works? Or do you do rebuttal afterwards?

20 MR. SMITH: Well, normally in the cases we've
21 done here, the only parties that do rebuttal -- are you
22 talking about rebuttal to what? To -- and I guess if
23 we're going to go there, we could do that and we can
24 allow rebuttal from each party, other parties. And then
25 finally, though, we're going to wind up in the end is the

1 Applicant in the end will have the final rebuttal
2 opportunity.

3 And I should mention too, one complexity that
4 occurs in these cases that is not quite normal is at the
5 end of direct and cross another anomaly a little bit at
6 the Commission is then we have Commissioner questions.

7 And then I always allow additional responsive
8 testimony by parties following Commissioners' questions.
9 Because sometimes other matters or additional information
10 occurs because of that.

11 MR. ELLISON: Mr. Smith, you mentioned
12 additional testimony. Do you mean questioning?

13 MR. SMITH: Yes. I mean questioning. Yeah.
14 Examination.

15 So I guess that's what we'll do. And I don't
16 know. Thoughts on, I guess, the suggestion -- is it from
17 Ms. Real Bird? Is that who said that or made that?

18 MS. REAL BIRD: I just wanted clarification. I
19 believe Mr. Rappold was asking about Intervenors'
20 rebuttal in the order.

21 MR. SMITH: Okay. And I guess I'm trying to get
22 at rebuttal in response to what would that be?

23 MR. RAPPOLD: Well, rebuttal testimony has to be
24 pointed towards a specific witness's direct testimony.
25 And my rebuttal testimony addresses Staff's testimony,

1 and I'm on the schedule to --

2 MR. SMITH: So, in other words, what you want to
3 have is the ability to respond to Staff's direct
4 testimony?

5 MR. RAPPOLD: Well, I couldn't do it any other
6 way.

7 MR. SMITH: I agree. I agree.

8 And so since we have gone with that order, I
9 agree so we will then do that and we will allow rebuttal
10 from Intervenors in response to Staff's testimony.

11 And, as I said, because we have Commissioners'
12 questions, which is unusual, and that occurs late
13 sometimes, also you will have the opportunity to present
14 rebuttal examination in response to -- in response to
15 Commissioner questions and testimony if relevant. Or if
16 it's really truly germane, which it usually isn't,
17 Commissioner questioning. At least examination, though.

18 Any thoughts on where we're at here?

19 MR. HARTER: Mr. Smith.

20 MR. SMITH: Yeah, Mr. Harter.

21 MR. HARTER: On the rebuttal, is that to any of
22 the witnesses that we can --

23 MR. SMITH: Yeah. Although it occurs witness --
24 yes. Absolutely. Yes, sir.

25 Okay. Now in terms of let's move on to

1 Intervenor order of evidence, testimony.

2 Have you guys had discussions among yourselves
3 about how you want to do that? I just don't know because
4 I'm not -- I'm not privy to that.

5 I'm not seeing anybody indicate anything. I
6 guess I just don't know what other order to go in other
7 than -- I mean, should I just go like I did here on
8 the --

9 Oh, Mr. Gough. Pardon me.

10 MR. GOUGH: Yes. I don't know that there was an
11 absolute agreement among Intervenors, but a group met in
12 discussion last night. And among those it was felt that
13 we should allow the citizens of South Dakota and the
14 Individual Intervenors go first with regard to opening
15 statements and the like, followed then by the more formal
16 tribal governments and NGOs.

17 MR. SMITH: That would be fine.

18 Go ahead, Mr. Capossela.

19 MR. CAPOSSELA: Thank you, Mr. Smith.

20 Standing Rock has requested amongst the
21 Intervenors, assuming on Thursday we're at Intervenor
22 direct testimony, for Standing Rock's witnesses to be
23 available to testify on Thursday.

24 MR. SMITH: Okay.

25 MR. CAPOSSELA: That's where we're at in terms

1 of our folks coming in excepting the rebuttal testimony
2 of Cahill, which was included in a prior motion for
3 Monday.

4 So we have cleared with the other Intervenors
5 that if we're at that part of the proceeding on Thursday,
6 that's where we want to move forward with Standing Rock's
7 witnesses third party that day.

8 MR. SMITH: Okay.

9 You know, we have had a number of I think we
10 should call them motions or requests for time certain and
11 that kind of thing. The Commission has formally approved
12 those in a few cases, but maybe that's something I'll
13 address right now is I guess my thought is even if it's
14 out of the ordinary.

15 And most of these are individuals. Although
16 there are some professional witnesses too for, you know,
17 the attorney represented parties. And my thought is that
18 we have a bit of liberality in that. Because of the
19 very, you know, complex, I guess, nature of just the
20 logistics of this case with having a huge number of
21 parties in the case that we just show courtesy to each
22 other and that we -- to the best that we can without
23 doing something that's going to cause somebody true
24 prejudice, that we do the best we can to accommodate the
25 schedules of witnesses of the other parties to the extent

1 that we can.

2 Any thoughts on that?

3 Mr. Taylor.

4 MR. TAYLOR: Thank you, Mr. Smith.

5 TransCanada doesn't particularly care about the
6 order in which Intervenors present, and we will, of
7 course, agree to accommodate any witnesses who can't be
8 here on a given day.

9 But we would like the Commission to establish an
10 order and then follow that order going forward so that
11 we -- tonight we know who's going to testify tomorrow so
12 that we can prepare cross-examination and so forth and
13 that that pattern will be consistent throughout the
14 hearing.

15 MR. SMITH: Okay. Well, let me ask this then:
16 We've heard from -- I think it was -- was that
17 Mr. Ellison on the -- that we start with Individual
18 Intervenors first. You know, Mr. Harter or other
19 Individual Intervenors -- oh, was that you, Mr. Gough?
20 I'm sorry.

21 John, do you have any thoughts on that? Is that
22 the way you'd like to see it, or would you rather wait?
23 And, again, TransCanada's going first; right? So that's
24 it. But, I mean, in terms of when we get to Intervenor
25 testimony.

1 MR. HARTER: Your alphabetical order was fine
2 with me.

3 MR. SMITH: That's fine with you?

4 MR. HARTER: Yeah.

5 MR. SMITH: Commissioners any thoughts?

6 Okay. Then we will begin with Intervenor
7 testimony. Individual, nonrepresented Intervenor
8 testimony first on the Intervenor side. And should I
9 just -- do you guys mind if for order's sake we just go
10 in the order that I did here of alphabetical order?

11 Mr. Clark.

12 MR. CLARK: Thank you, Mr. Smith. I apologize.
13 Late over the weekend I learned that one of our witnesses
14 had an unexpected event and had to travel out of state.
15 He doesn't know when he'll be back specifically. So if
16 it's possible, I would just like to delay ours to the
17 end, basically try to give him enough time to come back
18 to the state so that he can be available to testify.

19 MR. SMITH: Okay. Thank you. I think that's
20 what I'd like to kind of see. Because of the nature of
21 this, everyone to the best we can -- yes, ma'am. I can't
22 see your sign so --

23 MS. LONE EAGLE: Elizabeth Lone Eagle. I just
24 had a question real quick. I thought the question was
25 about Individual Intervenors going first for opening

1 statements.

2 So are you saying opening statements or
3 testimony?

4 MR. SMITH: Mr. Gough, do you want to clarify?

5 MR. GOUGH: My suggestion was for opening
6 statements.

7 MR. SMITH: Okay. Just for opening statements.

8 MR. GOUGH: But I have no objection to that
9 order otherwise. That was what was discussed last night.

10 MR. ELLISON: And, Mr. Smith, if it requires a
11 request, then I would like to make a request that that
12 same order continue for proof.

13 MR. SMITH: Okay. Do you have an objection to
14 that, of it also applying to proof, ma'am?

15 MS. LONE EAGLE: Right now I don't really know
16 because I'm new to this process so I really can't give
17 you a -- I know opening statements. I understand that.
18 But getting into the meat of everything, I'm not really
19 sure. So whatever is decide --

20 MR. SMITH: Okay. Well, we'll go that way, and
21 if it doesn't seem to be working, then we'll do something
22 else. How about that?

23 And I think because there's no other order then,
24 in terms of order of individuals and attorney represented
25 entities, I'll just go in alphabetical order, unless you

1 guys have another order you'd like to go in. And we'll
2 accommodate that if we need to.

3 MR. HARTER: Mr. Smith, with Individual
4 Intervenors -- and I can't speak for them, but I know
5 that -- in Nebraska there was another court deal going
6 on, and I don't know what's -- what people have sent in
7 or what on these opening statements and stuff and some of
8 the people like myself that's all we get.

9 So, you know, I would -- some way if they
10 haven't been able to send in a written one, if they could
11 respectfully grant them the ability to make a statement.

12 Thank you.

13 MR. SMITH: Yes. And that was my intent
14 actually. Because my assumption is we would have
15 individuals who -- they're having -- from what I've
16 gotten from communications from those folks, is I think
17 that proceeding in Nebraska is today. And what I've been
18 told is that with most of them they would prefer not
19 having to be here until like the 29th, 30th, along in
20 there.

21 And so far at least it's been the Commission's
22 action through several orders to accommodate those
23 particular scheduling needs. And unless there's some
24 prejudicial reason why and unless there's an objection
25 from TransCanada or staff or somebody, my intention is to

1 allow that, even if it's somewhat out of order.

2 Because I just think due to the nature of this
3 proceeding we've got to exercise some liberality. And so
4 I'm going to -- I want to do that, John, if -- you know,
5 unless there's an objection from anybody. But,
6 otherwise, I'd like to give everybody a shot to make
7 their statement heard, yes.

8 MR. GOUGH: Mr. Smith, not an objection but
9 further clarification. My original suggestion was
10 Individual Intervenors, tribal governments, and then the
11 NGOs.

12 I appreciate the traditions and precedent that
13 this Commission has followed over so many years and so
14 many cases. In Indian Country we have a tradition that
15 the elders get to speak first before the junior members
16 of the community speak. So following that we would
17 suggest that the Tribes who have been here far longer
18 than any of us get to speak following the Individual
19 Intervenors and then the NGOs.

20 MR. SMITH: Mr. Blackburn and Mr. Ellison and
21 others on the NGO side, do you have any objection to
22 that?

23 MR. MARTINEZ: We have no objection to that. I
24 think that's appropriate.

25 MR. SMITH: Okay.

1 MR. BLACKBURN: No objection.

2 MR. SMITH: I think that will work. And you
3 just -- sometimes I feel like I've got an awful lot to
4 keep in my mind here.

5 Mr. Gough, remember to remind me of that. But
6 also you can just -- just do it. Because do you want the
7 Tribes -- is it okay? Should they go in alphabetical
8 order?

9 Really any order you elect is fine. But I think
10 we should have some order so, like Mr. Taylor said, we
11 have some knowledge of where we're at.

12 Should we go in alphabetical order by Tribe?

13 MR. MARTINEZ: That's fine with me.

14 MR. CLARK: Actually, Commissioner, I'd like to
15 go last if possible.

16 MR. SMITH: You would?

17 MR. CLARK: Because of our witness.

18 MR. SMITH: Okay. That's fine.

19 MR. GOUGH: But, otherwise, alphabetical will be
20 fine.

21 MR. SMITH: Okay. We'll move Cheyenne to the
22 end then. That's fine.

23 MR. GOUGH: And, sir, no worries about getting
24 reminded. Thank you.

25 MR. SMITH: Uh-huh.

1 And I think we've already got agreement on this,
2 but does anyone here object -- if we've got individuals
3 who are -- a lot of them I'm assuming will just be here
4 maybe for one day due to work schedules and that kind of
5 thing.

6 Does anybody have an objection to those
7 Individual Intervenors being allowed to appear when they
8 can be here even if it's out of ordinary evidence order?

9 MS. REAL BIRD: The Yankton Sioux Tribe would
10 welcome that.

11 MR. SMITH: Okay. Thank you. Keystone,
12 TransCanada, do you have a thought?

13 MR. TAYLOR: Just a point of clarification. If
14 an Individual Intervenor shows up on Thursday, we do not
15 have to recall our witnesses and subject them to
16 cross-examination; correct?

17 MR. SMITH: You do not, no. If they're not here
18 for your direct case or whatever, no. I'm talking about
19 their evidence.

20 MR. TAYLOR: Thank you, Mr. Smith.

21 MR. SMITH: Right. Staff, any thoughts?

22 MS. EDWARDS: No objection from staff.

23 MR. SMITH: Okay.

24 Okay. Next we're going to turn to the order of
25 witness examination. Again we're intending to go with

1 the norm. And then what we generally go with, we go
2 direct testimony. And, again, we'd like to keep the
3 direct testimony -- because of prefiled, all parties
4 including the Applicant and Staff and the Intervenors, we
5 like to keep it relatively brief in a summary on direct.
6 You know, not going through every little detail because
7 we've already read it. You know, we've already got it
8 and read it.

9 And next cross-examination by other parties with
10 Intervenors first and then Staff. And again that's our
11 normal pattern so I'm going to recommend that. Followed
12 by Commissioner questions. And then additional
13 Intervenor and Staff cross-examination addressing
14 Commissioner question related issues. And, finally,
15 Keystone's redirect.

16 Okay. That's our normal way we do it, and does
17 anyone have a particular objection to that?

18 MR. ELLISON: I have no objection, Mr. Smith,
19 but I would request leave of the Commission that should
20 the redirect by TransCanada raise some questions that
21 would be appropriate for further inquiry, that the
22 Intervenors be allowed to make such inquiry.

23 MR. SMITH: Okay. You know, we'll have to wait
24 until the specifics of it, but feel free to make such a
25 request.

1 MR. ELLISON: Thank you, sir.

2 MR. SMITH: And just here I had a note to
3 myself. You know, the Commissioner issued an Order, you
4 know, that included a provision that we not indulge in
5 repetitive examination. We don't want to hear the same
6 questions time and again, unless you feel that it was
7 inappropriately done, I guess, the first time or
8 whatever. But that we use some discretion in terms of
9 avoiding needless repetition.

10 Okay. And I think we've already had a
11 discussion by Commissioners as to the issue in this case.
12 And, again, I would ask parties to try to contain their
13 evidence to the issue in the case, which is, you know,
14 whether the company, whether Keystone Pipeline -- XL
15 Pipeline, continues to meet the conditions set forth, the
16 50 Conditions set forth in the original Permit in
17 HP09-001.

18 And, again, obviously if we go beyond that, it's
19 possible that evidence could be subject to sustaining of
20 relevancy objections if we get outside of that parameter.
21 So just give me a heads up.

22 I think then we'll go -- are there any other
23 preliminary matters that any of the parties wish to
24 address at this time?

25 Mr. Blackburn.

1 MR. BLACKBURN: Thank you, Mr. Smith. I have a
2 motion related to Commissioner Fiegen's absence or her
3 capacity. That can normally be brought during the
4 opening statement process. It's one of the elements
5 that's allowed during the opening statement process, but
6 I would be happy to discuss that or present that motion
7 now if that would be convenient.

8 MR. SMITH: Why don't we do that. And then
9 we'll just go to straight opening statements.

10 MR. BLACKBURN: Thank you.

11 First, Bold wishes to make -- we'd like to make
12 a motion related to Commissioner Fiegen's incapacity to
13 participate in this evidentiary hearing.

14 First, Bold wishes Commissioner Fiegen a swift
15 recovery from her terrible disease. Her absence is a
16 very real loss to the Commission and to this process. In
17 fact, state law does not allow this loss.

18 South Dakota Codified Law Section 41-1-9 states,
19 A majority of the Commissioners shall constitute a quorum
20 for the transaction of business, but no Commissioner
21 shall participate in any hearing or proceeding in which
22 he has any conflict of interest or if he is temporarily
23 incapacitated. If a Commissioner determines that he is
24 incapacitated or disqualified from participating for any
25 reason in any hearing or proceeding, he shall certify

1 that determination to the Governor. Or if the character
2 of the incapacity of any Commissioner is such that he is
3 unable to certify his incapacity to the Governor, the
4 Commission may make such certification. In the event of
5 any such certification, the Governor shall then appoint
6 an elected constitutional officer other than the Attorney
7 General to act as the member of the Commission in place
8 of the disqualified or incapacitated Commissioner for the
9 purpose of such hearing or proceeding only.

10 This language allows the Commission to transact
11 business with only two Commissioners except in two
12 circumstances. First, it cannot transact business with
13 only two Commissioners when the third has a conflict of
14 interest. And, second, it cannot transact business when
15 a Commissioner is temporarily incapacitated.

16 The use of the word "but" after the definition
17 of quorum imposes a qualification on the quorum rule.
18 The Commissioner may proceed with only two Commissioners
19 to conduct business but not when a Commissioner either
20 has a conflict or is temporarily incapacitated.

21 The question arises about when a temporary
22 incapacitation arises and how long the incapacitation
23 lasts, if temporary. The law does not limit such
24 incapacitation to only those which would begin before the
25 start of the hearing and such interpretation would be

1 illogical because it's not possible to foresee all
2 incapacities. We can agree that a de minimus absence as
3 opposed to an incapacity of a Commissioner for a day or
4 two would not seem to trigger this limitation. Instead,
5 it is only to interpret this language to mean that the
6 law will be absent from a hearing for substantial period
7 of time such that he or she would not be able to
8 participate fully in significant aspects of the hearing.

9 Here it appears that Commissioner Fiegen -- and
10 we are certainly not clear about all the facts here --
11 due to her tragic illness will miss the entire
12 evidentiary hearing, and thus will not be able to assess
13 the credibility of witnesses, ask questions of witnesses,
14 or rule on critical evidentiary and procedural matters
15 during the hearing.

16 The evidentiary hearing phase of this docket is
17 its single most important phase and the most substantial
18 of the Commission's actions in this docket.

19 It is difficult to imagine the timing of the
20 temporary incapacity that could have a greater impact on
21 any hearing. Moreover, it is also not clear to any of us
22 how long her incapacity will last.

23 I'm sure that everyone in the room wishes her a
24 speedy recovery, but the length of her recovery period is
25 difficult to predict.

1 Since the Commission -- since a Commissioner
2 will be temporarily incapacitated during this hearing,
3 either the Commission must delay this proceeding until
4 after her successful recovery or the Governor is required
5 to appoint a constitutional officer as her replacement.
6 Those appear to be your only options.

7 And let me take the bull by the horns here.
8 Some might say that Bold is opportunistically exploiting
9 Commissioner Fiegen's illness to delay the hearing. We
10 are not.

11 In addition to TransCanada and the Staff, all of
12 the Intervenors are in attendance and ready for the
13 hearing and have committed substantial resources to the
14 hearing. This will inconvenience all of us.

15 Moreover, delaying the hearing will not impact
16 the overall schedule for development of the Keystone XL
17 Pipeline. Ongoing litigation in Nebraska and the Federal
18 Presidential Permit process means that TransCanada would
19 not be able to start construction for at least six
20 months, probably significantly longer than that, even
21 assuming the project is approved by these jurisdictions.

22 A modest delay to accommodate Commissioner
23 Fiegen to allow her time to recover would not result in
24 any overall delay of the project.

25 Finally, this is a very unusual situation to

1 which the Commission should speak so the Applicant and
2 Intervenors can understand the Commission's position on
3 this decision to proceed with this hearing.

4 This surprised us all. I think we're all
5 saddened by the situation. And we would like
6 clarification about why the Commission decided to move
7 ahead with this proceeding, and the motion is offered in
8 the spirit of inquiry about what the situation is and how
9 we move ahead.

10 Therefore, Bold offers -- first we offer our
11 best wishes for Commissioner Fiegen's return to full
12 health, and Bold also moves to continue this hearing
13 because such continuance is required by South Dakota
14 Codified Law 49-1-9.

15 Thank you.

16 MR. SMITH: Mr. Ellison.

17 MR. ELLISON: Thank you. If I may address again
18 on behalf of Dakota Rural Action, we do wish Commissioner
19 Fiegen a speedy recovery.

20 In addition to the arguments that Mr. Blackburn
21 has raised, we have some additional concerns. And one of
22 them would be that even if -- if this Commission were to
23 deny the motion to put this matter off, we would join
24 that motion because we think it's appropriate under the
25 circumstances and that these are last-minute matters.

1 Our concerns are timing. We don't -- we know
2 the general medical issues. We don't know some of the
3 specifics. We do understand that hospitalization might
4 be quite lengthy. We would expect that if there is
5 extensive surgery which is conducted, that there will be
6 possibly a very substantial amount of time that
7 Commissioner Fiegen would be on various kinds of
8 medication.

9 If they're pain medications, if they're other
10 medications related to cancer treatment, they certainly
11 have an effect on a person's ability to concentrate, on a
12 person's ability to remember, on a person's ability to
13 actually think through issues. I say that from personal
14 experience.

15 Therefore, we don't know. And we would hope
16 that if the motion was denied, that Commissioner Fiegen
17 would not even begin to look at these matters until she
18 is 100 percent off of any medications or treatments that
19 would in any way impair her 100 percent abilities.

20 We don't know if that's three weeks, three
21 months, six months. And it would seem to me that unless
22 Commissioner Fiegen waits until she is completely off
23 mind-affecting medications and treatments, that she would
24 not be properly in a position to begin review.

25 I know that after major surgery a person goes

1 through a period of time where suddenly they're feeling
2 much better than they did before but they're not healed
3 or they're still on medications that affect them. And
4 Commissioner Fiegen should take whatever time she needs
5 to be healed from this situation, but that then pushes
6 everything back anyway. And it must.

7 Out of fairness to all of the parties, for
8 Commissioner Fiegen to even begin to review prior to
9 being off medications and treatments would really be
10 inappropriate and unfair.

11 And so it makes no sense to proceed at this
12 point in the absence of an indication, for example, that
13 Commissioner Fiegen would be 100 percent within two
14 weeks. And I don't understand that's going to be the
15 case. Or three weeks.

16 If she is not really ready for several months,
17 what would be the harm then in waiting until we have an
18 appropriate, full Commission in the absence of the
19 gubernatorial substitution appointment.

20 We are very concerned. We look at this matter
21 very seriously. And we don't want Commissioner Fiegen
22 rushing any part of her recovery or her involvement in
23 this case prior to her being 100 percent medically fit to
24 do so.

25 Thank you.

1 MR. SMITH: Thank you.

2 Keystone? TransCanada.

3 MR. TAYLOR: With all due respect to the
4 Intervenors, 49-1-9 contemplates that Commissioner Fiegen
5 will make the decision on whether or not she's
6 incapacitated unless there is some showing that she is
7 unable to make that decision on capacity.

8 She has made that decision. She has made the
9 decision that consistent with the Administrative
10 Procedures Act she will read and certify rather than
11 appear at the hearing.

12 We think that that is totally appropriate. It's
13 a decision that she must make. When she's ready to read
14 and certify, she can read and certify. And she may be
15 ready to listen to part of the hearing as it's conducted.
16 That's her decision.

17 We're here. We're ready. Let's go.

18 MR. HARTER: Do the other parties get to weigh
19 in on this?

20 MR. SMITH: Pardon me. Yeah. Yes. I was
21 looking out there, Mr. Harter, and I didn't see anyone
22 else indicating.

23 MR. HARTER: I didn't raise my arm up.

24 MR. SMITH: Sometimes I can tell just by the
25 face, but I saw nothing so I moved on.

1 MR. HARTER: John Harter on this about
2 Ms. Fiegen's health.

3 I watched my mother, sat by her bedside for
4 months while she died of cancer. And when I first heard
5 about Ms. Fiegen I said a prayer for her. She is --
6 she's got a long road ahead of her, and she's fighting
7 for her life right now. And she does not need to have
8 this presented in front of her and distress her. Because
9 stress facilitates what she's fighting.

10 And I think it's a gross abomination that any of
11 us would put this on her. I think it was terrible the
12 burden that Kristen Edwards was put on her while she was
13 pregnant. And after watching for several months my mom
14 die of cancer, I think it's completely inappropriate for
15 this thing to continue.

16 And it's also prejudice against the Intervenors
17 because we don't get to hear her input and her questions
18 to the facts and the witnesses. And under the grounds of
19 prejudice and just good common decency, I think this
20 thing should be put off until she's in good health.

21 COMMISSIONER HANSON: Mr. Smith.

22 MR. SMITH: Yes, Commissioner Hanson.

23 COMMISSIONER HANSON: I submit that this is not
24 open to debate at this juncture. The state law, and I
25 will read it, states that if a Commissioner determines

1 that he is incapacitated or disqualified from
2 participating for any reason in any hearing or
3 proceeding, he shall certify that determination to the
4 Governor or if the charter of the in -- the character of
5 the incapacity of any Commissioner is such that he is
6 unable to certify his incapacity to the Governor, the
7 Commission may make such certification.

8 Commissioner Fiegen has been well-aware of the
9 challenge that she faces. She researched it very, very
10 carefully. She certified to us that she is capable of
11 going through the process that she wrote to us and
12 explained and, therefore, it's not even within our hands
13 at this point.

14 CHAIRMAN NELSON: Mr. Smith, if I might add a
15 couple of things.

16 MR. SMITH: Please, Chairman Nelson.

17 CHAIRMAN NELSON: First of all, I appreciate
18 your all's comments of concern for our fellow
19 Commissioner. Let me assure you of a couple of things.

20 Number one, Commissioner Fiegen's first question
21 to her doctors was can I wait until after this hearing to
22 begin treatment? And the answer was we would recommend
23 that that not be the case. That's why her treatment has
24 begun.

25 Secondly, and John, I don't mean this in any

1 disrespect, but Commissioner Fiegen is not dying of
2 cancer. She is well on her way to recovery. Everything
3 that has been done to this point points to a complete
4 cure. She is on the road back.

5 Mr. Ellison, you raised excellent points about
6 the effect of the drugs that are used during treatment,
7 and Commissioner Fiegen has evaluated that very, very
8 carefully. She is fully aware of that impact and fully
9 aware that she needs to be beyond that before she reviews
10 the transcript and takes any ultimate action in this
11 regard.

12 And so while this is not what any of us would
13 have wished, it is reality. She is -- she is doing well,
14 and we look forward to her joining us as soon as she is
15 able.

16 And so, with that, Mr. Blackburn, I understand
17 the concern. I would echo what Commissioner Hanson has
18 said, is that she has not declared an incapacity. She
19 will fully read -- and statute provides -- we've got
20 1-26-24 and an associated Supreme Court decision that's
21 squarely on point that allows a decision-maker to read
22 the transcript prior to making the decision.

23 So we carefully looked at this and determined
24 that we can, in fact, move forward.

25 Thank you.

1 MS. BRAUN: Commissioners, this is Joye Braun.

2 MR. SMITH: Oh, pardon me.

3 MS. BRAUN: Yeah. When I heard about
4 Commissioner Fiegen the first thing I did was I went -- I
5 took tobacco out, and I prayed for her.

6 As we have gone through this, we've gotten to
7 know each one of you, and I carry you guys all in my
8 heart because this is such a serious decision that we're
9 going to be making.

10 With all due respect, I go through chemotherapy
11 every six months, not for cancer but for a different
12 disease. And Commissioner Fiegen, when you start going
13 through these types of medications at the very beginning
14 of them you think that you can do anything. Especially
15 when you get prednisone. Prednisone is a steroid. You
16 get that, and you feel like you're super woman or
17 superman.

18 But I will guarantee you that you will not know
19 as an individual what those drugs are going to do to you,
20 what they do to your brain and what they do to your body
21 until you're going through them.

22 I know that firsthand. I also know what it's
23 like to be puking your brains out from that chemotherapy.

24 CHAIRMAN NELSON: Mr. Smith, I'm going to have
25 to interrupt. It is wholly --

1 MS. BRAUN: No. I'm going to go ahead and
2 continue talking.

3 CHAIRMAN NELSON: Mr. Smith, it is wholly
4 inappropriate for folks to speculate --

5 MS. BRAUN: My name is Joye. It's not
6 Mr. Smith. And, you know, with all due respect, you guys
7 have done so much against the Native American voice here
8 that I'm going to go ahead and continue talking.

9 MR. SMITH: Ma'am, this is out of line. And I'm
10 going to ask you to be quiet, or we are going to contact
11 security here and have you removed.

12 Okay. That's enough.

13 CHAIRMAN NELSON: Mr. Smith, if I might, it is
14 entirely inappropriate for anyone to speculate on the
15 type of treatments that Commissioner Fiegen is undergoing
16 or specific drugs that she may or may not be taking.
17 It's entirely inappropriate.

18 And I understand -- I understand what you're
19 saying, but it's inappropriate to speculate on that kind
20 of thing. We're not going there.

21 I can share the actual truth, but I'm not going
22 to because that's not appropriate. Commissioner Fiegen
23 has not authorized me to share the entire scope of the
24 treatment beyond what she has made public. But I can
25 tell you that your speculation is inappropriate.

1 MR. SMITH: Yes, ma'am. I can't see your sign
2 so I can't see -- you're behind the post.

3 MS. LONE EAGLE: My name is Elizabeth Lone
4 Eagle. So that way you don't have to see my name card
5 all the time.

6 MR. SMITH: Okay.

7 MS. LON EAGLE: Thank you.

8 I just had a question regarding one of the
9 points that I consider to be a due process for us as
10 Individual Intervenors, and it was brought up by
11 Mr. Harter regarding the fact that we won't be able to
12 have an understanding or know the questions that she
13 raises.

14 So my question is, is there a remedy for us for
15 that, that since, you know, she would be looking at
16 things after the fact not being able to see facial
17 expressions and things like that, just kind of going
18 through a transcript and hearing an audio tape and maybe
19 she has questions.

20 What's our remedy for not having access like we
21 should have to her part of the process? That's my
22 question.

23 MR. SMITH: Well, you know, I might say first of
24 all that, you know, you don't have the right to question
25 her.

1 MS. LONE EAGLE: No. No. I'm saying
2 understanding what her questions were. We don't even
3 know what her questions are because she'll be looking at
4 it after the fact.

5 What's our remedy so we're aware of what her
6 thought processes are as she's going through this?
7 Because we'll know what the other two Commissioners
8 are --

9 Do you understand what I'm saying? We'll hear
10 their questions. We'll understand where they're coming
11 from. But because of what's going to happen with
12 Commissioner Fiegen after the fact, what's our remedy to
13 be able to understand her part of the process?

14 That's what I'm asking. I'm not asking you to
15 change your mind or anything. I'm asking the question
16 because I don't understand.

17 MR. SMITH: Well, I don't know that there is
18 really an answer to that except, again, the one statute
19 that Commissioner Nelson referenced in the APA,
20 Administrative Procedures Act, and a case here, a Supreme
21 Court case, has held that a person may participate in
22 decision-making as an agency person assigned to do that
23 if they have, in fact, read the record, the transcript,
24 the hearing record, the evidentiary hearing record.

25 And, again, in general although Commissioners

1 have the right to ask questions, and they do once in
2 awhile, the questioning that occurs really in evidentiary
3 hearings is done by counsel for parties.

4 There are sometimes some follow-on questions by
5 Commissioners. But in general that's not a significant
6 or necessary part of the proceeding at all. It's the
7 parties' obligations to do their own examination. And
8 that's what's in general going to happen here.

9 CHAIRMAN NELSON: If I could add just one thing
10 to that, Mr. Smith, understand that in the seven days
11 we're gathered here we are not making a decision. I
12 suspect that we may ask for some posthearing briefs. But
13 at some point in the future all three Commissioners will
14 gather in a room in a public meeting to make our final
15 decision.

16 And at that point Commissioner Fiegen will have
17 an opportunity to ask questions if she has them of any of
18 the parties in an open public meeting. And so all of
19 that will be done very openly and very publicly with all
20 three of us.

21 MR. SMITH: Thank you. Mr. Dorr, something else
22 to add?

23 MR. DORR: Yeah. I have a question as far as
24 the process. She's not participating. She's going to be
25 reading the transcripts.

1 MR. SMITH: Yes, sir.

2 MR. DORR: At some point is she going to be
3 asking those attorneys over there, your Staff attorneys,
4 questions outside of our presence?

5 MR. SMITH: No. That will not happen.

6 MR. DORR: That's my question. Thank you.

7 MR. SMITH: No. That will not happen. We do
8 not allow that to happen. Any communication she has with
9 Staff will occur in a public setting, and you will be
10 able to -- you will be there -- be able to be there, if
11 you choose. Okay. We don't ever allow that.

12 Okay. Any other thoughts?

13 MR. RAPPOLD: Yes, Mr. Smith.

14 MR. SMITH: Mr. Rappold.

15 MR. RAPPOLD: Thank you. I want to echo
16 everyone's concerns for Commissioner Fiegen's health and
17 again wish her a speedy and healthy recovery.

18 Part of the problem that I think we have in an
19 incapacitation situation is that we oftentimes lack the
20 ability to make the determination on our own that we're
21 incapacitated. That's part of the problem with this
22 situation here.

23 The other part is that everything that we've
24 heard about Commissioner Fiegen's situation and why she's
25 not here amounts to hearsay and it would be inadmissible

1 evidence to determine whether or not the Commission can
2 proceed forward in her absence.

3 It's concerning. I mean no disrespect to the
4 Commission in the way this has been handled. We haven't
5 seen a certification from Commissioner Fiegen. We
6 haven't seen anything from the doctor that said what
7 everybody's talking about.

8 I'm not asking to know what exactly her health
9 condition is because that's her business. That's her
10 private business. But in this situation we do have
11 rights to actually be told with a certain amount of
12 formality under the law as to what's taking place.

13 And I wanted to make that statement for the
14 record prior to the Commission making a decision on the
15 motion to continue.

16 MR. SMITH: Okay. Yes, Ms. Real Bird.

17 MS. REAL BIRD: We do join in Mr. Blackburn's
18 motion and echo the sentiments stated earlier from
19 counsel for Intervenors.

20 And we also take the position that SDCL 1-26-24
21 does not apply here. It states that when in a contested
22 case a majority of the officials of the agency who are to
23 render the final decision have not heard the case or read
24 the record then it goes on.

25 Here we don't have the majority of your

1 Commission that are not hearing the case. So we do take
2 the position that that statute is not applicable to this
3 situation. That's our position.

4 Thank you.

5 MR. SMITH: Well, it's an interesting argument.
6 It seems to me completely illogical to interpret it that
7 way, but thank you.

8 Any Commissioner thoughts?

9 COMMISSIONER HANSON: Overruled.

10 MR. SMITH: Well, I'm going to deny the motion,
11 and we are going to proceed. Again, based on the
12 communications I've seen I have not seen an
13 incapacitation other than just a need to be -- to be
14 bedridden for a while. In terms of mental incapacitation
15 I have to observe that.

16 Yes, Ms. Craven.

17 MS. CRAVEN: Thank you, Mr. Smith. I know that
18 you've already made a ruling on your -- on this motion,
19 and we join the motion. I was at the hearing last
20 Tuesday along with my colleague Travis Clark, and
21 Commissioner Fiegen came over and told us personally that
22 she was going to have a very long surgery on Thursday and
23 that she would be in the ICU, intensive care unit, for
24 seven to nine days. So I imagine that she's there right
25 now.

1 So that to me if you're in ICU, you're fairly
2 incapacitated. That's a very serious place to be.

3 MR. SMITH: Okay. Thank you. Additional
4 Commissioner thoughts at this point?

5 Okay. Well, we're going to -- we're going to
6 move on.

7 And I guess one other thing here is this has
8 been known for -- as Ms. Craven just said, she actually
9 had a conversation about it for a while now and --

10 CHAIRMAN NELSON: John, I'm going to -- John, I
11 want to -- and I understand that you had that
12 conversation.

13 Let me just say Commissioner Fiegen's recovery
14 from that surgery is going much faster than the time
15 frames that she had referenced last week. Much, much
16 better. So I don't want to leave folks with the numbers
17 that you just quoted.

18 MS. CRAVEN: Well, that's what she told me
19 directly. So I have firsthand knowledge of that.

20 But the other thing is I then asked Mr. Taylor
21 what's going to happen if she's incapacitated. And he
22 told me that she will read the transcript.

23 So see he seemed to have prior knowledge of how
24 this was all going to unfold prior to any of us knowing
25 what was going to happen. So I think we feel like we've

1 been left out of what's happening here.

2 MR. TAYLOR: Mr. Smith.

3 MR. SMITH: Mr. Taylor, please.

4 MR. TAYLOR: I did explain to Ms. Craven what
5 the procedure was, and the reason that I explained to
6 Ms. Craven is because twice in my career I've been
7 involved in administrative procedure hearings in which a
8 Commissioner -- a Commissioner or a Commission member
9 read and certified as opposed to appeared at the
10 Commission.

11 I simply explained to Ms. Craven -- I had no
12 advanced knowledge of Ms. Fiegen's intentions until I
13 think -- if memory serves me correct, that Commissioner
14 Nelson announced that at the conclusion or in the course
15 of Tuesday's hearing.

16 MS. CRAVEN: No. There was nothing said at that
17 Tuesday hearing about this beyond what she told me
18 directly.

19 CHAIRMAN NELSON: It was at the Thursday hearing
20 when I publicly announced it.

21 MR. SMITH: With that, Cheri, how are you doing?
22 Should we proceed with opening statements, or should we
23 take a break now and move on?

24 Yes, sir. Mr. Martinez.

25 MR. MARTINEZ: Robin Martinez on behalf of

1 Dakota Rural Action.

2 There is one additional matter that I'd like
3 to bring up. We've just received an e-mail from
4 Mr. Taylor's office and apparently they have just as of a
5 few minutes ago filed some amended rebuttal testimony for
6 several of their witnesses.

7 I believe the deadline for that has passed. We
8 would move to strike any amended rebuttal testimony at
9 this time as being submitted.

10 MR. SMITH: Okay. Do you want to address that
11 now, or should we address that when you begin your case
12 in chief?

13 MR. MOORE: I'm happy to address it now.

14 The amended rebuttal is for Heidi Tillquist and
15 for Meera Kothari. It is based on the withdrawal of
16 testimony in response to the Rosebud Sioux Tribe's motion
17 after it withdrew two of its witnesses.

18 The Commission requested that we amend the
19 rebuttal so it was clear exactly what had been omitted
20 based on testimony. We have done that, and it has been
21 filed.

22 MR. SMITH: Okay. Does that answer that?

23 MR. MARTINEZ: Yes, it does. If indeed the
24 amendment is essentially a redaction of what has
25 previously been filed without limitation of it, I think

1 we would be fine with that.

2 MR. SMITH: Again, without seeing it to see what
3 the middling details are -- but that was pursuant to
4 Commission order so I think that is not noncompliant with
5 our Procedural Schedule.

6 So okay. With that, Commissioners, what do you
7 think? I mean, I'm kind of thinking maybe we take a
8 short break now and then proceed --

9 Because those could take -- it depends on
10 whether you want to do them now or do them at the time of
11 their testimony. So let's take a -- it's 10 to 11:00.
12 We'll reconvene at -- go into recess and reconvene at
13 11 o'clock.

14 (A short recess is taken)

15 MR. SMITH: We'll reconvene the hearing in
16 HP14-001. We're going to go to opening statements now.
17 And, again -- Ms. Lone Eagle.

18 MS. LONE EAGLE: Thank you. During the break I
19 had talked to several of the other Individual Intervenors
20 and I know that you had decided you wanted to go in
21 alphabetical order but I had asked if it was all right
22 with them if I made the first opening statements since
23 you're allowing Individual Intervenors to go first and
24 they agreed to that. So if it's all right --

25 MR. SMITH: If no one has an objection, that's

1 fine with me.

2 Mr. Taylor, is that an objection?

3 MR. TAYLOR: That's fine.

4 MR. SMITH: Okay. We'll go to opening
5 statements. And our typical procedure here -- and I
6 intend to allow it today -- is people have the choice of
7 giving their opening statement now at the commencement of
8 the case, of the evidentiary portion of the case, or
9 doing it at the beginning of your direct testimony,
10 whichever you choose to do.

11 And so today this morning we'll take people who
12 wish to do their opening statements now at the beginning
13 of the proceeding or whether you'd rather wait and do it
14 as an introduction to your testimony, this is also
15 acceptable. It's your choice to make.

16 And so, with that I guess we're going to begin
17 with Individual Intervenors. And Ms. Lone Eagle has
18 asked to go first, and so, Ms. Lone Eagle.

19 Another thing I'll say is, everybody, we've been
20 asked by the court reporter to please come up to the
21 front podium for opening statements. You will not need
22 to do that for examination but for purposes of --

23 Oh, yeah. Okay. We're going to limit to
24 10 minutes. Okay. And we have the timing system that we
25 had for the earlier public input hearing. The green

1 light will go on when you have four minutes to go in your
2 10 minutes. The yellow light will come on when you have
3 one minute to go. And the red light means 10 minutes are
4 up.

5 With that, Ms. Lone Eagle, please proceed.

6 MS. LONE EAGLE: First and foremost, pursuant to
7 the testimony of John Clifford on July 6, 2015, before
8 the South Dakota Public Utilities Commission I reiterate
9 the words of my father, also a precluded witness.

10 These proceedings are illegal.

11 (Speaks Lakota.)

12 My participation in these illegal proceedings is
13 under duress.

14 (Speaks Lakota.)

15 According to South Dakota, my participation is
16 deemed "voluntary," but in reality my participation is
17 involuntary as it is driven by natural survival instincts
18 on behalf of my children, my family, my people.

19 My participation is no more voluntary than my
20 father's land, also my family's source of sustained
21 economic stability, which has been volunteered for
22 imminent death by TransCanada as set forth in the
23 two-mile-wide voluntary evacuation plan.

24 This applies as well to my children, my home,
25 and my community of Bridger, South Dakota also located

1 within the two-mile birth of TransCanada's voluntary
2 evacuation zone.

3 Both locations in jeopardy from these
4 proceedings are included in TransCanada's planning but
5 outside the jurisdiction of the State of South Dakota
6 making these proceedings illegal under federal law.

7 According to the South Dakota Constitution
8 Article 21, Section 3 "Every person elected or appointed
9 to any office of this state, except such inferior offices
10 as may be by law exempted, shall before entering upon
11 duties thereof take an oath or affirmation to support the
12 Constitution of the United States."

13 You have all sworn such an oath. And as so
14 eloquently pointed out by my father, Article 6 of the
15 U.S. Constitution deems treaties to be the supreme law of
16 the land. In your own Order granting Motion to Preclude
17 consideration of aboriginal title or usufructuary rights
18 dated June 15, 2015, "the Commission does not have
19 jurisdiction over aboriginal title or usufructuary
20 rights."

21 In your own words, you have no authority to
22 approve a Permit affecting our lands and communities.
23 Therefore, you have no legal alternative than to deny
24 TransCanada's request for recertification.

25 On July 6, 2015, my nine year old daughter sat

1 before you and gave you her word that she would not allow
2 anything to harm her family or community. She was
3 followed by the wise words of several other children,
4 including an 11 year old who stated that if she could
5 figure out that Keystone XL Pipeline was bad for
6 South Dakota, why couldn't you?

7 A point which leaves me to wonder whether or not
8 the South Dakota Public Utilities Commissioners are
9 smarter than a fifth grader.

10 Thank you.

11 MR. SMITH: Thank you. Thank you.

12 Keystone, do you wish to give an opening now or
13 at the commencement of your case? Because otherwise
14 we'll go to other opening people who wish to do it at the
15 outset here.

16 MR. TAYLOR: Commissioners, parties, counsel, I
17 am William Taylor. I'm accompanied by James White,
18 James Moore, Stacey Van Camp, lawyers appearing on behalf
19 of TransCanada Corporation.

20 We're here today representing TransCanada
21 Keystone Pipeline, LP. In its certification that the
22 proposed KXL Pipeline continues to meet the conditions on
23 which this Commission issued a Permit authorizing
24 construction of the project in 2010, per the requirements
25 of the South Dakota Energy Facilities Permit Act,

1 SDCL Chapter 49-41B, in 2009 Keystone applied for a
2 Permit to construct a 36-inch diameter crude oil pipeline
3 from Hardisty, Alberta, Canada to Steele City, Nebraska,
4 315 miles of which would pass through South Dakota, part
5 of a larger pipeline project that would deliver North
6 American produced crude oil to Patoka, Illinois, Cushing,
7 Oklahoma, and on to the U.S. Gulf Coast.

8 In 2010 after conducting a series of public
9 meetings, hearing extensive testimony, listening to the
10 concerns of the public of the State of South Dakota,
11 after admitting extensive evidence, this Commission
12 issued a Permit authorizing the construction of the
13 pipeline in South Dakota subject to 50 Conditions with
14 which the pipeline must comply.

15 Because the proposed project crosses the
16 U.S.-Canadian border, the president, acting through
17 Department of State, must issue a Permit to construct the
18 pipeline. To date that has not happened.

19 The South Dakota act, at 49-41B-47 requires, and
20 I quote, "that if construction commences more than four
21 years after a Permit is issued, then Keystone must
22 certify to this Commission that the pipeline continues to
23 meet the conditions on which the Permit was issued."

24 "Continues to meet the conditions on which the
25 Permit was issued."

1 More than four years have passed since the 2010
2 Permit issued. In September 2014 we filed on behalf of
3 Keystone a certification signed by an officer of Keystone
4 under oath that the proposed project continues to meet
5 those conditions on which the Permit was issued.

6 The Commission chose to treat the certification
7 as a new docket. 40 plus persons and organizations
8 intervened as parties. Procedural and scheduling orders
9 were debated and entered. Two rounds of discovery was
10 undertaken. Extensive discovery was exchanged.
11 Extensive motion practice was engaged.

12 The scope of the hearing has been defined, the
13 issues refined and narrowed, and per the Commission's
14 Order and standard practice, written testimony, both
15 direct and rebuttal, was prepared and filed along with
16 the exhibits that support the testimony.

17 We are here today to meet Keystone's burden of
18 proof. That is, certifying that the project continues to
19 meet the 50 Conditions on which the Permit was issued and
20 that it can be constructed and operated accordingly.

21 We'll offer the testimony of seven witnesses,
22 five of whom are direct witnesses, two of whom are
23 rebuttal. We will present exhibits that meet that burden
24 of proof.

25 The testimony of our witnesses, many of whom

1 you've heard before, will conclusively demonstrate that
2 the project will continue to meet the 50 Conditions on
3 which the Permit was issued.

4 As Commissioner Nelson said this morning, this
5 is not a retrial of the 2009 proceedings. This is not a
6 retrial of whether the Permit should have issued in the
7 spring of 2010. The time to contest whether the pipeline
8 is a good or a bad idea was five and a half years ago in
9 the initial hearing.

10 That question was resolved then and is not in
11 issue today. The scope of today's hearing is narrow,
12 limited to whether the pipeline can be constructed today,
13 continuing to meet those 50 original conditions.

14 Now we acknowledge there have been some changes
15 in circumstances in the years that have intervened since
16 the Permit was issued. We coalesced those changes into
17 the Tracking Table of Changes, which was appended to our
18 Petition.

19 As the Table of Changes demonstrate, parts of
20 the proposed project in 2009 have already been
21 constructed. The Gulf Coast extension from Cushing,
22 Oklahoma, was treated as a separate project after 2009.
23 It has been constructed, completed, and is in operation.

24 The Steele City, Nebraska, to Patoka, Illinois,
25 and the Steele City, Nebraska, to Cushing segments of the

1 project were constructed as part of the base Keystone
2 Pipeline and are in operation today.

3 A facility, an on-ramp, has been added to the
4 project. The on-ramp located in Baker, Montana, will
5 allow 100,000 barrels of Williston Basin oil per day to
6 be transported in the pipeline and has been added to the
7 project since the 2009 proceedings.

8 Our testimony and our exhibits will show without
9 contravention the means and methods of construction and
10 reclamation remain unchanged. The project route in
11 South Dakota is unchanged. The market and demand for the
12 services that the pipeline will provide, that is, the
13 transport -- underscore transport -- the transport of
14 North American crude oil remains unchanged.

15 The company's commitment to comply with all
16 state, federal, and local laws and all Permit conditions
17 imposed by whatever governing authority imposes them
18 remains unchanged.

19 In summary, the project is unchanged from 2009
20 and can and will be constructed and operated according to
21 the conditions you imposed in the spring of 2010.

22 TransCanada respectfully requests that at the
23 conclusion of this hearing you make a finding that the
24 company has correctly and accurately certified to the
25 Commission that the proposed project continues to meet

1 the conditions on which the Permit was issued and that
2 you enter an order to that end.

3 Thank you.

4 MR. SMITH: Thank you, Mr. Taylor.

5 Intervenors, do other Intervenors wish to make
6 an opening statement now?

7 Yes, sir, Mr. Goldtooth?

8 The reporter would like people making opening
9 statements to come up here so she can see them.

10 MR. DALLAS GOLDTOOTH: I just want to make
11 sure -- I wasn't here earlier for rollcall.

12 MR. SMITH: Oh, you're just putting in an
13 appearance.

14 MR. DALLAS GOLDTOOTH: And I will do opening
15 too.

16 MR. SMITH: Okay. Please take the stand.

17 MR. DALLAS GOLDTOOTH: Good morning to everyone.
18 My name is Dallas Goldtooth, and I was actually supposed
19 to be leaving early this morning but decided to stay a
20 little bit later so I can provide an opening statement.
21 And because I was planning to leave early I wasn't
22 prepared on a written out -- to read off of something.
23 So I'll speak from the heart of sorts. I'm sure actually
24 everyone speaks from the heart.

25 I know that there was a concern in the public

1 comments, you know, last week or when we had the hearing
2 for public comments, a statement at the very end by
3 Commissioner Hanson about, you know, emotional statements
4 and that this is about the facts. But a lot of people
5 here and the arguments that are going to be presented by
6 the various Intervenors, they are facts about the -- how
7 the conditions have changed.

8 But for a lot of us this is a very emotional
9 process. We can't separate those two things because the
10 Intervenors are representing groups, people, tribal
11 nations, communities, who are very invested in the future
12 of their lands, communities, and the health of all
13 beings.

14 And so I just really strongly encourage
15 Commissioner Hanson, Commissioner Nelson, and
16 Commissioner Fiegen to really understand that, you know,
17 that what may seem as just pure emotions is based in true
18 concern and also is factually based on the dangers that
19 this Keystone XL Pipeline poses to our future. Not just
20 in the moment now but what comes down the road.

21 I think that's -- you know, how you define
22 conditions can be debated, but from my perspective we
23 have the actual conditions that were in the original 2010
24 Permit but then also the general conditions I think that
25 we have to take notice and recognize and acknowledge what

1 the current condition of where things are at right now,
2 given the Kalamazoo spill, which cost over 1 billion
3 dollars, you know. That's something to be noted, what's
4 going to happen here.

5 Acknowledge the Nexen spill that most people may
6 not know about the Nexen pipeline up in northern Alberta,
7 which is relatively new, only constructed in the past
8 year and a half with the highest safety regulations in
9 place with the processes that even TransCanada might be
10 proposing, saying for safety. That spill actually
11 outpaced the Kalamazoo spill. And that's tar sands.

12 You know, so I think that you have to take
13 notice of where things are at beyond what was
14 specifically in the Permit.

15 And I feel like, you know, you as the
16 Commissioners maybe feel like by law we can only focus on
17 what's in the Permit. And I just encourage you from
18 human to human to really just be mindful of that in the
19 back of your mind. And I'm sure you are.

20 And I just wanted to say that it's -- I hope you
21 can understand and it may be frustrating for all, Staff
22 and everybody, to understand how infuriating and
23 frustrating the process can be for tribal people.

24 You know, if there's any definitive -- if
25 there's anything that can define the struggle for

1 indigenous peoples for the past number of decades, even
2 going farther back, that is the recognition of our
3 inherent rights as the original occupants and inhabitants
4 of Turtle Island, also known as North America.

5 The continued struggle for recognition of our
6 inherent rights. And to have free and informed and prior
7 consent about development, about policy, anything that
8 may impact our communities now and into the future. And
9 that time after time on record on the federal level that
10 wasn't granted to tribal nations. Tribal nations,
11 communities, individual people have stated we have been
12 excluded on a proper level to be consulted on this
13 issue.

14 And now with decisions from the Commission some
15 weeks ago last month to exclude the tribal usufructuary
16 rights and treaty rights and from this discussion it
17 further adds to that fury, that anger, about, well, if we
18 can't talk about these issues on the federal level and we
19 can't talk about them on the state level, what do we have
20 left?

21 Where are we allowed to vent our worry and
22 sincere concern about the future of our communities,
23 whether it's Bridger, which is only within a mile of this
24 pipeline or whether it's Yankton, concern about the man
25 camps because it's so close to one of the only forms of

1 entertainment, the casino. What impact is that going to
2 have on the communities?

3 So that is a sincere frustration and anger that
4 I'd like to remind folks that you can understand the
5 greater context of these things.

6 And I really just thank you for listening and
7 taking this moment, but it -- I say that, and at the same
8 time I'm just as frustrated, just as angry about this
9 whole process. And I just want to encourage you that you
10 have your -- what's dictated in the law and in the
11 statute and all of that, whatever it may be, to listen
12 but on the human level look into the future for what's --
13 what is really good for South Dakota. What's good for
14 the Great Plains? What's good for the United States?
15 And what's good for the planet?

16 You know, and that -- please allow that to
17 inform your decision. Allow that to have some influence
18 onto yourself. Because if you stick to the rules of law
19 and if you go back in the history of this great country,
20 if we stuck to -- in some instances if we stuck strictly
21 to the rules of law, we probably would have been in some
22 tough situations.

23 Whether it's Jim Crow laws or whatever it may be
24 down in the south, we have to allow ourselves to be
25 influenced by our emotion and the greater context of our

1 emotions as human beings.

2 So I encourage each and every one of you to push
3 to that level to really look at the greater context of
4 where we're going as the people of South Dakota, as the
5 people of this planet. And I appreciate it all. That's
6 all I have to say.

7 Thank you. I have to step away. Also the
8 context is a lot of folks, a lot of tribal people, right
9 now this is prime ceremony time for our ceremonial
10 events. So myself, I'm gone for this whole week, but
11 I'll be back at the end of the week to be present here
12 and listening in hopefully.

13 But a lot of folks are dealing with what is a
14 very sacred time for a lot of Lakota people, Dakota
15 people. But I thank you guys very much. And good
16 luck.

17 MR. SMITH: Thank you.

18 Do any other Intervenors wish to make their
19 openings at this time?

20 Mr. Grassrope, do you want to go first? And
21 then, Mr. Dorr, you'll be next.

22 Okay.

23 MR. GRASSROPE: (Speaks Lakota.)

24 I come here only as -- to speak on my behalf and
25 as me being a person of a -- through spirituality that

1 we're all, you know, spiritual people.

2 And the things that I've been sitting here
3 listening to especially from TransCanada and from people
4 defending each other, it really should be eye opening to
5 see that the -- we're all sitting here fighting for
6 something and survival in some type of way.

7 And when I sit here and I really think about the
8 things that are coming, especially through TransCanada on
9 their pipeline, they say that they will guarantee you
10 that all of these things are here, and they'll put a
11 guarantee on it that everything will be safe.

12 But I ask the Commission and everyone here to
13 really sit here and truly look into your hearts to really
14 find that voice that's inside you that knows that there's
15 truth into things that are here, you know. We sit here
16 every day and we look, we have grandchildren and we have
17 children and we have everything that's here. We have the
18 most precious things in life that we stand on every day.
19 Land, unci maka, she provides everything for us to live
20 daily, gives us the breath so we can sit here and wake
21 up.

22 And there's many things that we tend to forget
23 about, and that's one of the things that we do. And life
24 is very important to all of us, and especially for our
25 children. Because they are our future leaders, and

1 they're going to be the ones that are going to be dealing
2 with these things if you go forward, if this
3 recertification is allowed.

4 If it's allowed, you know, as much as they could
5 sit there and say I guarantee you this will never happen,
6 this will never break, this will never spill, all of
7 these things that come along with it will never happen,
8 but I sit here and humbly ask you, all the Commissioners
9 here, that not only do we sit here and need to protect
10 every land, this whole land, this whole nation, it's all
11 in front of us. It's here, especially our children. And
12 the things that come along with this pipeline would only
13 sit there and do more harm to this nation.

14 You know, regardless of how I could sit here
15 and -- because what I'm doing, I speak from my heart, and
16 the deal I see is, okay, everybody fighting for a new
17 type of gold. And you got black gold, and that's what
18 they're trying to push through this pipeline.

19 Okay. If it comes through, then what if it sits
20 there and spills into our water? Right now when I look
21 at the Missouri River and Ogallala Aquifer, those are our
22 life wings, and that's what keeps us people here.
23 Everyone that lives in this whole nation that live around
24 in this area is all part of it. And that's our way of
25 life, and that's what helps us.

1 Because water is our first medicine, and that's
2 what helps us get through day to day. But if all this
3 stuff goes through, how are we ever to sit there and make
4 a decision and actually believe in something else that
5 doesn't mean nothing. Money. Money or anything like
6 that.

7 I know this is a corporate America, and it's
8 very hard to sit here because there's a lot of
9 corporations that want to just take and take and take
10 from unci maka and use it to benefit them and fulfill
11 their selfish greed.

12 And those are the things that I really truly
13 dislike through the things of the spirit deals. You
14 know, I -- I just got back from sundance, and I can
15 honestly tell you the very importance of water, you know.
16 It's very -- it's very -- you sit there, and it's very
17 warming to know that once you start drinking water it
18 makes you feel a lot more better. But if any of these
19 pipelines ever break, then what are our children ever
20 going to feel?

21 Then the water that we sit here and think so
22 highly precious of, that will be your new gold. And
23 that's the thing that I don't ever want to see any of my
24 children, their grandchildren, the children after ever
25 have to sit there and face.

1 So I just humbly ask that through all these
2 things that are standing around here -- because me, as
3 for myself, I speak only for myself is that you got all
4 of these manmade laws, all of these books, everything
5 here to sit here and covet you to sit here and help you
6 make a decision. But then you forgot the one that should
7 always truly help you, and that's spiritual. And that's
8 your God and, you know, the Creator.

9 He put you on this earth. We're all here
10 because of that. And those laws -- now we sit here every
11 day, and we wonder about those things. But that's
12 through him that we still sit here. So how can we sit
13 here and make a decision about things that never really
14 truly belonged to us.

15 And those are the things that we sit there and
16 really, really need to truly think about. So are we
17 going to sit here and say, all right, let's push this
18 pipeline through so that we can sit here -- don't matter
19 whose land it is, doesn't matter -- it doesn't matter
20 who -- that's all I get about it.

21 But the deal is, I sit here and think about it,
22 is it does matter because wherever that pipeline goes
23 there's people that live in those areas. And regardless
24 of what color, what race, anything, their children,
25 everyone is going to be affected.

1 Not only that, I like the great -- you're
2 sitting behind a symbol there, and it says The Great
3 State of South Dakota. You see a lot of -- the river.
4 You've got a lot of wildlife. They've got a lot of
5 things here.

6 But once this pipeline goes through and if it
7 does ever break, you might as well take that down because
8 it ain't going to be the great state anymore because most
9 of our wildlife and water and everything will be gone.
10 Then what are we going to say? We sat here for four to
11 seven days to make a decision.

12 You know, the deal I sit there and ask is just I
13 humbly pray, and I pray that in the end that the best
14 decision for all of us in this room is that there will be
15 a better decision for many of you guys that you can make.
16 That you can prevent things like this to ever happen to
17 any of our children or anything that goes on through our
18 future generation.

19 (Speaks Lakota.)

20 MR. SMITH: Do other Intervenors wish to present
21 their opening?

22 Oh, Mr. Dorr, you wanted to go.

23 MR. DORR: Gary Dorr, Individual Intervenor.

24 When friends are in discussion with me about
25 particular cases and their unfortunate outcome I am fond

1 of telling them in the United States we have courts of
2 law, not justice.

3 It seems that justice is not the same as law in
4 many of our courtrooms. But here in this Commission's
5 Keystone process we don't even get a serving of law, much
6 less justice.

7 This Commission has failed to follow its own
8 rules and administrative procedures. We have
9 Kristen Edwards who earlier told all the Intervenors in
10 an e-mail that all parties must state number and
11 paragraph of the Amended Permit Conditions in our
12 Interrogatories. She said TransCanada was a party to
13 this case and, therefore, was subject to the same
14 requirements of your own Order.

15 In our meeting on April 14 you, Mr. Chairman,
16 stated that you would give time for Staff to contribute
17 to that discussion. I clearly stated not once but twice
18 that Ms. Edwards had sent that e-mail. How convenient it
19 looks then when for the remainder of that meeting you
20 didn't call Staff. Check the transcripts. I did.

21 You didn't call Staff for comments or questions
22 while she still held the answer that you were not
23 seeking, that in her opinion as expressed to all the
24 Intervenors that TransCanada had to comply by asking
25 Interrogatories by paragraph and number. And yet because

1 you did not gain your own legal Staff opinion, you made a
2 ruling against the 17 Intervenors that they were not
3 precluded from offering testimony or evidence during the
4 hearing.

5 I'm not sure which is the worse sin, that a
6 couple of lay people didn't understand how to respond or
7 that this Commission failed to adequately gain the legal
8 perspective available to it in the form of Ms. Edwards
9 who was clearly confident enough to express it to all the
10 Intervenors or its own counsel, Mr. Smith, who should
11 have been adept enough to interpret the e-mail sent and
12 the letter of the law.

13 You've done nothing but trample over due process
14 of everybody in this room except for TransCanada. I
15 think an apology is in order here. We've been duped.
16 But I'm not going to sink to that level and ask you for
17 one. That's on your conscience. All of you sitting
18 there smugly and wondering what the hell is Mr. Dorr so
19 mad about.

20 You let Mr. Taylor tell you in front of God and
21 everybody be careful of what you're doing in a previous
22 hearing, and you didn't like me pointing that out as it
23 became obvious from your tone and attitude, Mr. Chairman.

24 I'm going to exercise that right you gave
25 Mr. Taylor now and urge this Commission to be careful of

1 what you do even in this late hour. What I'm mad about
2 is is that by prediction Mr. Smith -- by prediction of
3 Mr. Smith, we are left with emotional testimony. Because
4 that is what you've left us with.

5 You have precluded the true trump card here, and
6 that is the Fort Laramie Treaty of 1868. There are
7 rights contained in that Treaty that will trump this case
8 either in an appeal or a federal lawsuit.

9 You stated that the federal obligation is not
10 one of consideration in this case. Then is the Clean
11 Water Act excluded from this? Is the NEPA no longer
12 applicable here?

13 Why then is 15 Stat 635 the Congressionally
14 ratified Fort Laramie Treaty of 1868 being blatantly
15 disregarded here?

16 Why are easements for the Oglala Sioux Rural
17 Water Supply System held in trust by the United States
18 being blatantly disregarded?

19 When you have a 36-inch pipeline under
20 1,400 psi, 1,600 peak filled with benzene, toluylene,
21 ethylbenzene, xylene, and polycyclic aromatic
22 hydrocarbons, all are carcinogenic, why are you ignoring
23 the fact that you won't put this anywhere near a 14-inch
24 PVC water pipe, which is already the sole source of
25 potable drinking water for four Tribes?

1 Because this Commission is not seeking the
2 facts. In an act of dereliction of duty, that's why, a
3 duty entrusted to it by the State of South Dakota and
4 every single one of its citizens.

5 You all sit there and state that a federal
6 obligation to Tribes will not be argued here and the
7 Tribes should take the usufructuary and aboriginal rights
8 argument to Federal Court. It is an admissible case to a
9 competent court, but the original sin is that Keystone
10 failed to gain permission from the Tribes to cross the
11 treaty territory.

12 I said treaty territory, not Indian Country,
13 not aboriginal territory. Let's not get as confused as
14 Mr. Taylor does when it comes to land terms with
15 relations to Tribes.

16 Keystone further failed to get permission for
17 the workers to live in the same territory with their man
18 camps. Those treaty provisions are still valid in the
19 2nd and 11th Article of the treaty, just the same as the
20 Bad Men clause is. A point which simply illustrates that
21 a competent court recognizes the treaty rights, a fact
22 which seems to have eluded Mr. Taylor when he said that
23 it is a completely irrelevant court case. It's not.
24 It's a federal recognition that the rights are still
25 there.

1 You can cover the facts up. You can deny us the
2 chance to present the facts. But in the end you must
3 know that the Federal Government has an obligation, but
4 so does TransCanada have an obligation to gain permission
5 from the Tribes to cross the territory.

6 For that reason they cannot comply with Amended
7 Permit Condition No. 1 because they are not complying
8 with an applicable law separate from the federal
9 obligations to the Tribes.

10 The original sin lies with the fact that
11 TransCanada cannot comply with the Amended Permit
12 Condition No. 1.

13 The second sin lies with this Commission who
14 failed to admit, allow, or acknowledge the truth. The
15 truth is that the treaty is the supreme law of the land
16 and trumps your decision. This case has already been
17 lost by TransCanada even before they walked in the door
18 because the truth is 147 years old.

19 It is completely within your purview to deny
20 this Permit because before the Federal Government fails
21 to exercise jurisdiction, TransCanada broke the law,
22 15 Stat 365, as contained in that and, therefore, cannot
23 meet Amended Permit Condition No. 1.

24 Furthermore, in the last hearing Mr. Taylor said
25 the spirit camp is not within the corridor. It is within

1 the corridor. It comes within 50 feet of our land.

2 You allowed that to happen, and there's no
3 rebuttal allowed. I'm rebutting that now. The corridor
4 comes literally within feet of our land.

5 Now I think it's fair to say that I've lost --
6 I've lost some objectivity here, but it's because you
7 lost it first. This is a federal issue. It's also a
8 state issue. The easements are in the state.

9 TransCanada is going to break the law in the
10 state by crossing the territory without getting
11 permission. And that's something that's not coming out
12 because I -- I haven't marked any exhibits because you
13 have precluded all of them. You've precluded the fact
14 that the law is being broken. You violated your own
15 orders.

16 TransCanada should never even have been
17 ordered -- granted the Motion To Compel me because I
18 didn't answer their questions correctly. Those
19 Intervenors never should have been excluded because they
20 didn't get asked the questions correctly.

21 So I urge you today to look at the truth. The
22 truth is the law is going to be broken by TransCanada
23 crossing treaty territory. And for that reason Amended
24 Permit Condition No. 1 cannot be met. This Permit must
25 be denied.

1 MR. SMITH: Do other Intervenors wish to give
2 openings at this point?

3 Ma'am, just go from where you're at. Thank you.

4 MS. BRAUN: Thank you for making that
5 accommodation. I appreciate it.

6 My name is Joye Braun. I'm an Individual
7 Intervenor and a member of the Cheyenne River Sioux
8 Tribe.

9 The first thing is -- (Speaks Lakota.)

10 I believe these proceedings are illegal under
11 the 1851 and 1868 Treaty.

12 (Speaks Lakota.)

13 My participation in these illegal proceedings is
14 under duress. I say that again because I honestly
15 believe that this project, Keystone XL, is a direct
16 threat to my nation's people, Cheyenne River Sioux Tribe,
17 those Four Bands up there it, (speaks Lakota). We are
18 the Four Bands of the Oceti Sakowin.

19 And as I stated before here to the Commission, I
20 was asked to come here and be an Individual Intervenor by
21 the elders of my Tribe. And when the call came from
22 Bridger and from Takini and from Cherry Creek, those
23 people who live in one of the poorest counties in the
24 entire nation, when the call came from them that they
25 needed help I went there. So I'm on their behalf that I

1 came here and started going through this process.

2 Throughout this process, you know, I've been
3 sick and things have happened so this is my only
4 opportunity to talk to you guys. But I absolutely
5 believe that the Individual Intervenors, that their
6 rights have been trampled on.

7 I've watched my good friend Elizabeth Lone
8 Eagle. She has to have things mailed to her. Well,
9 motions and things get put out there, they get mailed to
10 her, and she doesn't even have a chance to respond. And
11 I know that's happened to other people too. Our rights
12 have been trampled on here.

13 Like I said, I've listened, and I read when
14 John Clifford, her dad, said that these proceedings are
15 illegal underneath those treaty rights. And you guys
16 yourself have said, like Gary Dorr said here, you know,
17 that you don't have the right to rule on something that's
18 federal, federal law like that, the treaty.

19 Well, this project is going to affect Indian
20 land. Now I can tell you firsthand that where this pipe
21 wants to go through, the land over there by Cheyenne
22 River is very unstable where it wants to go through.

23 Because I've seen firsthand at Buffalo Lake and
24 at Howes Lake where that land has given way to water.
25 And you guys know that on Highway 34 last year. Remember

1 how it was just a big mess over there, and that was just
2 water.

3 That land changes constantly. And if that
4 should happen when this pipe goes through -- and we know
5 from technical specifications that that pipe will erode.
6 Well, if it becomes weakened and that water and that land
7 breaks like that, mostly it's going to break down there
8 by Bridger or Takini, you know, or somewhere along there.
9 And that's really scary because that's going to affect
10 our people.

11 And the other question that I have is, you know,
12 TransCanada has said, you know -- and you guys have said
13 and everybody has said that they have to abide by all
14 laws. Cheyenne River Sioux Tribe has several laws in
15 place.

16 One of them is we did use the Bad Men clause in
17 Article 1, I believe, of our 1868 Treaty. We did use the
18 Bad Men clause against TransCanada. They are not allowed
19 on my reservation. Period.

20 And that also includes all of their
21 subcontractors and contractors. They're not allowed on
22 my reservation. That includes that 18 miles on
23 Highway 34 because that goes through my reservation. So
24 how do they plan to get their equipment through?

25 I can guarantee you we are working with our

1 Tribe to make sure that they do not come. They tried to
2 have a meeting at Takini, and as soon as we found out
3 about that we alerted our tribal Chairman at the time and
4 our chief of police at the time, and they were not
5 allowed to have that meeting at Takini. They had to go
6 to Faith.

7 Well, we met them at Faith. We met them at
8 Faith. Faith is not on a reservation. TransCanada left
9 that meeting because we told them to leave. We did not
10 want this there.

11 When they tried to come to our reservation to
12 meet with our Tribal Chairman, again, we escorted them
13 off of our reservation by the police. The police
14 escorted them off. We're not going to let it happen.

15 So there hasn't been tribal consultation.
16 They're not allowed on my reservation, including their
17 subcontractors. So how do they plan to do that? We're
18 not going to let it happen.

19 Another thing is right before we were all
20 approved to be Intervenors there was this map online, and
21 it had to do with the voluntary evacuation zone, which I
22 think is a poor choice of words, voluntary, because if
23 there's a spill, you're not being voluntarily evacuated.
24 You're going to leave because it's your house, benzene
25 and toluylene and all of that other nasty stuff going all

1 over the place. You have to go. Otherwise, you die or
2 get really sick.

3 But the voluntary evacuation zone at that time
4 before we were approved you could zoom in. You could
5 check to see where things were out on that zone. And as
6 soon as we were approved, that interactive map was taken
7 down. Now there's only five pictures for South Dakota on
8 there, and none of them are near tribal lands.

9 Why? What is TransCanada trying to hide? I
10 want to know. I know when Beth came up -- Elizabeth Lone
11 Eagle told you guys that that pipe was going to be, you
12 know, like two miles from Bridger, I know that you guys
13 were shocked. I was listening to the proceedings going
14 on.

15 I know you guys were shocked. Because they had
16 told you, oh, six miles. Everything is six miles. No.
17 Bridger is right there. Takini is close by.

18 And I know one of those conditions, you know,
19 like social and economic development and how this is
20 going to affect people and all of that stuff, well, you
21 know, the zip code for Howes is also used in a different
22 county. It's also used in Ziebach County.

23 That same zip code is used for Bridger, Takini,
24 part of Cherry Creek, and Red Scaffold. It's on my
25 reservation. But those things didn't know anything until

1 way later. And that pipe and that man camp is going to
2 be really close to Takini School.

3 Our police can't get down there for 45 minutes.
4 What happens when one of those man camps people try to
5 come take those kids? We know it's going to happen.
6 Scary.

7 I'm just going to ask you guys, really consider
8 some of this stuff. Really consider it hard. You guys
9 don't have the right to make a decision that affects
10 tribal lands, native people like that. Affect.

11 So, therefore, you guys have to stop. These are
12 illegal. This is an illegal hearing. It has to go to
13 federal. It has to have that consultation there. Things
14 have to happen right.

15 So with that said, I really urge you to either
16 stop these proceedings now because they're illegal or say
17 no to this recertification.

18 (Speaks Lakota.)

19 MR. SMITH: Thank you.

20 Okay. We have a choice of whether to proceed
21 with further statements -- it's 5, about 6 minutes to
22 noon -- or whether we take a break from now until say
23 10 after. I usually do an hour and 15 minutes for lunch.
24 10 after 1:00. Yeah. 10 after 1:00.

25 Any thoughts? Or should we proceed into the

1 noon hour with initial statements, introductory
2 statements?

3 COMMISSIONER HANSON: Start fresh after lunch.

4 MR. SMITH: Should we take a break now,
5 Commissioner?

6 CHAIRMAN NELSON: Sure.

7 MR. SMITH: Okay. Commissioner Hanson has
8 requested we take the break now. It's about five to.
9 With our normal hour and 15 minutes, that means we'll
10 reconvene about 10 after 1:00.

11 (A lunch recess is taken)

12 MR. SMITH: I'm going to call the hearing back
13 to order in Docket HP14-001, the matter of Keystone
14 Pipeline for a certification of its Permit issued in 2010
15 in HP09-001.

16 Yes, sir. Mr. Blackburn.

17 MR. BLACKBURN: I just wanted to note that
18 Mr. Rappold was taken ill. We're not entirely sure where
19 he is, but I believe he stopped at the hospital. But he
20 may be coming back. Anyway if he's not here, he asked
21 that we just notify you that's the case.

22 MR. SMITH: I appreciate that. Actually when I
23 looked at him over there he looked kind of peaked,
24 believe it or not. And I wondered if he was ailing a
25 little bit. So thank you for letting us know that.

1 I see that Mr. Ellison and Mr. Martinez, they
2 aren't here yet. Our time for reconvening is now. So my
3 guess is they're not going to make an opening statement
4 until the presentation. We'll see anyway.

5 And I'll ask, are there any additional
6 intervenors other than those who have already given their
7 opening statements?

8 MS. MYERS: Cindy Myers is behind the pillar,
9 and I would like to give one.

10 MR. SMITH: Yeah. Would you want to take the
11 podium here?

12 MS. MYERS: Sure.

13 MR. SMITH: Our reporter has requested that
14 because it's easier if she can see a person when she's
15 doing this.

16 You'll need to punch the "on" button there.

17 MS. MYERS: Good morning -- or good afternoon.
18 For the record, Cindy Myers. I'm an Individual
19 Intervenor.

20 This bottle of water right here is from my home
21 well in Nebraska. That's the way it comes out of the
22 aquifer, crystal clear, pristine, no treatment or
23 filtering. So my hope is for generations to come that
24 they can enjoy that same crystal clear water.

25 Our private well was so close to the first

1 proposed KXL route in Nebraska it was where the aquifer
2 level was close to the surface and the soil is sandy,
3 making our water very vulnerable to contamination. It
4 was from -- to like a mega pipe filled with tar sands
5 product into the aquifer and a special legislative
6 session in the Nebraska moved the route away from our
7 area.

8 A similar situation exists in Tripp County in
9 South Dakota. The water table is close to the surface.
10 The soil is sandy, and it's also very vulnerable to water
11 contamination. Only a half inch of steel would separate
12 KXL toxins from the ground water it would be submerged
13 in.

14 If the route was moved in Nebraska for this very
15 same reason, why is the route allowed in Tripp County?

16 Another water source vulnerable to contamination
17 from this project is the Missouri River, lifeline in
18 South Dakota providing at least 50 percent, probably
19 closer to 60 percent of water for South Dakota.

20 The Lewis & Clark Water System supplies 284,000
21 people from the Missouri River. The FSEIS only
22 considered spill impacts 10 miles downstream while
23 Dr. Stansbury and Dr. Davis have both said benzene could
24 travel much further, even hundreds of miles.

25 KXL crosses several river basins which flow into

1 the Missouri River and Dr. Arden Davis's comments reveal
2 his concern for drinking water sources, including
3 Tripp County and public water intakes using the Missouri
4 River. So I definitely feel this is a risk for the
5 health, safety, and welfare of South Dakotans.

6 Because KXL will funnel 35 million gallons of
7 poison daily and for decades into South Dakota, viable
8 drinking water sources are threatened. My testimony will
9 be based primarily on Conditions 35 and 40. In fact, one
10 of seven to establish that the health, safety, and
11 welfare of South Dakotans is not provided for.

12 The Applicant, TransCanada, according to
13 SDCL has the burden of proof to establish that the
14 facility will not substantially impair the health,
15 safety, or welfare of the inhabitants.

16 My testimony will demonstrate that TransCanada
17 has overlooked the well-being of South Dakotans in this
18 quest for profits.

19 I will make the following nine points: One,
20 there is no health impact assessment. Two, emergency
21 medical response plan is lacking. This is particularly
22 important for the first responders and local inhabitants.
23 Three, the South Dakota medical community is not prepared
24 to respond to dilbit disasters.

25 Four, the extreme toxicity of benzene has been

1 hushed, swept under the rug, and I will detail benzene
2 information to support my concerns. The goal is zero
3 benzene in drinking water. And this is difficult to
4 achieve since water treatment plants aren't capable of
5 removing this potent carcinogens.

6 KXL cross the Mni Wiconi water system in at
7 least a couple of locations, and the water pipe is PVC,
8 which is permeable to benzene and other toxins. I will
9 provide evidence demonstrating how drinking water sources
10 in South Dakota are at risk from dilbit spills.
11 Especially worrisome are the pinhole leaks which can
12 spill greater than 42,000 gallons and may not be picked
13 up by the leak detection system.

14 Seven, I believe the two most vulnerable
15 locations for water contamination from KXL's spills in
16 the state are the Missouri River, its tributaries, and
17 also the aquifer in Tripp County. The route is less than
18 1 mile from the well field supplying water for the City
19 of Colome.

20 Glendive, Montana, is a prime example of how an
21 oil spill into a river can migrate into water intakes and
22 contaminate public water systems. The benzene was
23 actually triple in the water system.

24 I will explore Dr. Madden's testimony which is
25 woefully inadequate in analyzing the health impacts of

1 this project.

2 Several of my Interrogatories directed to
3 TransCanada concern their Emergency Response Plan. I
4 specifically inquired if the Emergency Response Plan also
5 included emergency medical response planning.

6 TransCanada repeatedly replied to me public disclosure of
7 the Emergency Response Plan could commercially
8 disadvantage Keystone.

9 The FSEIS, Dr. Davis, the Agency for Toxic
10 Substances in DC's registry, Condition 35 and Condition
11 No. 40 clearly indicate that South Dakota water sources
12 are at risk from this mega pressure cooker pipeline
13 loaded with benzene.

14 The HP09 Permit document indicates reliance on
15 the federal environmental study to satisfy South Dakota
16 Law. Relying on the FSEIS simply seems to be about
17 satisfying a requirement instead of truly investigating
18 the FSEIS for impacts of a project to South Dakota.

19 The FSEIS does warn about the risk of water
20 contamination in discussing specific locations here in
21 South Dakota. I believe TransCanada may attempt to shift
22 the burden of this law onto other entities, but the law
23 clearly states it's the Applicant who has the burden of
24 proof to establish that the facility will not
25 substantially impair the health, safety, or welfare of

1 the inhabitants.

2 A law is a law whether it is considered when an
3 Applicant initially applies for a Permit or when that
4 Permit is recertified.

5 The law hasn't changed since the Permit was
6 issued in 2010, but what has is public awareness. This
7 is visibly indicated by the number of Intervenors this
8 time around. More facts are reaching the public despite
9 the bombardment of extensive biased advertising easily
10 bought by a financial powerhouse.

11 I thank you, the Commissioners, to allow me this
12 opportunity to be an Intervenor in this docket. I ask
13 the South Dakota Public Utilities Commission to make a
14 decision which is in the best interest of the people, not
15 what is best for a foreign company.

16 A revenue windfall now won't make a difference
17 seven generations down the road, but clean water and
18 healthy environment will.

19 Thank you.

20 MR. SMITH: Thank you. And we'll proceed here
21 with additional opening statements.

22 I did want to let everybody know that over the
23 noon hour I received a text message from Commissioner
24 Fiegen, and she informed me that she has listened to the
25 entirety of the proceedings live. So she is at least on

1 the receiving end participating in the hearing. Just to
2 let you know that.

3 Okay. Additional opening statements at this
4 time?

5 Mr. Harter.

6 MR. HARTER: Thank you, Commissioners. John
7 Harter, Winner, South Dakota representing myself, my
8 family.

9 First off, I stated this at the public hearing,
10 but I'm going to repeat it so it's on record.
11 TransCanada does not have an agreement with me. All
12 agreements were voided by me due to breach of contract by
13 TransCanada and their attorneys. Any entry on to my
14 property will be considered trespassing, and they will be
15 removed from said property.

16 TransCanada has never negotiated in good faith.
17 This is due to the state giving them eminent domain
18 authority, lying, bullying, coercion, extortion to attain
19 an easement. This is what the State of South Dakota and
20 the PUC are an accessory to.

21 TransCanada has stated publicly that they will
22 not build the safest pipeline they can. TransCanada has
23 downgraded the pipe wall thickness in high consequence
24 areas under roads from what they promised the people at
25 the public meetings.

1 As the State of South Dakota and the PUC is an
2 accessory to this it, I hold you liable and accountable
3 if permitted.

4 TransCanada has no answer to how they go clean
5 up a spill into our aquifer. This is -- the permitting
6 for this route is ignorant, greed filled, and for this I
7 hold you liable and accountable.

8 The pipeline is not a need. It is a want. It's
9 about moving volumes of bitumen for income to
10 TransCanada, to the people who own the oil, and the State
11 who is going to get tax revenue off of it. They want a
12 monetary gain for what they're taking from me and
13 ruining.

14 As constitutional officers the taking of
15 property for this Permit is a violation of the South
16 Dakota State Constitution, Article 17, Paragraph 4,
17 which reads "Corporations subject to eminent domain,
18 police power, the exercise of a right of eminent domain
19 shall never be abridged or so construed as to prevent the
20 Legislature from taking the property and franchises of
21 the incorporated companies and subjecting them to public
22 use, the same as the property of individuals and the
23 exercise of the police power of the state shall never be
24 abridged or so construed as to Permit corporations to
25 conduct their business in such a manner as to infringe

1 the equal rights of individuals or the general well-being
2 of the state."

3 As constitutional officers not abiding by the
4 Constitution leads to Article 16, Paragraph 3, "Officers
5 subject to impeachment grounds, removal from office,
6 criminal prosecution, the Governor and other state and
7 judicial officers, except county judges, justices of the
8 peace, and police magistrates shall be liable to
9 impeachment for drunkenness, crimes, corruption conduct,
10 or malfeasance or misdemeanor in office. But the
11 judgment in such case shall not extend further than to
12 remove from office and disqualification to hold any
13 office of trust or profit under the state. The person
14 accused, whether convicted or acquitted, shall
15 nevertheless be liable to indictment, trial, judgment,
16 and punishment according to law."

17 The State of South Dakota and the PUC have shown
18 the willingness to permit private, for-profit
19 corporations a Permit for monetary gain, while not
20 allowing private property owners the same ability. This
21 is a violation of my constitutional right to life,
22 liberty, and the pursuit of happiness. A violation of
23 the Constitution again leads back to Article 16,
24 Paragraph 3.

25 The State of South Dakota and the PUC are

1 endangering the public for monetary gain. And this
2 doesn't only mean private land. This is where I'm really
3 concerned at and bring this up is, one, it's already been
4 stated our river waters and tributaries. This thing at
5 one point on my property is 455 yards from the Colome
6 City wells. I stated this. You're probably sick of
7 hearing it, but I don't care.

8 The cone of depression comes well out into my
9 property for these wells. I have not seen no one from
10 the PUC come out and show an interest.

11 The permitting of the pipeline will cost my
12 family in excess of \$40,000 a year. This is during
13 installation and reclamation is what I'm basing this on.
14 For this I hold the State of South Dakota and the PUC
15 board liable and accountable.

16 On the grounds of conducting a fair and
17 impartial hearing for the finding of facts, I charge the
18 PUC board Chris Nelson, Gary Hanson, Kristie Fiegen, and
19 some Staff of gross negligence.

20 You have not conducted a fair and impartial
21 hearing. You are in violation of the Equal Protections
22 Act. I charge the PUC and the State of South Dakota with
23 witness and evidence tampering for monetary gain to the
24 State of South Dakota.

25 The PUC board sanctioned Intervenors harsh for

1 alleged violation of discovery, but they did not sanction
2 TransCanada for the same violation. And TransCanada was
3 the one that asked for the ruling. Mr. Gary Dorr alluded
4 to this in his testimony.

5 There have been four spills into the Missouri
6 River. Two of them, if I remember correctly, were in
7 Montana. The last one was just this winter.

8 Question: Has the DENR done water testing from
9 the spills -- water testing after these spills? And have
10 you as a PUC inquired as to the results of what happened
11 to our Missouri River water from these spills? If not, I
12 find this is gross negligence.

13 The DENR -- referring back to the City of
14 Colome's water wells, when I asked an employee there why
15 they let it be put in so close to the wells, they told
16 me, well, we must have just overlooked that. This is
17 gross negligence.

18 TransCanada is not treating southern Tripp
19 County as a high consequence area as is stated in the
20 50 Conditions. This is gross negligence.

21 In the Fifth Amendment -- I'll read the whole
22 thing. The Fifth Amendment provides that citizens not be
23 subject to criminal prosecution and punishment without
24 due process. Citizens may not be tried on the same set
25 of facts twice and are protected from self-incrimination,

1 the right to remain silent.

2 The amendment also establishes for the power of
3 eminent domain, ensuring that private property is not
4 seized for public use without just compensation. There
5 has been no just compensation because everybody that I
6 know of or the larger share of them have entered these
7 agreements under duress, being threatened by eminent
8 domain.

9 With me I brought some water along from home.
10 It's out of my tap. Okay. I doctored it up a little
11 bit. I would ask anybody that's for this pipeline if
12 they would want to come up and take a drink of this water
13 and trust me. I'll take care of you.

14 Anybody?

15 Thank you.

16 MR. SMITH: Thank you.

17 Additional persons wishing to make -- are there
18 any other individuals who wish to make opening statements
19 at this time?

20 MR. ELLISON: I just received a text message
21 from Mr. Rappold.

22 MR. SMITH: Yeah. We've been told that.

23 MR. ELLISON: That he's ill?

24 MR. SMITH: Uh-huh.

25 MR. ELLISON: Yeah. He did ask me if his

1 opening could still be reserved, please.

2 MR. SMITH: Oh, yeah. You have the total
3 option. You can make it at the time of your direct case.

4 MR. ELLISON: I don't know which he plans, but
5 if he's able to come back in time before openings are
6 finished.

7 MR. SMITH: Oh, okay. Sure. I mean, the other
8 option we gave everybody is to submit it in writing. He
9 has that option. But, yes, we always provide those two
10 options in everything. And, honestly, usually attorneys
11 usually give theirs in connection with their case. So
12 yeah. We'll just have to see how it goes with his
13 health.

14 MR. ELLISON: Yes, sir.

15 MR. SMITH: Thank you.

16 Okay. Additional persons wishing to do their
17 openings now?

18 Mr. Clark?

19 MR. CLARK: Yes.

20 Thank you, Mr. Smith and thank you
21 Commissioners. I'm sorry. For the record this is
22 Travis Clark for Cheyenne River.

23 TransCanada Keystone has not complied with the
24 Conditions outlined in the Final Amended Decision and
25 Order, nor will it do so in the future. Specifically,

1 Keystone has failed to comply and essentially has stated
2 that it has no intention of complying in the future with
3 Conditions 6, 7, and 34 as they relate to the Cheyenne
4 River Sioux Tribe.

5 I will not occupy the Commission's precious time
6 with a verbatim recitation of those Conditions. However,
7 in general Condition 6 asserts that Keystone must notify
8 all affected landowners, utilities, and local
9 governmental units as soon as practicable of material
10 deviations in the proposed route of the pipeline.

11 The Cheyenne River Sioux Tribe is such an
12 affected local government. The Cheyenne River Sioux
13 Tribe will be impacted and materially affected by the
14 deviation -- by the proposed deviations to the pipeline,
15 certain proposed deviations from the pipeline such as the
16 proposed Bridger Creek crossing.

17 In an effort to consult and coordinate with
18 affected local governments, Condition No. 7 requires
19 Keystone to provide contact information to all local law
20 enforcement agencies and local governments within the
21 vicinity of the project. Keystone has made no effort to
22 comply with this Condition with regard to the Cheyenne
23 River Sioux Tribe, and it has no intention to do so in
24 the future, as they basically stated in their
25 Interrogatories to us.

1 Finally -- I'm sorry. This Commission has also
2 ordered Keystone to seek out and consider the local
3 knowledge of local governments and government officials
4 during the high consequence area review process.

5 Specifically, the Commission required
6 TransCanada Keystone to identify all unusually sensitive
7 areas as defined by 49 CFR 195.6 that may exist whether
8 currently marked on the Department of Transportation's
9 HCA maps or not. And they were told to add such HCAs to
10 their Emergency Response Plan and Integrity Management
11 Plan.

12 During the course of this evidentiary hearing it
13 will become exceedingly clear that Keystone failed to
14 comply with this Condition with regard to the Bridger
15 Creek crossing. Moreover, the Commission will also learn
16 that while the local knowledge of other affected units in
17 the Four Corners area, the Bridger Creek crossing -- they
18 sought out their local knowledge and input. They
19 specifically and purposely excluded the Cheyenne River
20 Sioux Tribe and its officials, despite the orders of this
21 Commission in that Condition.

22 It is also worth mentioning here that Finding of
23 Fact No. 100, which was unaffected by the Tracking Table
24 of Changes as part of Keystone's Petition for
25 Certification, states that local emergency responders may

1 be required to initially secure the scene and ensure the
2 safety of the public and that Keystone will provide
3 training with that regard.

4 Keystone has had absolutely no contact with the
5 Cheyenne River Sioux Tribe or its emergency agencies with
6 regard to that requirement.

7 As you may notice by sort of the theme of these
8 Conditions, our theory of this case is pretty simple and
9 straightforward. The Commission ordered in those three
10 Conditions to contact and consult with affected local
11 governments, which necessarily includes affected local
12 tribal governments such as the Cheyenne River Sioux
13 Tribe.

14 Consultation with -- sorry. Lost my place.
15 Consultation with affected local governments is at the
16 heart of each of these Conditions and that Finding of
17 Fact. TransCanada Keystone ignored this Commission's
18 Final Amended Decision and Order and has stated in its
19 Interrogatories that it will continue to ignore affected
20 tribal governmental units.

21 Keystone's previous noncompliance with the Final
22 Amended Order and Decision along with its continued
23 intransigence should concern the Commission greatly. The
24 PUC is tasked with protecting the people of South Dakota.
25 To that end, it conditioned it's Permit to TransCanada

1 with the expectation that Keystone would comply with its
2 orders. Keystone has not. It has ignored them.

3 It has ignored tribal governments which will be
4 affected by the construction and operation of the
5 proposed pipeline, in defiance of the PUC's orders to
6 the contrary. This fact should become crystal clear over
7 the course of this hearing. After having been apprised
8 of Keystone noncompliance and intransigence, this
9 Commission will be duty bound to deny the Applicant's
10 Petition for Certification.

11 Thank you.

12 MR. SMITH: Thank you, Mr. Clark.

13 Additional persons wishing to give their opening
14 statements now?

15 Mr. Blackburn?

16 MR. BLACKBURN: Any of the tribal organizations?

17 MR. CAPOSSELA: Chairman Nelson, Commissioner
18 Hanson, Peter Capossela for the Standing Rock Sioux
19 Tribe.

20 There's a building on the corner of southeast
21 First Avenue and Constitution Avenue in Washington, D.C.
22 And there's a lot of nice buildings in DC, but this great
23 white marble building with large white marble columns and
24 a beautiful open area in front of the building. It's the
25 U.S. Supreme Court building.

1 And in bold letters above those columns, Equal
2 Justice Under Law. And I think what that means is the
3 South Dakota family farmer, the rural rancher, the Indian
4 Tribe -- that's why I'm here -- that our testimonies, our
5 evidence, our concerns will get equal consideration and
6 deliberation in administrative and judicial proceedings
7 such as the certification proceeding on the Keystone XL
8 Pipeline.

9 That in our system, in our legal system, the
10 little guy's on par with the big oil company, with the
11 titans of business and industry. And that's what makes
12 our system work. And I think that's a challenge for the
13 Commission moving forward in this proceeding.

14 Now for its part, TransCanada will put forward
15 testimony and evidence that will contain a lot of general
16 statements, a lot of generalities. We're on top of it,
17 we have some changes in our pipeline, we have our
18 Tracking Table of Changes, but it's all good.

19 The Standing Rock Sioux Tribe will put on
20 specific testimony with specific evidence and proffer
21 specific facts relating to the conditions -- the Amended
22 Permit Conditions.

23 The Tribe will demonstrate that the Keystone XL
24 Pipeline violates Amended Conditions 1, 7, 10, 13, 14,
25 and 34, among others. Condition 1 requires that Keystone

1 XL be in compliance with all applicable law. I will talk
2 about that through the course of this proceeding.

3 As Mr. Clark had mentioned, Condition 7 -- 6 and
4 7 involves consultation, communication, cooperation with
5 local units of government, with local emergency
6 responders. A member of the Standing Rock Sioux Tribe
7 Local Emergency Response Commission Doug Crow Ghost will
8 testify in front of the Commission on his experience or
9 lack therefore with respect to compliance with Condition
10 No. 7. And Condition 10, the public outreach, the public
11 outreach to local units of government, to local emergency
12 responders.

13 Conditions 13 and 14 involve the CRNP. There's
14 a lot of general promises and generalities on
15 mitigation -- in the mitigation plan.

16 And then Condition 34 involves compliance with
17 regulations governing high consequence areas. And we'll
18 demonstrate that they have not been properly identified.

19 But with respect to Condition 1, compliance with
20 applicable law, one thing that I think is really
21 important is that the EPA has promulgated new regulations
22 under the Clean Water Act governing the waters that are
23 covered. The waters of the United States have been
24 redefined.

25 Consequently, the existing environmental surveys

1 underlying the existing Permit are inadequate under the
2 regulations under the Clean Water Act that exists today.
3 Those regulations were published on June 29, 2015, in the
4 Federal Register. So there's a whole new set of rules
5 under the Clean Water Act that Keystone has to comply
6 with that has not been brought up.

7 The spill frequency estimates require the
8 emergency response provisions of the Clean Water Act. At
9 this point TransCanada is relying on its spill frequency
10 estimates based upon a study that was conducted in 2006.
11 Since that time there have been significant spills,
12 including spills of tar sands crude, in the Kalamazoo
13 River in Michigan. There have been significant spills
14 from Michigan to Montana to California. Relying on an
15 '06 spill frequency estimate does not seem to be
16 sufficient for compliance with the law.

17 I mentioned we're going to have the tribal water
18 resources director, Mr. Crow Ghost, testify before the
19 Commission. Mr. Crow Ghost will present testimony and
20 explain the Tribe's concerns with the crossings of the
21 water in which the Tribe is the senior water rights owner
22 in the watershed.

23 The construction will increase sedimentation in
24 those waters. Even if there's no accident, there's going
25 to be deterioration of important waters to the Standing

1 Rock Reservation and, of course, the prospect of a spill,
2 of an accident. But the pipeline crosses at least two
3 waters to which the Tribe is a senior water rights
4 holder.

5 We're also going to proffer testimony from the
6 Environmental Protection Agency which has reviewed the
7 State Department's environmental studies. And that's by
8 law. The law requires that the EPA review draft
9 environmental documents by all government agencies.

10 The EPA wrote to TransCanada in July 2010, "We
11 also recommend that the revised Draft EIS address the
12 potential impacts to areas where Tribes may have
13 unadjudicated water rights to water bodies that could be
14 affected by spills from the proposed pipeline." We have
15 a fancy term for that. It's called corroborating
16 evidence.

17 We've got tribal agencies and federal agencies
18 saying the same thing, that the impacts of tribal water
19 need to be studied. But it was never done.

20 The EPA is not the only executive branch agency
21 that's expressed concerns with Keystone XL. June 27,
22 2011, PHMSA wrote to TransCanada, "PHMSA's denying your
23 May 26, 2010, Special Permit Application based on
24 operating compliance issues relating to not performing
25 weekly aerial patrols and quarterly ground patrols as

1 required."

2 Again, you're going to hear evidence from the
3 Tribe. You're going to hear evidence from the Applicant.
4 And I think the -- some of the feedback on the culture of
5 safety at TransCanada from the Feds provides a prism with
6 which to evaluate the credibility of TransCanada's
7 proffered evidence. And I ask that you take a healthy
8 and skeptical approach toward the testimony and evidence
9 that TransCanada proffers.

10 The Executive Branch is not the only branch of
11 government that's expressed concerns with Keystone XL.
12 The Authoritative Nonpartisan Congressional Research
13 Service of the Congress, they're the experts hired by
14 both the republican and democratic leadership in Congress
15 to provide technical advice.

16 They've been asked to comment on Keystone XL,
17 and they've done a series of studies presented to
18 Congress. And in 2012 the Authoritative CRS wrote to the
19 appropriate Congressional committees "Another potential
20 source of data is the pipeline operating history of
21 Keystone. Keystone has operated the Keystone main line
22 pipeline in the Cushing extension since 2010. Since that
23 time, the Keystone Pipeline has generated 14
24 unintentional releases. This figure is considerably
25 higher than Keystone XL spill frequency estimates DOS

1 included in the SEIS."

2 Now that wasn't written by radical
3 environmentalists. That was written by the nonpartisan
4 research branch of the U.S. Congress that the State
5 Department missed the boat when it came to evaluating the
6 potential of harm for spills in South Dakota and
7 throughout the pipeline in Keystone XL.

8 We have evidence that -- we appreciate your
9 serious, your judicious, your deliberate consideration.
10 That, as has been mentioned, the burden of proof is on
11 TransCanada here, and they're going to put on evidence
12 and the Intervenors and the Tribal and other Intervenors
13 can put on evidence also. And we ask that you give
14 serious consideration to the evidence that's received and
15 to the burden of proof and that you deny certification of
16 the Keystone XL Permit.

17 Thank you, Commission.

18 MR. SMITH: Thank you.

19 Ms. Real Bird.

20 MS. REAL BIRD: Mr. Chairman and Commissioner
21 Nelson -- excuse me. Hanson. Thomasina Real Bird for
22 the Yankton Sioux Tribe.

23 In SDCL 49-41B, the South Dakota Legislature
24 found that the energy development in South Dakota and the
25 northern Great Plains significantly affects the welfare

1 of the population, the environmental quality, and
2 location and growth of industry and the use of natural
3 resources of the state.

4 The Legislature also found that by assuming
5 permit authority, that the state must also ensure that
6 these facilities are constructed in an orderly and timely
7 manner so that the energy requirements of the people of
8 the state are fulfilled.

9 Therefore, it is necessary to ensure that the
10 location, construction, and operation of the facilities
11 will produce minimal adverse effects on the environment
12 and upon the citizens of this state by providing that a
13 facility may not be constructed or operated in this state
14 without first obtaining a permit from the Commission.

15 SDCL 49-41B-19 provides the Public Utilities
16 Commission shall also hear and receive evidence presented
17 by any State Department, agency, or units of local
18 government relative to the environmental, social, and
19 economic conditions and projected changes therein, and
20 the Applicant here has the burden of proof under both
21 SDCL 49-41B-22 as well as 49-41B-27.

22 So in 2009 TransCanada filed its Application for
23 a Permit with the PUC to construct a pipeline, and that
24 would run from the Canadian border through a number of
25 states, including South Dakota, and ultimately end up in

1 Texas.

2 As required by federal law, TransCanada filed an
3 Application for a Presidential Permit for that pipeline.
4 As also required by federal law, the State Department
5 conducted an intensive assessment of the potential risks
6 and consequences of constructing that pipeline and
7 produced a Final Environmental Impact Statement.

8 The PUC's Decision and Final Order in 2010
9 relied heavily on the FEIS and incorporated it into
10 Permit Condition No. 3. TransCanada's Application for a
11 Presidential Permit was subsequently denied, and shortly
12 thereafter the company applied once again for a
13 Presidential Permit. However, this time the pipeline
14 would run only from the Canadian border to the southern
15 border of Nebraska.

16 Because the proposed project was not the same as
17 the project assessed through the FEIS, the State
18 Department was required to supplement that work, and it
19 produced a Final Supplemental Environmental Impact
20 Statement.

21 And so the FEIS, which the PUC relied upon so
22 heavily in its 2010 Decision, is no longer valid with
23 respect to the proposed project, and it has been replaced
24 by the FSEIS. Because this Keystone factor of the
25 Commission's decision is no longer valid, that Condition

1 of the Permit itself has been rendered invalid, and the
2 proper course of action is now for TransCanada to apply
3 for a new permit.

4 Therefore, TransCanada cannot meet its burden of
5 proof under SDCL 49-41B-27 because it cannot meet the
6 third Condition of the 2010 Permit, which requires
7 TransCanada to comply with the recommendations contained
8 in the now invalid FEIS rather than the current FSEIS.

9 During the evidentiary hearing the Applicant's
10 presentation of evidence that it is required to present
11 in order to meet its burden consists of five direct
12 witnesses. One of the Applicant's witnesses is
13 Corey Goulet.

14 According to prefiled testimony, Goulet is the
15 president of Keystone projects with overall
16 accountability of the implementation and development of
17 the Keystone Pipeline system, including this project.

18 His testimony consists of providing updated
19 information regarding 10 of the Commission's Findings of
20 Fact from the 2010 Decision. And notably Mr. Goulet will
21 not testify as to any Condition or proof that the
22 Applicant can continue to meet the Conditions upon which
23 the Permit was granted.

24 Instead Mr. Goulet's testimony includes a
25 conclusory statement, that he is not aware of any reason

1 that the Applicant cannot continue to meet the Conditions
2 upon which the Permit was granted.

3 We received similar prefiled testimony from
4 the Applicant's witnesses, including David Diakow,
5 Meera Kothari, Heidi Tillquist, John Schmidt. Their
6 prefiled testimony follows a very similar pattern, that
7 they will provide testimony regarding updated
8 information. However, they're not going to testify as to
9 any condition or proof, and they all include the same
10 conclusory statement.

11 With these five witnesses it's our position that
12 the Applicant does not meet its burden.

13 Despite the South Dakota Legislature's finding
14 that the energy development in South Dakota and the Great
15 Northern Plains significantly affects the welfare of the
16 population, the environmental quality and location and
17 growth of industry and the use of natural resources of
18 the state and despite the Legislature's mandate that the
19 Commission ensure the location, construction, and
20 operation of the facilities, produce minimal adverse
21 effects on the environment and upon the citizens of this
22 state, the Commission has chosen not to hear evidence of
23 intervening Tribes' aboriginal and usufructuary rights.

24 These rights are retained rights that Tribes
25 possess since time and memorial. They are not granted

1 from the United States but exist by virtue of Tribes'
2 existence.

3 These rights were retained when Tribes entered
4 into treaties with the United States Government and are
5 considered federal laws. These rights are directly
6 applicable to these proceedings by Federal Law and
7 South Dakota Law, and they speak directly to Condition
8 No. 1.

9 However, the Commission has decided not to allow
10 presentation of this evidence and, therefore, you will
11 not hear testimony of its integral aspect of these
12 proceedings.

13 The Yankton Sioux Tribe will present testimony
14 that the Applicant does not continue to meet all
15 Conditions upon which the Permit was issued, including
16 socio-cultural threats, threats to safe drinking water,
17 and safety threats from the man camps, to an already
18 at-risk population.

19 Finally, the South Dakota Legislature has
20 mandated that the State ensure that these facilities are
21 constructed in an orderly and timely manner so that the
22 energy requirements of the people of the state are
23 fulfilled. However, there will be no testimony from the
24 Applicant that the proposed project will fulfill the
25 energy requirement of the people of the State of South

1 Dakota.

2 For these reasons the Yankton Sioux Tribe asks
3 the Commission to deny the Petition.

4 MR. SMITH: Thank you.

5 Mr. --

6 MR. BLACKBURN: May it please the Commission.
7 My name is Paul Blackburn. I represent Bold Nebraska in
8 this proceeding.

9 Chair Nelson, Commissioner Hanson, Mr. Smith,
10 and the Commission Staff, good morning or good afternoon
11 now, and thank you for providing this opportunity to all
12 of us. We appreciate the hard work, hard administrative
13 work, required during this proceeding to this point.

14 It's déjà vu all over again. Couldn't resist
15 it. In 2009-2010 nobody expected to be back here.
16 TransCanada originally said that the construction started
17 in 2011 and then it was 2012 and now we're 2015, and
18 there is not a construction start date yet.

19 A lot has happened. Looking forward, the future
20 of the Keystone XL Pipeline is still doubtful. Here's
21 what we know:

22 There is outstanding state court litigation in
23 Nebraska that will continue to require at least another
24 year to resolve. And this may be followed by additional
25 administrative process. It is unclear when the U.S.

1 Department of State will issue a decision in the
2 Presidential Permit and what that decision might be.

3 Oil prices are down dramatically and show no
4 sign of rising, putting the future of both tar sands/oil
5 sands and the Bakken development in doubt and, therefore,
6 also putting the future of the need for the Keystone XL
7 Pipeline in doubt. The oil transportation market is
8 changing, and if oil prices are low, the rate of change
9 will accelerate.

10 TransCanada faces stiff competition from
11 Enbridge for oil -- Enbridge Pipeline, Inc., for oil
12 transportations and market share, and Enbridge has
13 proposed substantial expansions of its pipeline system
14 that would compete directly with its services proposed
15 and provided by the Keystone XL Pipeline.

16 And, finally, the credit and corporate bonds
17 markets are certainly tightening in this economic
18 environment.

19 And possibly TransCanada will face additional
20 new challenges. Suffice to say that the ultimate fate of
21 the Keystone XL Pipeline is uncertain and will likely be
22 decided far away from South Dakota. There is little to
23 no evidence of these critical factors in TransCanada's
24 prefiled testimony. There certainly are issues over
25 which the Commission has jurisdiction. They're important

1 issues and important to the Tribe and South Dakotans that
2 will be impacted by the proposed pipeline.

3 Bold Nebraska will not be introducing evidence
4 but instead will rely on the evidence from
5 cross-examination and evidence provided by the other
6 parties, presented by the other parties. Since
7 TransCanada has the burden of proof in this proceeding,
8 it has an affirmative duty to prove that it will comply
9 with each of the 50 Permit conditions.

10 It cannot merely make unsubstantiated claims
11 that it will comply with these conditions. It cannot
12 offer unsubstantiated opinions that it has this capacity.
13 Rather, TransCanada must provide evidence providing its
14 ability to comply with each condition.

15 In the absence of affirmative evidence that it
16 will have the capacity to comply with the current
17 Conditions, the Intervenors do not have a duty to prove
18 that TransCanada is unable to comply with the 2010 Permit
19 Conditions.

20 Rather than provide substantial evidence,
21 TransCanada has offered Exhibit 2000 -- I believe that's
22 the number -- its certification. This is a half-page
23 claim that says nothing more than yes, we can. It is
24 prefiled testimony that is almost entirely conclusory and
25 unsupported by substantial evidence.

1 This testimony does little more than say that
2 TransCanada executives and Staff contractors agree with
3 its certification. TransCanada's Petition to the
4 Commission to prove the certification is also the summary
5 document and contains no substantial evidence.
6 TransCanada cannot really say yes, we can and then shift
7 the burden to Intervenors to prove them wrong.

8 Bold notes that the crude oil pipeline business
9 is very specialized and that a substantial amount of the
10 revenues related to TransCanada's internal capacity and
11 its internal capacity to comply with the Final Permit
12 Conditions is within the knowledge of only TransCanada.
13 Therefore, the Commission must allow full
14 cross-examination of TransCanada's witnesses. We cannot
15 read their minds.

16 Ultimately, the Commission must determine
17 whether TransCanada has carried its burden of proof. If
18 TransCanada has not included substantial evidence in the
19 record about its capacity to comply with the Permit
20 Conditions, the Commission must assume that -- must not
21 assume that TransCanada can comply with those Permit
22 Conditions and then expect the Intervenors to disprove
23 TransCanada's capacity.

24 In the absence of adequate evidence presented by
25 TransCanada, the Commission may also not rely primarily

1 on the testimony provided by Staff or evidence provided
2 by Staff to find that TransCanada has met its burden of
3 proof. TransCanada and TransCanada alone must carry its
4 burden of proof initially.

5 Thank you for hearing all of us today.

6 MR. SMITH: Thank you, Mr. Blackburn.
7 Mr. Ellison, Mr. Martinez, were you going to go now or
8 wait?

9 MR. MARTINEZ: We'll go ahead and go now.

10 Mr. Chairman, Commissioner Hanson, I'm Robin
11 Martinez with the Kansas City law firm, Martinez,
12 Madrigal and Machicao. I'm here today with my
13 co-counsel, Mr. Bruce Ellison. We're representing Dakota
14 Rural Action in these proceedings.

15 You really have I think a very difficult
16 decision ahead of you with very diametrically opposed
17 positions.

18 On one hand you have a very large, multibillion,
19 multinational corporation that really is a key player in
20 our fossil fuel based economy. There's a lot of
21 political pressure to fall in line with what TransCanada
22 wants.

23 On the other hand, you also have a large number
24 of parties who have united to oppose the Keystone XL
25 Pipeline. It's an almost unprecedented coalition of

1 Native American Tribes, family farmers and ranchers, and
2 concerned citizens.

3 Now the witnesses that Mr. Ellison and I are
4 going to present here to you during these hearings I
5 think will help you understand why Dakota Rural Action is
6 so opposed to the Keystone XL Pipeline.

7 Now DRA is an organization that's focused on
8 family farming and ranching. That's a very, very proud
9 traditional here throughout the Midwest and the Great
10 Plains Regions. Not just here in South Dakota. Also in
11 Missouri where I'm from where my own family runs a cattle
12 ranch.

13 Family farmers and ranchers, they're the
14 backbone of our country's agricultural history and
15 tradition. And if there's one thing that family farmers
16 and ranchers understand, it's the importance of
17 conservation and taking care of their land. The land is
18 their livelihood. The water that feeds their land is
19 their lifeblood.

20 Now before I started working and agreed to work
21 with Dakota Rural Action, I wanted to know what that
22 organization was all about. When doing my own inquiry I
23 learned that its members worked to conserve and protect
24 South Dakota's environment and its unique way of life.

25 Its members work to protect ground water and air

1 quality from pollution, and it works to remove barriers
2 to and promote the development of clean, renewable energy
3 sources, like wind power and biofuels. And I think it's
4 those core set of principles are why DRA's members oppose
5 this proposed pipeline.

6 Because they believe that the pipeline poses
7 unacceptable risks to their land, to their water, and,
8 hence, their livelihoods and their way of life.

9 Now during the hearings we're going to have a
10 number of witnesses that we really hope that you'll
11 listen to and whose testimony you'll carefully consider.
12 These witnesses will tell you why TransCanada should not
13 be permitted to build the Keystone XL Pipeline for
14 South Dakota and why the pipeline poses risks to
15 South Dakota's land and water.

16 Past performance, at least in my experience, has
17 usually been a good indicator of future performance.
18 That's why one of the witnesses that we'll have, DRA
19 member Sue Sibson, wants to testify here before you.

20 As you know from her prefiled testimony and,
21 Commissioner Hanson, as you know from having visited her
22 farm personally, her land lies along the route of the
23 original Keystone I Pipeline. When the Commission
24 permitted TransCanada to build Keystone I in the eastern
25 portion of South Dakota you imposed a number of

1 conditions on them. And they're somewhat similar to the
2 conditions that we have here.

3 One of those conditions being that TransCanada
4 mitigates the effects of pipeline construction on the
5 land and then reclaim the land following construction.
6 Mrs. Sibson is going to testify that TransCanada
7 inflicted an unmitigated disaster on her property.

8 She's going to tell you in her testimony that
9 six years after construction the right of way that was
10 taken by TransCanada via threat of eminent domain remains
11 unproductive and unusable for farming and grazing. She's
12 also going to testify that ironically TransCanada
13 discounted her concerns until, low and behold, she was
14 named as a witness in these proceedings. And then all
15 the sudden she started getting calls continually from
16 suddenly concerned TransCanada officials wondering what
17 they can do to help her. I think we all know there's no
18 such thing as coincidence.

19 Now Ms. Sibson's testimony is going to highlight
20 the fact that TransCanada is either unwilling or
21 incapable of living up to its commitments and complying
22 with its obligations to reclaim land.

23 Now I'm a believer in the principle that a
24 picture's worth a thousand words. And, accordingly, we
25 were pretty disappointed when you issued an Order

1 excluding photographs and video that they had taken of
2 the damage inflicted on her land. Therefore, you're
3 going to have to rely on her testimony to paint a picture
4 in your minds of what that's done.

5 Now another witness that we're going to put on
6 during these proceedings probably ranks as one of
7 TransCanada's least favorite persons in the universe. In
8 fact, it's rumored that TransCanada has even gone so far
9 as to hire a public relations and research firm to
10 counter the information that Evan Vokes is disclosing
11 about the company that he used to work for.

12 Mr. Vokes is an insider. He's a former
13 TransCanada employee with critical experience in pipeline
14 engineering and construction.

15 Now one of the things you'll see in these
16 proceedings is that TransCanada is going to attack him
17 with hammer and tongs. When you hear his testimony
18 you'll understand why. And even though you've disallowed
19 many of the records that Mr. Vokes produced for us that
20 document TransCanada's failure to comply with various
21 conditions, he's going to tell you about them.

22 Now what's interesting about Mr. Vokes is that
23 he's actually a pipeline guy. When we first discussed
24 his testimony he made it clear to us that he believes
25 that pipelines are a crucial component of our country's

1 energy infrastructure. But he also believes that if
2 you're going to build a pipeline, you better do it right
3 and that the engineers who work on pipelines owe a duty
4 to the public to get it right.

5 Now what Mr. Vokes is going to tell you is that
6 TransCanada cannot get it right, that the company has a
7 cultural sort of inbred -- sort of corporate culture of
8 valuing profits over safety, that they cut corners in
9 order to get pipelines operational, taking a view if
10 there's a problem or spill, we'll just deal with it
11 later.

12 Mr. Vokes's testimony is going to have a lot of
13 detail about how pipelines are constructed, how they can
14 fail. And he's going to describe for you some very
15 specific instances where TransCanada fell flat on its
16 face, including a case where a segment of the Keystone I
17 Pipeline -- in fact, in my state, Missouri, over in the
18 St. Louis area -- suffered a 95 percent corrosion after
19 only being placed two years in service.

20 His testimony is going to demonstrate that
21 TransCanada cannot or will not meet the conditions
22 imposed on it with respect to safety and sound
23 engineering.

24 The final witness you're going to hear from
25 from DRA is Dr. Arden Davis. Now Dr. Davis is a very

1 respected professor here in South Dakota at the
2 South Dakota School of Mines and Technology.

3 He's a professional engineer, and he's an expert
4 in geological engineering where he's focused much of his
5 efforts through his career on studying ground water and
6 environmental contamination. His testimony is going to
7 be that a crude oil or diluted bitumen leak from the
8 proposed Keystone XL Pipeline would have a devastating
9 effect on the groundwater supplies, surface water, and
10 environment here in South Dakota.

11 Dr. Davis knows South Dakota's geology. His
12 testimony will walk you through the geological features
13 of the proposed pipeline route. He's going to show you
14 the large number of water crossings where potential
15 pipeline leaks or breaches could contaminate the water
16 that South Dakota farmers, ranchers, and other residents
17 rely on for their drinking water, for their livestock,
18 and to water their crops.

19 Dr. Davis is going to tell you about how the
20 proposed pipeline crosses major South Dakota waterways
21 such as the Little Missouri, the Grand River, Moreau, the
22 Cheyenne River, the Bad River, and the White River. He's
23 going to tell you about the alluvial aquifers that are
24 adjacent to those water crossings and how contamination
25 from pipeline leaks or spills can migrate down gradient

1 into surface water and ground water, causing serious
2 problems for the folks that live downstream.

3 He is also going to testify about the nature of
4 the contamination posed by leaks and spills from the
5 proposed pipeline. And he's going to tell you about the
6 fact that the diluted bitumen transported from Canadian
7 tar sands is a lot more caustic than the light, sweet
8 crude that you might get from the other oil fields, which
9 is commonly referred to as Texas tea.

10 He's going to tell you how it's cut with other
11 toxic compounds like benzene and toluylene, ethylbenzene,
12 and xylene. And his testimony will focus on how these
13 compounds are disbursed through waterways and aquifers
14 and how they pose significant risks to human health.

15 Finally, Dr. Davis is going to tell you about
16 the geological risks that are posed from the proposed
17 pipeline from ground and soil instability through the
18 regions that the pipeline runs and how worst-case spill
19 scenarios could unfold affecting the water and health of
20 the people here in South Dakota.

21 MR. SMITH: We're at the 10 minutes so wrap it
22 up.

23 MR. MARTINEZ: That's great because I'm on my
24 very last sentence here.

25 And I was just going to conclude by getting

1 right to the bottom line that DRA's witnesses are going
2 to let you know that TransCanada either cannot or will
3 not comply with the conditions it has to meet in order to
4 get recertification. They're simply not going to be able
5 to meet their burden.

6 Thank you.

7 MR. SMITH: Thank you.

8 Are there any other Intervenors? I look out
9 there and --

10 MS. CRAVEN: I have an opening statement.

11 MR. SMITH: Oh, yes. Please do.

12 MS. CRAVEN: Thank you. I'm going to read my
13 statement, if that's all right.

14 My name is Kimberly Craven. I'm here
15 representing the Indigenous Environmental Network. Thank
16 you for this opportunity, Commissioners Nelson,
17 Commissioner Hanson, and Commissioner Fiegen, if she's
18 listening. We wish her well. We hope she recovers
19 soon.

20 A significant event was marked last week that
21 South Dakotans need to be aware of. It's been five years
22 ago on July 25, 2010, that 843,000 gallons of tar sands
23 oil spilled into the Kalamazoo River in Michigan
24 devastating the river, the town nearby, and its people.

25 Five years later the town is still cleaning up

1 and the effects of the tar sands are still being felt.
2 The tar sands oil, heavier than crude oil, did not float
3 on the water but sank to the bottom of the river making
4 it very hard to clean up. The tar sands oil also
5 contains dangerous, highly toxic chemicals that poison
6 the water, killing the fish, and impacting the health of
7 Kalamazoo people.

8 We now know what we expected, that the tar sands
9 are some of the dirtiest, most toxic oil known to man.
10 According to the National Resource Defense Council, the
11 contamination stretched almost 40 miles along the River.
12 About 60 homes were evacuated for more than three weeks,
13 and businesses shut down, some permanently. In the
14 months following the spill a Michigan survey found that
15 more than half the residents in four communities along
16 the contaminated portion of the river suffered health
17 impacts such as headaches, respiratory illnesses, and
18 nausea. Fish populations were decimated and thousands of
19 turtles, birds, and mammals impacted.

20 The spill from Enbridge's Pipeline, Line 6B
21 became the costliest inland oil cleanup in U.S. history
22 with a tab exceeding 1 billion dollars.

23 Dallas talked to you about the Nexen spill that
24 happened two weeks ago. Officials believed it had been
25 leaking for two weeks before someone out walking

1 discovered it. There were about 31,000 barrels of heavy
2 crude mixed with sand and water near an oil sands
3 production facility in a rural area surrounded by boreal
4 forest that were spilled. That is two football fields of
5 tar sands oil which spilled out undetected by the
6 high-tech systems relied upon to do so.

7 We are here today to consider if the Conditions
8 are the same as when the first Permit from the Keystone
9 XL Pipeline was issued.

10 The Indigenous Environment Network has in the
11 past and wants to read for the record that we firmly
12 believe that use of the word "condition" in the statute,
13 South Dakota Codified Law 49-41B-27 that brought us here,
14 today should be viewed in the plain meaning of the
15 dictionary for that Condition that we're looking -- that
16 we should be looking at the Conditions under which the
17 permit was issued, not just the 50 Conditions and the
18 30 Conditions of the -- tracking the changed Conditions,
19 the Findings of Fact found in Appendix C.

20 It is our opinion the conditions in 2010 are
21 vastly different in 2015. The different conditions
22 include full knowledge of the danger of tar sands and how
23 the increased use of these fossil fuels which will be
24 flowing through the pipeline are exacerbating the
25 weather, the climate, and our planet.

1 But if we are talking about the 50 original
2 Conditions and 30 changed Conditions of the Findings of
3 Fact, we are concerned about 14, 20, and 80. As
4 Mr. Taylor highlighted this morning, regarding the
5 Marketlink Pipeline coming from the Bakken oil fields to
6 connect to this pipeline, it changes the pipeline, since
7 that Marketlink was never part of the original
8 consideration of the Application in the previous docket.

9 There are more main line valves, and TransCanada
10 is no longer seeking a Special Permit, which is part of
11 the original Application consideration.

12 I also join in my colleagues' concern about the
13 lack of consultation and cooperation with the tribal --
14 with the affected tribal nations regarding the pipeline,
15 how it will impact their water rights, which are property
16 rights, their cultural resources, and responses to
17 spills.

18 We have no witnesses, but we will cross-examine
19 TransCanada's and the State's witnesses who will be
20 providing testimony that TransCanada has met their burden
21 of proof in this docket proceeding.

22 As native people, we are taught to make
23 decisions taking into consideration how our actions will
24 impact the seven generations from now. To that end, IEN
25 strongly believes in both the rights of Mother Earth and

1 future generations whose lives will be impacted with what
2 is decided in this hearing room.

3 We would ask that the South Dakota PUC
4 Commissioners envision these two entities, that they are
5 sitting here with us in this room and that you consider
6 the rights of Mother Earth and her children of the future
7 generations as you deliberate in recertifying the
8 Keystone XL Pipeline Permit.

9 Thank you.

10 MR. SMITH: Thank you, Ms. Craven.

11 I think we have one more there. Mr. Go --
12 Gough. Sorry for mispronouncing.

13 MR. GOUGH: (Speaks Lakota.)

14 My name is Robert Gough, Secretary of
15 InterTribal Council On Utility Policy. InterTribal COUP
16 includes membership of 15 Tribes in North Dakota,
17 South Dakota, Nebraska, and Wyoming. I'm not a member of
18 any of these Tribes. I'm of the mixed descent, Irish,
19 French, English, and Lenape also known as Delaware. My
20 ancestral homelands are on either side coastal islands
21 along the eastern and western shores of the North
22 Atlantic.

23 I tell you this because the consequences of the
24 decision you make in this matter can have direct and dire
25 effects not only on the people, lands, and waters of

1 South Dakota but upon my ancestral homelands on both
2 sides of the pond, including the entire New York,
3 New Jersey metropolitan region and have those effects
4 during the lifetime of our children and grandchildren.

5 The water levels of that pond may rise anywhere
6 from 16 to 29 feet above the business-as-usual
7 scenario -- with the business-as-usual scenario.

8 No single decision of any agency of the State of
9 South Dakota, other than the one you made on limited
10 information in 2010, will have greater impact upon the
11 global reach in the atmosphere of our entire planet.

12 InterTribal COUP has attempted to raise issues
13 of climate, climate change, weather, adverse weather,
14 extreme weather events which were slighted in the FEIS
15 but given more significant attention in the federal
16 process resulting in the FSEIS, including explicit
17 comments from the U.S. Environmental Protection Agency,
18 through our presentation of expert witnesses, Dr. James
19 Hanson and Dr. Robert Oglesby in climatology. Both, as
20 you know, were precluded.

21 Does TransCanada contend that their pipeline
22 will be immune from extreme and adverse weather events
23 over the next 50 to 60 years? Does TransCanada contend
24 and does the Commission agree that the next half century
25 will be as tranquil as the 20th Century in terms of

1 weather and extreme events?

2 Can or does our past century of weather records
3 adequately foretell what we should expect and plan for in
4 the foreseeable future? We have already seen a
5 seven-year drought and a 500-year flood just in this new
6 century alone. South Dakota -- along the South Dakota
7 stretch of the Missouri River since the first decade of
8 this half century.

9 More importantly for South Dakotans, will the
10 impact that the breaks, leaks, and spills from this
11 pipeline have on the fragile land and water resources so
12 many South Dakota residents depend upon for our lives and
13 livelihood. Can TransCanada promise no breaks, no
14 spills, no leaks? Have they made such promises
15 elsewhere? Have they kept such promises?

16 The 2010 Permit hearing did not handle climate
17 and climate change in any direct manner because
18 TransCanada and the Commission have jointly determined to
19 hold climate constant over the next 50 plus years of the
20 lifetime of the Keystone XL Pipeline.

21 You need to affirmatively acknowledge that.
22 That was what was expected at the end of 2010 be what we
23 should expect to see in 2065? Or should we consider at
24 all that we are basically being told that a single
25 snapshot in time is more than enough to fairly gauge the

1 intensity, frequency, and kinds of storms, droughts,
2 tornadoes, and other weather-related phenomenon that can
3 and will impact this infrastructure over the next half
4 century, particularly on fragile soils and lands that
5 have already been identified by other Intervenor?

6 The world has changed considerably over the past
7 four years, and now we have come to comprehend the
8 potential impacts of changing climate on scarce water
9 resources through pipelines, breaks, and leaks. We know
10 that there have been 150 reported pipeline accidents in
11 the U.S. since the issuance of the 2010 Permit.

12 InterTribal COUP is merely asking these
13 questions. Dr. Hanson released findings recently, this
14 past week, in fact, of a study in the Atmospheric and
15 Physics Science Journal called Ice Melt, Sea Level Rise,
16 And Thunderstorms. And that Report 16 follows
17 established that major ice sheets are melting at an
18 increasing rate so global warming driven by fossil fuel
19 initiatives conceivably can produce rapid, nonlinear sea
20 level rise on orders of magnitudes of several meters in
21 this century.

22 I won't go into the details of that, but I will
23 mention that sea level rise by the end of this century
24 could reach 29 feet above current levels, that the rapid
25 level of sea level rise may begin sooner than generally

1 assumed because of the conservatism built into the
2 scientific models that were being used to model this
3 behavior. And that there are no morally defensible
4 excuses to delay the phaseout of fossil fuel industries
5 as rapidly as possible.

6 The implications are profound, including the
7 likelihood of massive social, dislocation, migration of
8 coastal populations along the eastern seaboard and severe
9 and lasting economic disruption worldwide. This paper
10 also establishes the high likelihood of related steeper
11 pressure gradients, far more powerful North Atlantic
12 storms, weakened zonal winds, and more frequent cold
13 outbreaks for the middle latitudes here.

14 I would ask that these circumstances are quite
15 beyond the longer term prospects of the driving --
16 driving the heat and disruption of hydrologic cycles,
17 marked decline in agricultural yields, and species
18 collapse that have galvanized the scientific community in
19 recent years to counsel immediate action by state,
20 national, and world leaders on these issues.

21 This new information establishes that the time
22 for serious action is upon us. Future delays serve only
23 to undermine the potential ruin the opportunity for later
24 successes.

25 The Keystone Pipeline constitutes an enormous

1 impediment to this transition. Its approval through
2 South Dakota PUC recertification will embolden the fossil
3 fuel industry to wring every last drop of crude from
4 Alberta tar sands at enormous immediate environmental
5 cost there and here and with literally incalculable
6 national and global consequences, including future
7 generations here in South Dakota.

8 InterTribal COUP is conceived as our -- is
9 concerned, as are most Intervenors, that the -- as tribal
10 and nontribal Intervenors, with the inevitable spills and
11 leaks which will be ignored and downplayed in testimony.
12 However, we would also like to be -- make the Commission
13 aware that there would likely be a need to more
14 adequately prepare to address the significant costly and
15 irreparable harm that will come to South Dakota
16 communities with the successful build-out of this
17 pipeline.

18 However, we are more concerned about the
19 potential of the pipeline working perfectly and properly
20 operated in a business as usual fashion to deliver
21 700,000 to 830,000 barrels per day or perhaps 900,000
22 barrels per day.

23 Circumstances have changed dramatically since
24 the PUC initially approved the pipeline. What was then a
25 little discussed matter is now of national global crisis.

1 The PUC should at least hear what the climate scientists
2 have had to say. This Commission has declined twice to
3 do so, holding that expert information on climate and
4 adverse weather, which is now how climate will change and
5 will reveal itself through extreme events such as the
6 recent 500-year flood, is not relevant to the
7 recertification process that the Keystone Pipeline will
8 plead in their Application.

9 In this case InterTribal COUP would request that
10 the PUC consider two actions: One, to issue a finding
11 based on the submissions of TransCanada that both the
12 description of the proposed project and the conditions,
13 including the scientific awareness and understanding of
14 the impact of the direct consequences of approving either
15 the proposed project which has now changed -- is now
16 looking at changed circumstances. The Cheyenne River
17 Sioux Tribe representative articulated those with regard
18 to the FEIS and the FSEIS.

19 As such TransCanada should be required to submit
20 an Application for a new Permit for its new and currently
21 proposed project.

22 Number two, whether this process or a new Permit
23 proceeding, we would request the Commission appoint a
24 guardian ad litem for future generations in this process
25 to review and monitor the ongoing activities of the

1 Applicant, should recertification be granted.

2 The goal is to recognize the rights of future
3 generations to a healthy and livable earth and to
4 constitute a practical means for honoring those rights
5 through state policy, legal frameworks, and institutions
6 and who are designed along principles that will allow the
7 present generation to fulfill their responsibilities to
8 future generations. Such principles would include
9 budgetary concepts --

10 MR. SMITH: Mr. Gough, you're at your time
11 limit.

12 MR. GOUGH: Finish my last -- no debt to future
13 generations without corresponding assets, legal persons
14 restorative justice, and others that will support the
15 rights of future generations.

16 Thank you very much.

17 MR. SMITH: Thank you.

18 Are there other Intervenors that wish to do
19 openings at this point?

20 Paul, did you want to do yours now or later?

21 MR. SEAMANS: Later.

22 MR. SMITH: I think that's everybody. Is it
23 Ms. Bardaglio? Is that how you say it?

24 MS. NAPP: Actually, no. My name is Donna Napp.
25 I came up from the Gulf Coast for this. Nobody --

1 MR. SMITH: So you're not an Intervenor?

2 MS. NAPP: I'm not an Intervenor. I'm just
3 sitting here.

4 MR. SMITH: Thank you. I just saw the sign in
5 front of you.

6 MS. NAPP: I believe that Wrexie will be here
7 Monday.

8 MR. SMITH: I apologize.

9 Thank you. Then, Staff, do you wish to make an
10 opening statement at this time?

11 MS. EDWARDS: Briefly.

12 Thank you, Mr. Smith, Commissioners, and fellow
13 parties.

14 Staff is here today in its role as a neutral
15 party to help the Commission determine whether the
16 Keystone XL Pipeline project can continue to meet the
17 Conditions upon which the Permit was granted in June of
18 2010.

19 Staff has worked within the narrow parameters
20 established by the Legislature for this process. The
21 limited purpose is to determine whether or not the
22 project continues to meet the Conditions established by
23 the Commission in 2010.

24 Staff testimony will remain within the scope set
25 by SDCL 49-41B-27. We will not attempt to retry the

1 Permit proceedings. That is not what the Legislature has
2 allowed us to do here. We acknowledge and respect how
3 much time and scrutiny went into evaluating the project
4 in HP09-001. That decision was not reached lightly.

5 We have contacted and will provide testimony
6 through many of the witnesses provided by Staff in the
7 Permit docket. We have worked with those witnesses over
8 the past several months to determine whether in their
9 expert opinion they believe that the Keystone XL Pipeline
10 project can continue to meet the conditions upon which
11 the Permit was granted.

12 As you will hear in their testimony or have
13 already read, those witnesses do feel that Keystone
14 continues to meet or exceed those conditions.

15 Thank you.

16 MR. SMITH: Thank you. Is there anybody else in
17 the -- any other parties in the room that wish to make
18 their opening statements at this time?

19 I'm seeing no indication. I think we've covered
20 everybody in the room either by asking them and they
21 declined or --

22 So with that, Mr. Chairman, should we take a
23 recess before embarking on the -- would you like one,
24 Cheri?

25 Well, why don't we take a -- what do you say?

1 10 to? Is that sufficient? That's about 12 minutes or
2 13.

3 Okay. We'll come back into session at 12 to --
4 or pardon me. 10 to. We're in recess until 10 minutes
5 to 3:00.

6 (A short recess is taken)

7 MR. SMITH: We'll call the hearing back to order
8 in Docket HP14-001. We have concluded opening statements
9 from everyone in attendance who wished to do so today.

10 And, with that, we will turn to the actual
11 evidentiary case. And the party having the burden of
12 proof, the Petitioner, TransCanada Keystone Pipeline, LP,
13 please proceed with your case in chief.

14 MR. TAYLOR: Thank you, Mr. Smith. TransCanada
15 calls Corey Goulet.

16 (The oath is administered by the court reporter.)

17 DIRECT EXAMINATION

18 BY MR. TAYLOR:

19 Q. Will you state your name and business address for
20 the record, please.

21 A. My name is Corey Goulet, and I work in Calgary,
22 Alberta for TransCanada Corporation.

23 Q. And would you tell the Commission what your job
24 position is with TransCanada Corporation.

25 A. I am currently the President of Keystone Project.

1 As well, I'm the vice president and general manager of
2 major project implementation.

3 Q. And how long have you been the president of the
4 Keystone XL project?

5 A. Approximately three years.

6 Q. Thank you. Do you have with you today Exhibit 2001?

7 A. I do.

8 Q. And would you tell the Commission what that is,
9 please.

10 A. That's my direct testimony in these proceedings.

11 Q. Let me ask you a question. Exhibit 2001, that is
12 the Prefiled Direct Testimony that you submitted?

13 A. It is.

14 Q. Do you adopt that as your testimony in this
15 proceeding today?

16 A. I do.

17 MR. TAYLOR: We'd offer Exhibit 2001.

18 MR. SMITH: Hearing no objection, 2001 is
19 received into evidence.

20 Q. And do you have in front of you Exhibit 2010? That
21 is 2010.

22 A. I do.

23 Q. Would you tell the Commission what that is?

24 A. That's the Rebuttal Testimony that I provided.

25 Q. And do you adopt that as your Rebuttal Testimony

1 that will be presented in this case?

2 A. I do.

3 Q. Thank you.

4 MR. TAYLOR: We'll offer 2010.

5 MR. SMITH: Is there an objection?

6 MR. TAYLOR: Surrender the witness for
7 cross-examination.

8 MR. SMITH: Hearing no objections, 2010 is
9 admitted.

10 MR. TAYLOR: Mr. Smith, we'll surrender the
11 witness for cross-examination.

12 MR. SMITH: Okay. Same issue we've had in terms
13 of order. Do you have a particular suggestion,
14 Intervenors, for order?

15 MR. BLACKBURN: We would prefer after talking to
16 some of my colleagues to have the Tribes initiate their
17 cross-examination first, and then the nontribal entities
18 will do so.

19 MR. SMITH: Okay. And have the Tribes discussed
20 the order amongst yourselves? How do you wish to do
21 that? Should I just go alphabetically, or how do you
22 want to do it? Alphabetically?

23 Okay. I think that brings to us Mr. Clark as
24 the first cross-examiner.

25

CROSS-EXAMINATION

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BY MR. CLARK:

Q. Good afternoon, Mr. Goulet.

A. Good afternoon.

Q. You stated in your direct testimony that you are responsible for the overall leadership and direction of the Keystone XL Pipeline project; is that correct?

A. That's correct.

Q. Okay. You also stated in your opinion that Keystone can continue to meet the Conditions on which the Permit was granted.

A. That's correct.

Q. Would that include Conditions 6, 7, and 34?

A. I'll just refer to those Conditions, but I believe that that's part of my certificate as well.

Q. Good to go.

Just briefly to refresh your memory, generally those Conditions state the following: Condition 6, Keystone shall notify all affected local landowners, utilities, and local governmental units as soon as practicable of any material deviations proposed to the route.

Condition 7, Keystone shall provide contact information to all local law enforcement agencies and local governmental units within the vicinity of the project.

1 And, finally, Condition 34, during the HCA review
2 process Keystone will identify all unusually sensitive
3 areas as defined by 49 CFR 195.6 that may exist. And as
4 part of that process, Keystone is required by
5 Condition 34 to seek out and consider local knowledge of
6 including that of local government and local government
7 officials.

8 Not a question. Just refreshing your memory on
9 those three conditions.

10 Are you aware that the proposed Bridger Creek
11 crossing is in very close proximity to the Cheyenne River
12 Sioux Reservation?

13 A. I am.

14 Q. Excuse me. Are you aware that several other
15 portions of the project other than the Bridger Creek
16 crossing are also in close proximity to the Cheyenne
17 River Sioux Reservation?

18 A. I am.

19 Q. Pursuant to Condition 34, Keystone is required to
20 seek out and consider local knowledge, including that of
21 local government officials; is that correct?

22 A. That's what you've stated, yes.

23 Q. Now to refresh your memory on the particular
24 regulation, 49 CFR 195.6 defines unusually sensitive
25 areas as drinking water resources where the water intake

1 for a community water system obtains its water supply
2 primarily from a surface water source and does not have
3 an adequate drinking water -- alternative water resource.
4 Just to refresh your memory.

5 Are you aware?

6 MR. TAYLOR: Mr. Smith, I'd like to pose an
7 objection. His characterization of 49 CFR 195, the CFR
8 speaks for itself.

9 The question properly should be is Mr. Goulet
10 familiar with the regulation? And if Mr. Goulet says he
11 is not, then he should provide Mr. Goulet with a copy of
12 the regulation if he wants to examine him as to the
13 nature and enforcement of the regulation.

14 MR. SMITH: Do you have a response to that,
15 Mr. Clark?

16 Q. Are you familiar with the regulation?

17 A. I'm not directly familiar with the regulation.
18 Someone in my staff is.

19 Q. Okay. I'll move on.

20 Are you aware that the Mni Waste Water Company's
21 primary water intake for potable water is downstream from
22 this the Bridger Creek crossing?

23 A. I'm not personally aware of that, but I think I've
24 been told that at one time.

25 Q. Are you aware that the Mni Waste Water Company is a

1 tribally chartered water company of the Cheyenne River
2 Sioux Tribe?

3 A. I am aware of that.

4 Q. Are you aware that the Mni Waste Water Company is
5 the sole provider of potable water to all residents of
6 the Cheyenne Sioux Reservation, both Indian and
7 non-Indian?

8 A. I've never been told that, but I take your word for
9 it.

10 Q. A spill of sediment -- a spill or sediment
11 disturbance of existing pollutants due to the
12 construction of the Bridger Creek area could potentially
13 affect the Cheyenne River Sioux Tribe, could it not, if
14 it's upstream of the Bridger Creek crossing, the water
15 intake?

16 MR. TAYLOR: Mr. Smith, objection. It's a
17 compound question.

18 MR. SMITH: Do you want to split it, please.

19 MR. CLARK: Sure.

20 Q. Would you agree that an oil spill at the Bridger
21 Creek crossing would affect the Cheyenne River Sioux
22 Tribe?

23 A. It may. It may not.

24 Q. Okay. Would you agree that sediment disturbance of
25 existing pollutants could affect the Cheyenne River Sioux

1 Tribe?

2 MR. TAYLOR: Objection. Assumes facts not in
3 evidence.

4 MR. SMITH: Overruled.

5 A. It may or may not, again.

6 Q. Do you consider the Cheyenne River Sioux Tribe an
7 affected local government in the vicinity of the proposed
8 project?

9 A. It's an affected party.

10 Q. To the best of your knowledge, has Keystone or any
11 of its agents notified the Cheyenne River Sioux Tribe of
12 the Bridger Creek HDD route change?

13 A. I am not aware if we have or not.

14 Q. To the best of your knowledge, has Keystone or any
15 of its agents submitted any contact information to the
16 Cheyenne River Sioux Tribe, its law enforcement agency,
17 or any other emergency agency of the Tribe?

18 A. I'm aware that we tried to contact the Cheyenne
19 River.

20 Q. But you're not aware of any actual substantive
21 discussion with the Tribe?

22 A. I'm aware that there were opportunities to discuss
23 various aspects of the project with the Cheyenne River,
24 and at times we were told Cheyenne River weren't
25 interested in speaking with us.

1 Q. To the best of your knowledge, has Keystone or any
2 of its agents sought out and considered the local
3 knowledge of the Cheyenne River Sioux Tribe or any of its
4 officials?

5 A. I'm not aware if we have or not.

6 Q. Are you aware that Keystone sought out and
7 considered the local knowledge of the Bureau of Indian
8 Affairs agency on the Cheyenne River Sioux Tribe?

9 A. I'm not aware if we have or not.

10 Q. Are you aware that the Bureau of Indian Affairs is
11 not an entity of the Cheyenne River Sioux Tribe but is a
12 separate governmental unit?

13 A. I wasn't aware of that fact.

14 Q. Could you tell us, do you know why Keystone sought
15 out the local knowledge of the Bureau of Indian Affairs
16 but not the Cheyenne River Sioux Tribe?

17 A. I'm not aware of why we would have sought out the
18 input from one group and not the other.

19 Q. To the best of your knowledge, has Keystone or any
20 of its agents provided the Cheyenne River Sioux Tribal
21 emergency personnel with any training whatsoever?

22 A. I wouldn't expect we would have provided that
23 training at this point. We're a long ways from
24 completing construction, let alone starting it, and,
25 therefore, it wouldn't be necessarily appropriate to

1 provide that training at this time.

2 MR. CLARK: No further questions.

3 MR. SMITH: Thank you.

4 Let's see. That would be Dakota Rural Action.

5 MR. ELLISON: I thought all the Tribes were
6 going first.

7 MR. SMITH: Oh, pardon me. I'm sorry. I was
8 just looking at my list. You're right. I apologize.

9 MR. ELLISON: Not a problem.

10 MR. SMITH: Does that include Indigenous
11 Environmental Network?

12 MS. CRAVEN: We're not a Tribe.

13 MR. SMITH: I guess that would be Rosebud, and
14 he's not here.

15 Okay. Well, at this point that would be
16 Standing Rock.

17 MR. CAPOSSELA: With your indulgence, I would
18 like to approach him.

19 MR. SMITH: Please.

20 MR. CAPOSSELA: Thank you, Mr. Smith.

21 MR. SMITH: I'll let everyone else know that.
22 You're free to use either the podium or your desk,
23 whatever works better for you.

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CROSS-EXAMINATION

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BY MR. CAPOSSELA:

Q. Mr. Goulet, in your testimony you explained the withdrawal of the Special Permit from PHMSA, the Special Conditions and the permit for the waiver on pressure from PHMSA?

A. That's correct.

Q. Can you guarantee the Public Utilities Commission that TransCanada will not in the future seek a Special Permit from PHMSA waiving the pressure requirements for the Keystone XL Pipeline in South Dakota?

A. I know at this time we don't have any plans to seek the Special Permit for the pipeline.

Q. Would you answer my question?

Can you guarantee to this Commission that in the future TransCanada will not seek a waiver for the pressure requirements for the Keystone XL Pipeline in South Dakota?

MR. TAYLOR: Objection, Mr. Smith. The question is argumentative. It does not seek to solicit an answer, and it's been asked and answered.

MR. CAPOSSELA: I would say it's not been answered. At this time. But I asked him if it's something that they foreclosed. And I guess I'll accept that he answered no, but I'd prefer to let the witness

1 answer the question.

2 MR. SMITH: Are you able to answer the
3 question?

4 A. I'm able to answer the question as I said. At this
5 time we don't have any plans to obtain a Special Permit,
6 but that doesn't mean that the regulations can't change
7 and that special permits might be available to us in the
8 future.

9 So, no, I can't guarantee that it will never happen.
10 But at this time we have no plans.

11 Q. I have a document that's been marked -- premarked as
12 Exhibit 8015.

13 MR. TAYLOR: 8015?

14 MR. CAPOSSELA: Yes, sir.

15 MR. TAYLOR: What is the date of that one?

16 MR. CAPOSSELA: June 27, 2011.

17 MR. TAYLOR: Thank you.

18 MR. CAPOSSELA: May I approach the witness,
19 Mr. Smith?

20 MR. SMITH: You may.

21 MR. CAPOSSELA: Mr. Goulet, take your time.

22 CHAIRMAN NELSON: Excuse me. I'm going to have
23 to ask -- every one of your questions has got to be into
24 the microphone.

25 Q. Take your time, Mr. Goulet. I'm just going to ask

1 you briefly to give your explanation of what that letter
2 is. But take your time and look at it for as long as you
3 want.

4 MR. TAYLOR: First, I'm going to make a
5 foundation objection. He has to establish -- I'll just
6 make a foundation objection. I won't argue.

7 MR. SMITH: Do you have a response?

8 MR. CAPOSSELA: I've identified it as Standing
9 Rock Exhibit 8015. It's a PHMSA letter with the date
10 that I mentioned.

11 MR. SMITH: Okay.

12 A. What was your question, sir?

13 Q. Would you just briefly give your account of what
14 that letter is. What is that letter?

15 MR. TAYLOR: If you know.

16 A. Well, you know, this is not a matter under my
17 control or leadership, but it looks like a request that
18 we made for a Special Permit for a gas pipeline. And
19 when I say "we" I mean TransCanada Pipeline, Limited.

20 Q. Thank you.

21 MR. CAPOSSELA: I'm going to approach the
22 witness again.

23 MR. SMITH: You can just approach. I don't
24 think we need to go through it every time.

25 CHAIRMAN NELSON: If I could just interrupt,

1 we've got folks listening on the internet, and this is an
2 important proceeding to them just as it is to us, and I
3 want to make sure they have the full scope of what's
4 happening here.

5 Q. I have a document, Mr. Goulet. It's dated June 27,
6 2011, from the U.S. Department of Transportation Pipeline
7 and Hazardous Materials Safety Administration that's been
8 premarked Exhibit 8016.

9 MR. SMITH: Was that 8016, you said?

10 MR. CAPOSSELA: Yes, Mr. Smith.

11 Q. Again, Mr. Goulet, I just would ask, take your time.
12 Take a look at that letter and just give a brief account
13 of what that letter is in your own words.

14 MR. TAYLOR: Foundation objection.

15 MR. SMITH: Overruled.

16 A. It appears that this is a response to TransCanada
17 from the Associated Administrator For Pipeline Safety at
18 PHMSA, U.S. Department of Transportation, regarding an
19 Application that we made for a Special Permit.

20 Q. I have a document that's been identified as
21 Exhibit 8017. It's a PHMSA letter dated June 27, 2011.

22 Mr. Goulet, I'll trade you.

23 And my question is the same. Take your time, check
24 it out, and just briefly in your own words explain what
25 that letter is.

1 MR. TAYLOR: Object on the grounds it lacks
2 foundation. There's no demonstration that this witness
3 has any knowledge of the subject matter of these letters
4 other than what he can see in the written text as he
5 reads it.

6 That is not proper foundation for the admission
7 of the exhibit for any purpose, much less
8 cross-examination.

9 MR. CAPOSSELA: It has not been moved to be
10 entered into the record yet. We're laying the foundation
11 for the existing of these documents, and the prefiled
12 testimony involves compliance with PHMSA regulations.

13 And so this is within the scope, and we're
14 putting information into the record establishing the
15 existence and what these documents are.

16 MR. SMITH: I guess I'm going to overrule on the
17 grounds that I can't yet see that his testimony is being
18 offered as foundational evidence for the document. He's
19 just having him reference it in terms of asking him
20 questions about his knowledge of it.

21 Q. Again, Mr. Goulet, just in your own words just
22 summarize what you think this letter is, what this letter
23 is.

24 A. Well, this is no different than the last letter.
25 It's a response from, again, Mr. Jeffrey Wiese of PHMSA

1 to the company, specifically David Chittick, on a
2 Special Permit Application that we made.

3 Q. Thank you. I'm going to reference premarked
4 Exhibit 8018. It's a letter July 16, 2010.

5 Take your time, sir. Again, in your own words, what
6 is your understanding of what is this letter?

7 MR. TAYLOR: Mr. Smith, can I have a standing
8 objection to this methodology of examination? The letter
9 speaks for itself. It has to be admitted. There has to
10 be foundation laid for the letter.

11 If Mr. Goulet is being asked to read the letter
12 as a scrivener -- or is he being asked to read the letter
13 because he knows what's in it? Or is this asking
14 Mr. Goulet to read it so that later he can be asked to
15 comment on it?

16 There's absolutely no precedent or foundation
17 for this approach to using letters of this type. He has
18 to lay some basic foundation. Did this fall out of the
19 sky? What is it?

20 MR. CAPOSSELA: These letters, Mr. Smith, will
21 be introduced as exhibits. There will be motions to
22 introduce these letters in our case in chief. These are
23 letters that are directed to TransCanada.

24 And it may unfold that when motions are made to
25 introduce these letters into evidence that -- from the

1 Tribe on our case in chief, that there might be
2 objections. And the Rules of Evidence permit laying
3 foundations by -- through the admission of party
4 opponents.

5 So we're getting into the record TransCanada's
6 knowledge of the existence of these letters, an
7 understanding of what these letters are, and we will seek
8 their admission at the appropriate time. Now is not the
9 appropriate time, but we have the right to ask Mr. Goulet
10 if he knows what these letters are and to bring these
11 letters forward at this time.

12 Alls we're doing is asking what these letters
13 are, if he knows about them, what these letters are.

14 MR. TAYLOR: I agree that he absolutely has the
15 right to ask Mr. Goulet have you ever seen this letter
16 before? Did this letter come to you, Mr. Goulet, in your
17 official capacity as the vice president of Keystone?

18 But to ask him to say -- which his question is
19 tell us in your own words what this letter means is
20 simply asking him to characterize the contents of the
21 letter.

22 I can do that. Counsel can do that. Anybody
23 who can read the English language can do that. That's
24 not proper foundation. And it also is not an appropriate
25 examination of this witness with respect to these

1 letters.

2 He has to lay the foundation for the admission
3 of the letters in some other fashion. All he can get by
4 way of foundation from this witness is this isn't my
5 business. I'm not in the gas business. I didn't receive
6 these letters. They aren't addressed to him.

7 MR. SMITH: Well, I agree this isn't going to
8 lay the foundation for admission of the letters, but I
9 don't know that that means he can't question this witness
10 about his knowledge of the existence of those documents
11 and his knowledge of them.

12 Maybe you could just do a little more
13 foundational questioning of him in terms of that, in
14 terms of --

15 MR. CAPOSSELA: I would be happy to. I'm trying
16 to get through this. We could be -- we could have been
17 done five minutes ago without these objections.

18 MR. SMITH: I appreciate that too. Maybe just a
19 little bit more of laying not an introduction foundation
20 but a context foundation for the witness's help.

21 Q. Do you know Mr. David Chittick?

22 A. I do.

23 Q. Who is it?

24 A. He's one of our directors for pipeline engineering
25 in our Pipeline Integrity Department.

1 Q. And what are his responsibilities?

2 A. His responsibilities are for -- for managing the
3 pipeline integrity of our entire pipeline network.

4 Q. Would that include corresponding with PHMSA over
5 special permit requests or waiver requests?

6 A. He could correspond on some special waiver requests
7 that have to do with the existing pipeline system. I
8 doubt that he would do that for new pipelines.

9 Q. With whom would he do that in the United States?

10 A. He would do that with PHMSA.

11 Q. Who wrote the letter?

12 A. The letters that you've provided me are written by
13 Jeffrey Wiese, as I said, the associated administrator
14 for pipeline safety.

15 Q. With what agency?

16 A. With the U.S. Department of Transportation Pipeline
17 and Hazardous Materials Safety Administration.

18 Q. And what's the date of the letter?

19 A. This particular one, which is Exhibit 8018, is dated
20 July the 16th, 2010.

21 Q. To your colleague, Mr. Chittick?

22 A. That's correct.

23 MR. CAPOSSELA: Mr. Smith, I'm going to
24 reference premarked Exhibit 8019. It's a letter from
25 PHMSA to TransCanada dated July 16, 2010.

1 Q. We're going to trade letters again, Mr. Goulet.

2 A. I'm used to it.

3 MR. TAYLOR: Mr. Smith, along this line of
4 question may I inquire of the witness for the purposes of
5 an objection?

6 MR. SMITH: You may.

7 MR. TAYLOR: Mr. Goulet, is Jeffrey D. Wiese --
8 I'm sorry. Is David Chittick a subordinate of yours?

9 THE WITNESS: He is not.

10 MR. TAYLOR: And he is the recipient of all 1,
11 2, 3, 4, 5 of the letters; right?

12 THE WITNESS: He was.

13 MR. TAYLOR: So on that basis would renew my
14 foundation objection. If he were a subordinate of
15 Mr. Goulet, then perhaps there would be some distant link
16 to relevancy and foundation. But we're back to where
17 you're asking Mr. Goulet to be the mailman, to read the
18 letter into evidence, and that's neither proper
19 foundation nor proper cross-examination.

20 MR. SMITH: Do you have a response,
21 Mr. Capossela?

22 MR. CAPOSSELA: You know, I don't have a
23 response. I think that the objection is improper and I
24 think that this is a waste of time and I could have been
25 done a long time ago.

1 I would ask that the witness be permitted to
2 answer the question, finish my line of questioning, and
3 move on.

4 MR. SMITH: Okay. You know, I can see,
5 Mr. Taylor, that if we were involved in a murder case,
6 you know, we might go down a path like that, but here I
7 think all he's trying to do is obtain this witness's
8 particular knowledge of these letters and I just don't
9 see sufficient prejudice to not allow him to be
10 questioned about them.

11 He can answer, quite frankly, that if he has no
12 knowledge of them, he can say that.

13 MR. TAYLOR: If the record could just show my
14 standing objection to this line of questioning.

15 I think there's one more of those letters;
16 right?

17 MR. SMITH: Okay. If there's one more, your
18 objection stands, and my ruling on it stands.

19 Just for that purpose. Again, you're not using
20 him to lay your foundation for these letters, for their
21 admissibility; right?

22 Is that correct?

23 Q. Mr. Goulet?

24 A. What was the question again, sir?

25 Q. What's the date of the letter?

1 A. July 16, 2010.

2 Q. Who's it addressed to?

3 A. To Jeffrey Wiese -- or sorry. To Mr. Chittick.

4 Q. From?

5 A. From Mr. Wiese.

6 Q. Your understanding of the -- take your time. Check
7 it out.

8 Your understanding of the letter is --

9 A. Well, again, this is a letter from Mr. Wiese to
10 Mr. Chittick denying a Special Permit Application that we
11 made. But there are eight pages of attachments so I'm
12 not going to read through all of those.

13 Q. Thank you for the summary.

14 I have premarked Exhibit 8020, PHMSA letter dated
15 May 5, 2010. Is it fair to characterize this letter,
16 Mr. Goulet, as similar to the other letters that
17 you've -- that you've looked at this afternoon, that I
18 showed you this afternoon. PHMSA letter to David
19 Chittick regarding a Special condition Permit that was
20 denied?

21 Take your time. Is that what this is?

22 A. It is. It's a Special Permit Application about a
23 Special Permit Condition.

24 MR. CAPOSSELA: Thank you for that
25 clarification.

1 I have no further questions of Mr. Goulet,
2 Mr. Smith.

3 MR. SMITH: Thank you.

4 I think that brings us to Yankton Sioux Tribe.

5 MS. REAL BIRD: Thank you, Mr. Smith. Thomasina
6 Real Bird from the Yankton Sioux Tribe.

7 MR. SMITH: Please proceed.

8 CROSS-EXAMINATION

9 BY MS. REAL BIRD:

10 Q. Mr. Goulet, does Yankton Sioux Tribe consider
11 Keystone a local government unit as that term is used in
12 Condition No. 6?

13 A. I don't know if we do or not.

14 Q. The minor route variations that are referenced in
15 your prefiled testimony, did you notify the Yankton Sioux
16 Tribe of those variations?

17 A. I'm not aware if we did or not.

18 Q. Who in your organization would be aware of the
19 answer to that question?

20 A. Well, I think I have a colleague who might be more
21 aware of the route changes who will be testifying later.
22 I'm not sure that she's aware of whether we contacted
23 Yankton Sioux, but I'm sure you can ask her. It's
24 Meera Kothari.

25 Q. Thank you.

1 Has Keystone appointed a public liaison officer as
2 is required by Condition No. 7?

3 A. Yes, we have. Sarah Metcalf.

4 Q. And has Keystone provided Ms. Metcalf's contact
5 information to the Yankton Sioux Tribe?

6 A. The existence to the Yankton Sioux Tribe?

7 Q. Sorry. I'll rephrase that if you misunderstood.
8 Has Keystone provided the contact information for the
9 public liaison officer to the Yankton Sioux Tribe?

10 A. I'm not aware if we have or not.

11 Q. And would Ms. Kothari possibly have that
12 information?

13 A. She may.

14 Q. Okay. Anyone else in the organization that may have
15 that information?

16 A. I'm sure there would be people who could tell you
17 exactly the information that was provided to Sarah
18 Metcalf and who she contacted. They may not be here.

19 Q. Do you have names of those people you have in mind?

20 A. Not off the top of my head, no.

21 Q. You do not know who in your organization will have
22 that information?

23 A. Again, I don't know who's been, you know, discussing
24 all the contact information. It would be someone in our
25 Stakeholder Relations Department perhaps.

1 Q. So you do not know who in your organization is
2 responsible for meeting Condition No. 7?

3 A. I am generally aware of the departments who are
4 responsible for meeting Condition No. 7, but I'm not
5 aware of all the individuals in those departments who
6 would be directly involved with Ms. Metcalf.

7 Q. But as you sit here today, can you testify that your
8 organization has met Condition No. 7?

9 A. I believe we have. Because we have provided
10 Ms. Metcalf with the contact information for relevant
11 people along the line. And to the best of my knowledge
12 we met that condition.

13 Q. But you don't know if relevant people includes the
14 Yankton Sioux Tribe?

15 A. I do not know.

16 Q. Pursuant to Condition No. 10, has Keystone commenced
17 a program of contacts with the Yankton Sioux Law
18 Enforcement?

19 A. I'm not aware if we have or not.

20 MR. TAYLOR: May I interpose an objection?

21 MR. SMITH: You may.

22 MR. TAYLOR: Condition 10 is prospective in
23 nature, not later than six months prior to the
24 commencement of construction. Construction has not
25 commenced and could well not commence in the next six

1 months.

2 And to pose a question to Mr. Goulet have you
3 complied with Condition 10 cannot be answered. I object
4 on that basis.

5 Those conditions that are prospective in
6 nature --

7 MS. REAL BIRD: I'll rephrase.

8 MR. SMITH: Thank you.

9 Q. Pursuant to Condition No. 10, does Keystone intend
10 to commence a program of contacts that would include the
11 Yankton Sioux Tribe Law Enforcement?

12 A. We certainly would if they were a party that was
13 relatively close to the pipeline. And I don't know the
14 criteria. I'd have to read through the Condition to
15 determine if they were a party that we needed to contact.

16 But our plans would definitely be as the Condition
17 requires; within six months of commencement of
18 construction to contact state, county, and municipal
19 emergency response, law enforcement and highway, road,
20 and other infrastructure management agencies.

21 Q. I'll read Condition No. 10 to refresh your
22 recollection. "Not later than six months prior to
23 commencement of construction Keystone shall commence a
24 program of contacts with state, county, and municipal
25 emergency response, law enforcement and highway, road and

1 other infrastructure management agencies serving the
2 project area in order to educate such agencies concerning
3 the planned construction schedule and the measures that
4 such agencies should begin taking to prepare for
5 construction impacts in the commencement of project
6 operations."

7 So bearing in mind that Condition, does Keystone
8 intend to contact the Yankton Sioux Tribe Law
9 Enforcement?

10 A. Again, provided that the Yankton Sioux Tribe was
11 within an area that was affected by the project.

12 Q. And who defines the area affected by the project?

13 A. Well, I'm not aware of how we make that
14 determination.

15 Q. How would you say it --

16 A. Well, I would say it would have to be someone in the
17 vicinity of the construction or operations of the
18 pipeline in order that they would be affected by the --
19 those activities.

20 Q. And vicinity, what does "vicinity" mean to you? How
21 would you define that as you sit here today?

22 A. I don't have a definition for that. But they would
23 have to be affected by either the construction or
24 operation of the pipeline.

25 I'm sure we would put together criteria that would,

1 you know, guide our staff to determine who to contact. I
2 mean, clearly you're not going to go to California and
3 contact municipalities in California about a project in
4 South Dakota, for example.

5 So you'd have to determine an appropriate criteria
6 to determine, you know, who the affected parties were as
7 a result of those activities.

8 Q. So based on your explanation, it means to be in the
9 state? Is that your definition of vicinity? To be in
10 the state as opposed to California, out of state?

11 A. No. That's not my definition.

12 Q. Okay.

13 A. I'd say we have to establish criteria before we
14 implemented this activity.

15 Q. So you haven't yet begun to implement Condition
16 No. 10 or think about it or define --

17 A. It indicates that we've commenced it already in the
18 quarterly report that was admitted as part of the
19 certification. But it says we will continue to
20 coordinate with county and municipal emergency
21 response --

22 I won't go through the whole list. But it indicates
23 we'll continue to contact the stakeholders that were
24 referred to in the Condition.

25 Q. Since you indicated you have commenced that

1 obligation is it your testimony that you do not know
2 whether you have contacted the Yankton Sioux Tribe Law
3 Enforcement?

4 A. That's correct. I do not know. I don't have
5 personal knowledge of that.

6 Q. And you don't know if your Condition intends to or
7 not?

8 A. Well, I don't know, again, if they're an affected
9 party.

10 Q. And as you sit here today, do you believe they're an
11 affected party?

12 A. I believe that we will try to contact the Yankton
13 Sioux Tribe as part of these -- of this Condition.

14 Q. Would that contact include the Yankton Sioux Tribe
15 as it relates only to law enforcement or all of the
16 contemplated areas in Condition No. 10, including
17 roads?

18 A. I think it depends on how the Tribe might be
19 affected. If we weren't planning to use the roads
20 through the reservation or -- we might not make that
21 contact.

22 Q. Mr. Goulet, were you involved in the geographic
23 element of the design of the pipeline system?

24 A. I wasn't directly involved.

25 Q. Would you describe your involvement.

1 A. Well, as I indicated, my involvement is for the
2 overall leadership of the Keystone Project. And we have
3 Staff who are responsible for various aspects of the
4 project, including the design.

5 I would have had a department responsible for that,
6 and they would have conducted the design on behalf of the
7 project.

8 Q. I'm going to ask you a question, and if you don't
9 know the answer, just let me know, of course.

10 At the design phase were you aware that there were
11 Tribes with reservations in South Dakota?

12 A. I was aware of that.

13 Q. Were you aware that there are Tribes with ancestral
14 lands located in South Dakota?

15 A. I would be aware of that.

16 Q. Were you aware that there are Tribes with treaty
17 lands in South Dakota?

18 A. I would be aware of that generally.

19 Q. To your knowledge, does a route cross through
20 ancestral lands?

21 A. To my knowledge, the pipeline does not cross any
22 reservations or land held in trust for the Tribes.

23 Q. To your knowledge, does the route cross through
24 ancestral lands was my question.

25 A. I don't know the definition of ancestral lands well

1 enough to answer that question.

2 MR. TAYLOR: I would like to interpose an
3 objection, Mr. Smith. Move that the objection be
4 interposed between the question and Mr. Goulet's answer.

5 I don't want to unduly prolong these
6 proceedings, but this Commission has made a decision some
7 time ago with respect to usufructuary tribal lands and
8 the matters related to tribal lands that are outside the
9 bounds of the current reservation.

10 And the decision was that that was out of bounds
11 for this hearing.

12 MR. SMITH: The objection is sustained.

13 MS. REAL BIRD: My response to that is that's an
14 improper characterization of the Commission's Order. It
15 was not the scope announced by counsel.

16 I'll move on.

17 Q. The Tribes that you were aware of that had
18 reservations -- that have reservations in South Dakota,
19 did you reach out to any of those Tribes?

20 A. My understanding based on the reports that I
21 received is that we reached out to Tribes which we
22 believed might be affected by the project.

23 I don't think that was all of the Tribes, but it was
24 many of the Tribes in South Dakota.

25 Q. Would you list those Tribes that you did reach out

1 to?

2 A. Well, I'm aware that we reached out to Tribes such
3 as Cheyenne River, Rosebud, Standing Rock, Yankton. We
4 may have tried to contact Yankton. Lower Brule.

5 Those are the ones I'm aware of. But I'm sure there
6 are other Tribes that we also reached out to as well.

7 Q. Were you involved in the reaching out?

8 A. I wasn't personally involved in all the activities.
9 I did attend at least two functions where Tribes
10 attended. One was a tour of a man camp in North Dakota.
11 And I know Tribes -- there were at least three Tribes
12 involved in that activity.

13 Q. Do you know the names of those Tribes?

14 A. Yeah. I believe it was the Cheyenne River, the
15 Lower Brule, and I think the Rosebud. And there were
16 members of those Tribes present on that particular tour.

17 Q. How did you determine that they were members? Did
18 they have a title with the Tribes or --

19 A. Well, some of them had titles. Some did not. I was
20 told that by the tribal members themselves so I can only
21 take it on their word.

22 Q. Sure.

23 Did the reaching out take any other form other than
24 the tour that you described?

25 A. Not my personal reaching out, no.

1 Q. Are you aware of other types of reaching out your
2 organization conducted?

3 A. We also conducted pump station tours with tribal
4 members as well.

5 Q. Did you say post station?

6 A. Pump station.

7 Q. Oh. Sorry.

8 A. And we've also -- you know, we have a very detailed
9 program of contacting the Tribes in an affected area as a
10 result of a project, and Mr. Lou Thompson in our
11 organization as well as a number of people who work for
12 him are responsible for that program.

13 And, you know, on top of those two particular
14 activities, they would do many, many other things to try
15 to contact the Tribes and talk to them about the project.
16 And I know at least a couple of people who have worked
17 for Mr. Thompson have spent a lot of time trying to reach
18 out and talk to Tribes about a number of different
19 aspects of the project as well as the opportunity for the
20 Tribes to participate in the project.

21 Q. What's Mr. Thompson's position with your
22 organization?

23 A. I believe he would be the manager of tribal
24 relations in the United States.

25 Q. And how did your organization know you were talking

1 about the tribal government as opposed to just any tribal
2 member that had thoughts on your project?

3 A. Well, you know, I think -- again, I'm speculating
4 because I didn't do the -- I didn't have the
5 conversation with the Tribes. But I do know generally
6 that Mr. Thompson reaches out to the -- the leadership of
7 the Tribe through the prehistoric -- the historic officer
8 and, you know, THPO and so forth and the actual
9 leadership of the organization themselves.

10 So I know he does a lot of research and collects a
11 lot of information to find out who the appropriate
12 contacts are in the Tribe.

13 Q. Following these contacts with the Tribe, how did
14 your organization incorporate concerns or comments
15 expressed by Tribes?

16 A. Well, those would have been incorporated where they
17 made sense in the design -- the preliminary design of the
18 project.

19 Q. Do you know specifically a way that your
20 organization incorporated comments?

21 A. Again, I'm not -- I'm not a party to those
22 discussions.

23 Q. Okay.

24 A. But it would be between Mr. Lou Thompson and our
25 engineering department and our construction department to

1 determine what changes, if any, have to be made to the
2 plans as a result of the input provided by the Tribes.

3 Q. Are any representatives from your engineering or
4 construction department scheduled to testify at these
5 hearings?

6 A. Again, Ms. Meera Kothari is from the engineering
7 department and can discuss in more detail the -- you
8 know, the conversation that she may have had with
9 Mr. Lou Thompson regarding input from the Tribes and
10 whether or not that was incorporated into the design.

11 Q. At the time the route of the pipeline was selected
12 were you aware that there are numerous sacred and
13 cultural sites along that route?

14 A. I'm generally aware that that might be the case.

15 Q. Your answer is yes?

16 A. Yes.

17 Q. Who in your organization is responsible for making
18 sure that those sacred and cultural sites are protected?

19 A. Again, we would have done surveys to determine the
20 existence of those -- of those sites and avoided them
21 where possible if we're aware of them.

22 Q. Do you know if the entire route, 100 percent was
23 surveyed?

24 A. Not to my personal knowledge.

25 Q. Did you do anything else to protect discovered

1 cultural or known sites?

2 A. Well, one of the things that we do that we believe
3 is important is we hire tribal monitors typically on our
4 projects. And we did so most recently on the Gulf Coast
5 project portion of the Keystone system.

6 And those tribal monitors are there to ensure that
7 when we come across sites which are -- which are
8 important to the tribal community, that we stop work and
9 make changes if that's appropriate.

10 MS. REAL BIRD: That's all we have for now.
11 Thank you.

12 MR. SMITH: Well, given that Rosebud isn't here,
13 I think we have -- we'll turn to just other
14 organizational intervenors.

15 And, Mr. Blackburn, I think we'll start with
16 you.

17 CROSS-EXAMINATION

18 BY MR. BLACKBURN:

19 Q. Good afternoon, Mr. Goulet. I'm Paul Blackburn, and
20 I represent Bold Nebraska.

21 Does your expertise and your purpose for being here
22 today relate to the commercial need for the Keystone XL
23 Pipeline?

24 A. No, it doesn't. Mr. Diakow who will be a witness
25 following me can talk about the commercial need of the

1 project.

2 Q. Are you generally familiar with the Transportation
3 Service Agreements that are used by TransCanada with
4 regard to the Keystone XL Pipeline?

5 A. I'm aware of them, but again Mr. Diakow would be the
6 person to talk to relative to the Transportation Service
7 Agreements.

8 Q. Thank you.

9 In paragraph 5 of your prefiled testimony you've
10 discussed the Bakken link?

11 A. Uh-huh. Bakken Marketlink.

12 Q. Bakken Marketlink facility? Is that the best way to
13 describe it? Or project?

14 A. Sure. You can refer to it as the Bakken Marketlink.
15 And associated with that project is what we call the
16 Baker On-Ramp in Baker, Montana.

17 Q. Thank you. When was the Bakken Marketlink
18 project -- when did development of it start?

19 A. Again, Mr. Diakow would be more familiar with that.
20 I'm aware that we introduced it around the 2010, 2011
21 time frame.

22 Q. And could you describe why it was developed?

23 A. Well, it -- my understanding is it was developed as
24 a result of requests that we had from the shippers. I
25 can probably talk more about what it is than why we

1 introduced it.

2 But I do know that the shippers were looking for a
3 way of getting Williston Basin crude south, and so they
4 approached us about putting it onto the Keystone XL
5 Pipeline.

6 Q. Do you know if the shippers were the only entities
7 or interests that were -- sought development of the
8 Bakken Marketlink project?

9 A. Well, I'm generally aware that the Montana Governor
10 at the time, Governor Schweitzer, was also interested in
11 the company pursuing the Bakken Marketlink and encouraged
12 us to do so as well.

13 Q. Thank you. Could you describe the Baker On-Ramp in
14 a bit more detail in terms of what it is physically just
15 so people know what that means?

16 A. Sure. It would be the construction of a terminal
17 facility near the pipeline, near Baker, Montana. And
18 what that would do is take crude in from other pipelines
19 into a couple of tanks next to the pipeline, and then
20 that crude would be injected into the pipeline as
21 batches.

22 While that crude was injected as batches, the
23 pipeline upstream or from Hardisty, Alberta, to Baker
24 would be actually shut down and that batch would be
25 injected into the pipeline and the remainder of the

1 pipeline would remain in operation.

2 Q. Thank you. Can you describe what the Hardisty
3 Terminal is?

4 A. The Hardisty Terminal is a similar facility, but
5 it's at the lead of the entire Keystone XL Pipeline.

6 Q. It's fair to say it's the northern terminus of the
7 XL Pipeline?

8 A. That's correct.

9 Q. Thank you. You mentioned that other pipelines would
10 be connecting to the Baker On-Ramp. That's correct?

11 A. That's correct.

12 Q. What other pipelines are those?

13 A. Actually I'm not knowledgeable about the exact
14 pipelines that would be connected, but my understanding
15 is there's a couple of pipelines that will be connected.
16 And maybe perhaps Mr. Diakow is aware of which pipelines
17 they are, but he may not either.

18 Q. Thank you.

19 And what is the maximum physical capacity to move
20 oil of the Bakken Marketlink facility?

21 A. Well, it's designed for a capacity of about 100,000
22 barrels per day. And that's about one-eighth of the
23 capacity of the entire line of 830,000 barrels per day.

24 Q. And how is that -- is that capacity sold?

25 A. Yeah. I mean, the shippers who would use that would

1 be -- would have to pay a toll to ship that product to
2 market. And that toll would be applicable from the Baker
3 On-Ramp to wherever they want to take their crude off.

4 Q. And that capacity is -- is that capacity sold
5 through open seasons?

6 A. I think we have some longer term contracts
7 associated with that capacity. I understand that 65,000
8 barrels per day is long-term capacity with another 35,000
9 that would be available to sell through the spot market
10 at the time.

11 Q. Thank you. You anticipated my next question.

12 Can you tell us today who that capacity -- or who
13 the shippers were that contacted for that capacity?

14 A. I cannot, but Mr. Diakow can. Save your question
15 for him.

16 Q. Okay. And then I'm going to go through similar
17 questions with regard to the base Keystone Pipeline but
18 they'll be quicker because I know that's not at issue but
19 I believe there's been some minor changes there. So --
20 in terms of the capacity of that.

21 Let me take a step back.

22 Will the base Keystone Pipeline and Keystone XL
23 Pipeline, if constructed, be operated together as a
24 single system?

25 A. Well, that's a -- there's a complicated answer to

1 that.

2 As a crude oil transportation system that will be
3 operated together. However, the intention is to separate
4 Keystone XL from the base Keystone system. And Keystone
5 XL will transport crude from Hardisty through the
6 pipeline in question we're talking about today, through
7 Steele City, down the Cushing extension into the Gulf
8 Coast as a bullet line, as one continuous pipeline, and
9 will be separate from the base Keystone system.

10 Q. Currently does TransCanada's base Keystone Pipeline
11 and Keystone extension ship oil -- are they used to ship
12 oil to Cushing, Oklahoma?

13 A. They are. And until the Keystone XL system is
14 completed, the base Keystone system either transports oil
15 through to Patoka or goes south through Cushing to the
16 Gulf Coast and, for that matter, can deliver some product
17 in Cushing as well.

18 Q. Should the Keystone XL Pipeline be built, would
19 current shipments of crude oil -- shipments of crude oil
20 that currently flow through the base Keystone Pipeline to
21 Cushing, would those shipments be transferred to the
22 Keystone XL Pipeline?

23 A. Certainly, some of them would be.

24 Q. Okay. Has TransCanada recently changed its -- or
25 increased its contractual -- contracted capacity on the

1 base Keystone Pipeline to move -- to transfer crude oil?

2 A. I'm not sure that they've increased their contracted
3 capacity, but they have increased their available
4 capacity.

5 Q. Thank you for correcting me. That's what I thought.
6 And then let's see.

7 Do you know what the contracted capacity is on the
8 proposed Keystone XL Pipeline?

9 A. Again, the contracted capacity would be best
10 described by Mr. Diakow. I know that the available
11 capacity's 830,000 barrels per day.

12 Q. Thank you. Has TransCanada monitored Bakken crude
13 oil prices in the last two years?

14 A. We monitor all oil prices so I'm sure we've
15 monitored the Bakken as well.

16 Q. Thank you. Are you personally aware of recent
17 trends in the Bakken crude oil crisis?

18 A. I'm aware that Bakken crude oil prices have dropped
19 dramatically in the last six to 12 months, yes.

20 Q. Do you off the top of your head know approximately
21 how much those prices have changed?

22 A. They're probably about half of what they were
23 12 months ago. From 100,000 -- sorry. \$100 per barrel
24 approximately to approximately \$50 a barrel.

25 Q. Okay. Has TransCanada forecast the impact of these

1 reduced Bakken prices on the shippers that have attracted
2 on the buffer Bakken link capacity?

3 A. Well, what I can tell you is that our shippers
4 remain 100 percent committed to the project, whether they
5 originate from Hardisty or Bakken Marketlink. And that's
6 because the alternatives are more expensive for them
7 generally. And they've signed long-term contracts to
8 move crude on the Keystone XL system.

9 Q. And just to refresh me, would you -- are you -- do
10 you know the Bakken Marketlink shippers' identities?

11 A. Again, I'm not familiar with those. And Mr. Diakow
12 will know.

13 Q. That's what I thought you said. Thank you.

14 Have any of the shippers -- the contractual
15 commitments on the Marketlink sought to change their
16 contracts in any way, up or down, terms, any commercial
17 change in any of them?

18 A. I think all your questions related to the commercial
19 terms, and the contract should be directed to Mr. Diakow.

20 Q. Thank you.

21 A. I can talk about the physical pipeline system and
22 the general design and usage, but he'll be able to
23 provide those details.

24 Q. Could you describe the -- TransCanada's
25 infrastructure in the Gulf Coast related to the Keystone

1 XL Pipeline?

2 A. Well, currently the Gulf Coast project delivers to
3 the Sunoco refinery in Nederland, Texas. And we have a
4 metering facility that takes crude off of that location.

5 We're currently building what's called the Houston
6 lateral, which is an approximate 50-mile lateral that
7 takes off on Pump Station 41, which is the last pump
8 station on the system, and delivers crude to eastern --
9 east Houston.

10 And that's under construction and should be in
11 service near the end of the year. And it's designed to
12 deliver to refineries in the east Texas area. Sorry.
13 East Houston area.

14 Q. And is there a particular name for the terminal in
15 east Houston that it delivers to?

16 A. It's called the Houston Tank Terminal.

17 Q. Is that connected to the ECHO Terminal?

18 A. Not to my knowledge.

19 Q. Thank you. Could you tell me what the ECHO Terminal
20 stands for? I believe it's an abbreviation.

21 A. I don't know that much about the ECHO Terminal so --

22 Q. Thank you. And you also are aware of the Canadian
23 Association of Petroleum Producers?

24 A. I am.

25 Q. Is TransCanada a member of the Canadian Association

1 or CAP? A member of CAP?

2 A. No, we're not. We're not a producer.

3 Q. Okay. Are TransCanada's shippers members of CAP, to
4 your knowledge?

5 A. Yes, they are.

6 Q. Does CAP prepare annual forecasts of Canadian crude
7 supply available for export?

8 A. They do.

9 Q. And do you know when CAP came out with its most
10 recent report?

11 A. I know they came up with one not too recently -- not
12 too long ago, pardon me. But I'm not familiar with the
13 contents of that report.

14 Q. Do you generally know whether their forecast went up
15 or down?

16 A. I don't know specifically what the report said, but
17 I suspect they indicated that the forecast went down.

18 Q. Does TransCanada prepare its own forecasts of crude
19 oil supply available for export from Canada?

20 A. I'm sure we look at many different reports and put
21 together our own expectations, yes.

22 Q. Thank you.

23 MR. BLACKBURN: Just a second. Thank you.

24 Q. When PHMSA issues formal orders to TransCanada are
25 you personally aware of such orders?

1 A. When they relate to the projects that I'm involved
2 in and they're of significant importance, I'm made aware
3 of them.

4 Q. Thank you. And just to be clear, PHMSA is the
5 Pipeline and Hazardous Materials Safety Administration.
6 Not everybody may know that.

7 A. We saw many different letters earlier from a
8 different Intervenor.

9 Q. And are you familiar with CFR Part 195, Appendix
10 H -- or sorry. Subpart H, related to corrosion?

11 A. I'm generally aware of that statute.

12 Q. Are you aware of any formal written orders sent
13 from PHMSA to TransCanada related to corrosion under
14 Subpart H?

15 A. Well, again, my responsibility wouldn't be for
16 pipeline integrity of the existing pipeline. My
17 responsibility would be for the construction of new
18 facilities.

19 So I'm not aware of all of the orders that would
20 have been issued by PHMSA to TransCanada relative to that
21 part of the code.

22 Q. And just to take a step back on your qualifications,
23 were you employed by TransCanada during construction of
24 the base Keystone Pipeline?

25 A. I was employed by TransCanada, but I wasn't involved

1 in the base Keystone Pipeline Project.

2 Q. Thank you.

3 MR. BLACKBURN: No further questions at this
4 time. Thank you.

5 MR. ELLISON: I'd like to suggest a break now so
6 we can just keep going until 5:00.

7 MR. SMITH: Okay. And what kind of break would
8 people like? 10 minutes or -- Gary?

9 COMMISSIONER HANSON: I think with the number
10 of people that we have here and the lack of bathroom
11 facilities, we should probably give them at least
12 15 minutes so that everybody has a shot at it.

13 MR. SMITH: A quarter after. And if we're at
14 the point of being able to like conclude a witness or
15 that, we may spill past 5 o'clock too if that's okay with
16 everyone.

17 MR. ELLISON: You mean complete a witness with
18 all the cross-examination from all the remaining parties?

19 MR. SMITH: Well, it looks like we're just about
20 there now. So maybe. But it depends on how it is.
21 That's a judgment call.

22 Mr. Dorr.

23 MR. DORR: If we're going past 5:00, can you
24 make sure the air conditioner stays on?

25 MR. SMITH: I would sure like to, but I don't

1 know if I can. Hopefully they will. And we don't have
2 to either. It's just a thought. If it's convenient for
3 people, you know.

4 (A short recess is taken)

5 MR. SMITH: I think we're on Dakota Rural
6 Action. Is it going to be you, Mr. Ellison?

7 MR. ELLISON: Yes.

8 CROSS-EXAMINATION

9 BY MR. ELLISON:

10 Q. Good afternoon, Mr. Goulet.

11 A. Good afternoon.

12 Q. How long have you worked for TransCanada, sir?

13 A. Approximately 17 years.

14 Q. And you started approximately 1998?

15 A. That's right.

16 Q. Where did you work before that?

17 A. I worked at Interprovincial Pipeline, which is a --
18 well, it was changed to Enbridge Pipelines. So it's the
19 former company name of Enbridge Pipelines.

20 Q. And when did you begin working for them?

21 A. I worked -- well, I technically worked for them for
22 13 years, but they had a sister company called Home Oil,
23 which I worked with for four years in the beginning of my
24 career.

25 Q. Were you involved in the -- what was your job

1 description with the Enbridge company?

2 A. I had many different jobs in operations,
3 engineering, and project management associated with crude
4 oil pipelines.

5 Q. Were you involved in any way in the construction of
6 the Enbridge Pipeline that leaked in 2010 by Kalamazoo?

7 A. I was not involved in the construction of that
8 pipeline, no.

9 Q. What about design or in any other capacity?

10 A. I was not involved in any capacity on that
11 particular pipeline. It leaked in the United States, and
12 they had a -- well, a company, Lakehead Pipelines, that
13 was responsible for the construction and operation of
14 that pipeline.

15 Q. Do you know what the -- what Enbridge or the
16 appropriate name of the company at that point told
17 regulators was the likelihood of a spill from that
18 pipeline?

19 MR. TAYLOR: I'm going to object to this. It
20 calls for speculation and hearsay.

21 MR. ELLISON: Asking if he knows, counsel.

22 A. I do not know.

23 Q. Did you draft your written testimony, sir?

24 A. I reviewed it in detail, provided comment.

25 Q. Who drafted it?

1 A. Counsel.

2 Q. Which counsel?

3 A. Mr. Taylor.

4 Q. Prior to the final draft did you -- you said it was
5 drafted by Mr. Taylor. Did you give him all of the
6 important information that you thought needed to come out
7 in this hearing, or did he give you a draft of what he
8 thought was important to bring out?

9 MR. TAYLOR: Objection. Invades the
10 attorney-client privilege.

11 MR. SMITH: Sustained.

12 Q. Sir, according to your resume, Exhibit A attached to
13 your Direct Testimony, you stated that one of the
14 departments that you led was pipeline engineering?

15 A. That's correct.

16 Q. And that was for Keystone?

17 A. No. That's not correct. Pipeline engineering was
18 before we got into the liquid pipeline business, and it
19 was for gas pipelines.

20 Q. Okay. You didn't differentiate that, though, in
21 your resume, did you?

22 A. I'm not sure I did or not.

23 Q. Now your current position is that you are the
24 president of Keystone projects.

25 A. That's correct.

1 Q. I've heard a lot about what you don't know. What do
2 you do?

3 What are your job duties and responsibilities?

4 A. I have overall responsibility of the development and
5 implementation of projects associated with the Keystone
6 system.

7 So, for example, right now we're building the
8 Houston lateral and the Houston Tank Terminal, and I
9 would have overall responsibility for that. In that
10 capacity I would make sure that we have the proper
11 personnel, processes, and systems in order to get those
12 projects developed and implemented.

13 Q. Were you involved at all in the construction of the
14 Gulf Coast line?

15 A. I was. I had that capacity at the time the
16 Gulf Coast project was constructed.

17 Q. So at the time that project was being constructed
18 you were the overall person in charge of making sure that
19 it was not only built in compliance with your own plans
20 but also with various agency regulations and conditions?

21 A. I would have had that accountability, yes.

22 Q. And would that also include the siting or the
23 routing of that pipeline?

24 A. Of the Gulf Coast project?

25 Q. Yes, sir.

1 A. I'm trying to think back to the routing in the
2 project probably predated my involvement in the project.
3 In fact, I know it did.

4 I took on the role of leader of that project in 2012
5 just shortly before it started construction. So during
6 the development of that project I wouldn't have been in
7 that role and, therefore, would not have been involved in
8 the routing of that project.

9 Q. Okay. Was it that same pipeline that had a near
10 miss a few years ago from external corrosion ostensibly
11 due to siting too close to a foreign pipeline?

12 A. I think you're referring to the incident in
13 Missouri.

14 Q. Okay.

15 A. Which is not the Gulf Coast project.

16 Q. What is that project?

17 A. That's the Phase 1 of Keystone Project.

18 Q. And what was your involvement with that project?

19 A. I wasn't involved at all in that project.

20 Q. Okay. When you are done with the construction phase
21 is there a turnover process that must take place?

22 A. There is.

23 Q. And that's where you turn it over from the
24 construction people to the operational people?

25 A. That's correct.

1 Q. And what do you do to make sure that the operational
2 people are competent and qualified to perform their
3 duties?

4 A. Well, first of all, that's not really our
5 accountability. We do have an operating department who
6 makes sure that the people who take it over are
7 qualified.

8 What the responsibility of the closeout of the
9 project and the transfer of the operations -- what we're
10 trying to do is make sure that the facilities are ready
11 for operations, that we meet all of our internal and
12 external obligations and commitments that would allow the
13 pipeline to be operated in a safe and reliable manner.

14 The actual training and development of the people
15 who are going to operate the pipeline is the
16 accountability of our operations department.

17 Q. And do you have oversight of that?

18 A. I do not.

19 Q. There was a question that was asked by one of the
20 other Intervenors about affected parties or who might be
21 affected.

22 Do you remember those discussions?

23 A. I do.

24 Q. Would affected parties also -- does TransCanada
25 consider affected parties to also be people, areas of

1 land, water bodies, that could be potentially affected by
2 a worst-case spill?

3 A. That would probably be one potential definition.
4 But, again, I don't -- I'm not personally aware of the
5 criteria that we use to determine the people that we
6 speak to relatively to stakeholder relations for a
7 project.

8 Q. Well, for example, I mean, since you're involved in
9 the construction phase, as that pipeline would be --
10 The plan is to construct it along a certain path
11 that's been determined by TransCanada; correct?

12 A. That's right.

13 Q. And is there -- to your knowledge, does TransCanada
14 go segment by segment by segment and say if we had a
15 worst-case spill here, segment A, segment B, segment C
16 but each respectively this could affect 10 miles this
17 way, it could destroy farmland, it would wipe out
18 tributaries, water systems, whatnot?

19 Do you do that for each one of the segments along
20 the proposed KXL Pipeline?

21 A. You know, the best person to talk about the exact
22 process that we use to determine the affect of spills in
23 a segment by segment basis would be Heidi Tillquist who
24 will be a witness for us later on in these proceedings.

25 Q. Okay. But you're the overall supervisor, aren't

1 you?

2 A. That's right.

3 Q. Okay. So what do you know? Is it -- to your
4 knowledge, is that segment-by-segment analysis done so
5 that TransCanada, to begin with, would know potentially
6 how large than affected area could be by a worst-case
7 scenario? If it happens in Meade County, if it happens
8 in Tripp County?

9 A. I do know that we would do an analysis of the area
10 that might be affected by a worst-case scenario.

11 Q. And you do that for each one of the segments?

12 A. That's correct.

13 Q. And how do you document that?

14 A. We would have a report that describes the -- you
15 know, the high consequence areas and the effect of worst
16 case -- or spills along the pipeline.

17 Q. Well, you've narrowed HCAs down to 19.1 miles for
18 what, a 351-mile pipeline.

19 What about the other 290 miles?

20 A. Well, obviously, all of those 290 miles would be
21 evaluated to determine if they were affected and could be
22 considered a high consequence area.

23 Q. Let me ask my question again. TransCanada has
24 narrowed down the HCAs down to about 19.1 miles in
25 South Dakota, maybe even less.

1 A. Right.

2 Q. What about the entire rest of the pipeline route
3 that you guys might not think is important or PHMSA might
4 not think is important but the people who live along that
5 route who fish, who farm, who drink the water?

6 It's as important to them, would you agree, as
7 someone with an HCA?

8 MR. TAYLOR: Objection, Mr. Smith. The question
9 is argumentative. It's not designed to elicit an answer.
10 It's just simply an argument.

11 MR. ELLISON: I'm asking if he knows and what he
12 knows. He's the guy in charge of this project. I'm
13 trying to find out how he oversees this project and,
14 obviously, from our perspective how it potentially
15 affects people, affects the land.

16 It's a critical question. It's a legitimate
17 question. And either he knows or he doesn't know.

18 MR. TAYLOR: The subject matter is legitimate,
19 but the question as phrased is argumentative and
20 compound.

21 MR. SMITH: Can you simplify it, break it into
22 chunks?

23 MR. ELLISON: Sure. Okay.

24 Q. If I wanted to -- what do you call your segments?
25 Are they by mile, post marker?

1 A. Sure. By milepost markers.

2 Q. Say between milepost marker 370 and 371.

3 A. Uh-huh.

4 Q. So we've got a whole mile. Okay. Are you saying
5 then that TransCanada has conducted a worst-case scenario
6 analysis even if it's not an HCA so that TransCanada
7 would know first and then hopefully the local affected
8 population would know second about what could potentially
9 happen to them in their area?

10 Do you do that?

11 A. Mr. Ellison, I think you need to talk to
12 Ms. Tillquist about exactly the process that we use to
13 evaluate the spill scenarios you're talking about.

14 Q. So as president of projects you don't know?

15 A. What I do know is we do an evaluation of the
16 pipeline to determine the appropriate design for the
17 project, and I do know that the Department that does
18 that. But I wouldn't be aware of the details associated
19 with that analysis.

20 Q. Has a report been turned over to the Public
21 Utilities Commission?

22 A. I'm not aware --

23 Q. -- which does that analysis?

24 A. I'm not aware that one has or has not been turned
25 over.

1 Q. Are you aware of whether it's even been done, the
2 analysis?

3 A. I know that generally that there's analysis done on
4 worst-case scenario spills.

5 Q. For HCAs?

6 A. Yes.

7 Q. But not for non-HCAs; isn't that correct?

8 A. I can't answer that question.

9 Q. Okay. So, in other words, you know that it's done
10 for what, 4 percent of the pipeline, but you don't know
11 about the rest? Is that what you're saying?

12 MR. TAYLOR: Mr. Smith, I'm going to interpose
13 an objection. This was asked and answered. The last
14 question is argument. It's not a legitimate inquiry.

15 MR. SMITH: Well, I'm going to sustain it on the
16 asked and answered.

17 Q. One of your duties, sir, according to your direct
18 testimony, is that you have overall accountability for
19 the implementation and development of the KXL Pipeline
20 system; correct?

21 A. That's correct.

22 Q. But for specifics we have to ask somebody else?

23 A. Well, I have accountability. That just means I have
24 the responsibility or wouldn't know every detail
25 associated with every aspect of the project.

1 Q. Wouldn't you consider worst-case spills situations
2 to be an important aspect of your work?

3 A. It's important that -- it's important for me to
4 understand that we have done that analysis.

5 Q. I mean, you are also responsible, according to your
6 Direct Testimony, with overall leadership and direction
7 of the project; correct?

8 A. That's correct.

9 Q. And the only way you can provide leadership and
10 direction is if you have those details; isn't that
11 right?

12 MR. TAYLOR: Objection. Argumentative.

13 MR. SMITH: Overruled.

14 A. I don't necessarily have to have all the details.

15 COMMISSIONER HANSON: Excuse me. I would move
16 to sustain his objection so it's up to Commissioner
17 Nelson at this juncture to break the tie.

18 CHAIRMAN NELSON: I'm going to side with
19 Mr. Smith. So I guess that's a tossup.

20 MR. ELLISON: That's why we need Commissioner
21 Fiegen.

22 A. As I was saying, I don't think I have to know all
23 the details to undertake my job effectively. And your
24 question implied that I did.

25 Q. Just trying to understand what having the job of

1 accountability, leadership, and direction means to you,
2 sir, and TransCanada, and you've answered that. I
3 appreciate that.

4 Now in that responsibility that you have could you
5 please advise the Commission as to beginning with
6 South Dakota what permits have you not yet even applied
7 for that you know you have to?

8 A. For example, the Army Corps of Engineering Permit.
9 And there are literally hundreds of county permits that
10 we're required to obtain for the construction of the
11 project.

12 Q. Now have you started any of those?

13 A. Generally wouldn't start until you were ready to
14 begin construction in a matter of months. So, no, we
15 haven't.

16 Q. And would it be fair to say, though, that some of
17 those proceedings -- I mean, would it be fair to say that
18 TransCanada expected these proceedings not to last a
19 year?

20 A. We would have expected this to be -- these
21 proceedings to be complete.

22 Q. Already?

23 A. Yeah.

24 Q. Do you have any idea of what some of the other
25 agencies might require with local or state in terms of

1 how long those proceedings could take?

2 A. Again, you know, what specific agency are you
3 referring to?

4 Q. Well, I'm referring to any agency that you need to
5 get a permit to do your construction that you haven't
6 gone to yet, sir.

7 A. They're all different.

8 Q. Okay. So is it fair to say that you don't know, or
9 what?

10 A. Until you give me a specific agency, I can't say if
11 I know or don't know.

12 Q. All right. Army Corps of Engineers. What's the
13 process there, sir?

14 A. Well, the process takes, you know, three to six
15 months to get an Army Corps of Engineering Permit.

16 Q. That's if there's no opposition.

17 A. That might -- that might be the case. If there's no
18 opposition.

19 Again, Mr. Ellison, I'm not responsible for getting
20 all the permits associated with the project. We have
21 many internal Staff and consultants who do that for us.

22 Q. But you are responsible for seeing that it's done,
23 are you not, sir?

24 A. That's correct. And according to the schedule
25 that's provided to me, for example, the Army Corps of

1 engineering -- we don't have to seek that Permit until
2 further down the road.

3 Q. You mentioned in your direct testimony, sir, that
4 you're individually and jointly responsible for the Table
5 of Changes that has been submitted to this Commission?

6 A. That's correct.

7 Q. Could you describe for us which ones you were
8 individually responsible for, sir?

9 A. I think it's in the testimony, and it's -- do you
10 want me to read it out to you?

11 Q. Well, it says jointly and individually. So I just
12 wanted to know of 14 through 23 and 107 which ones you
13 were individually responsible for.

14 A. Well, I'm -- those are the ones that I testified on,
15 as you know.

16 Q. According to your testimony, you are individually
17 and jointly responsible for those changes, for those
18 particular findings, the recommended changes; correct?

19 MR. TAYLOR: Objection. The witness has
20 answered the question. It's been asked and answered, and
21 it's argumentative.

22 MR. ELLISON: No, he hasn't.

23 Q. Did you, for example, for Finding 14 -- proposed
24 change 14, did do you that alone, or did you do that
25 jointly?

1 MR. TAYLOR: Do you have it in front of you,
2 Mr. Goulet?

3 THE WITNESS: I do have it in front of me.

4 A. And a draft of the proposed update was provided to
5 me, and I reviewed it and determined that it was accurate
6 to the best of my knowledge.

7 Q. Okay. Would you agree, sir, that the -- there's
8 been a significant proposed change for Finding 14 where
9 TransCanada has shifted from asking this Commission to
10 look at not what the needs are of domestic consumption
11 but what the demands are by the refineries and the
12 production abilities of the company?

13 A. I don't think I'd agree with that, no.

14 Q. When you look at proposed update for 14 it also
15 refers you to finding -- Proposed Findings or changes in
16 Findings 24 through 29; is that correct, sir?

17 A. That's correct.

18 Q. If you look at No. 26, doesn't that state that while
19 there's been a rise in U.S. crude oil production,
20 predominantly light crude has replaced most foreign
21 imports of light crude. However, the demand persists for
22 imported heavy crude oil by U.S. refineries that are
23 optimally configured to process heavy crude -- is that
24 slates?

25 A. Slates. That's correct.

1 Q. Okay.

2 So you're trying to meet a demand of the refineries,
3 not necessarily a domestic need for gasoline in the
4 United States; isn't that correct?

5 A. Well, that attempts to describe why our shippers
6 still require this project. And that's the fact that
7 even though production of U.S. light crude has increased
8 dramatically, the heavy crude refineries in the Gulf
9 Coast still require imported heavy crude.

10 Q. So that they can process it and do what with it?

11 A. And create refined products such as diesel and
12 gasoline.

13 Q. Would it be fair to say that most of the -- if not
14 all of the oil that is coming from the tar sands and is
15 coming down the Keystone base project and this proposed
16 project, is mainly for export, is it not?

17 A. No, it's not. It's for usage by the refiners in the
18 Gulf Coast region. We're delivering to refineries in the
19 Gulf Coast region.

20 Q. Right. So they can refine it and have it exported.

21 A. Not necessarily. They would -- they would use it
22 for domestic demand as well.

23 And, you know, I'll defer this to my colleague
24 Mr. Diakow if you go into much more detail.

25 But I will tell you that what I am aware of is that

1 there is some export of refined products out of the
2 United States, and some of it from the Gulf Coast. But
3 it's a small percentage of the total amount that's
4 refined distributed around the United States.

5 Q. A small percentage goes around the United States?
6 Is that what you're saying?

7 A. No. A small percentage is exported.

8 Q. Would it be fair to say that when there was recent
9 Congressional legislation being contemplated around this
10 pipeline that TransCanada lobbied heavy to eliminate a
11 proposed amendment that this oil only go for U.S.
12 markets?

13 MR. TAYLOR: Objection. That's so far beyond
14 the scope of his direct examination he can't see it.

15 MR. SMITH: I'm going to sustain that.

16 MR. HARTER: Isn't the need for the pipeline in
17 question? This is John Harter.

18 MR. SMITH: No, not specifically. What's in
19 issue here is whether they continue to meet the
20 Conditions of the Permit. That's what's at issue.

21 MR. HARTER: And the need for it isn't an issue?

22 MR. SMITH: It's not part of the Conditions that
23 I know of.

24 MR. ELLISON: It is part of the Findings of
25 Fact.

1 MR. SMITH: Those are not Conditions.

2 MR. ELLISON: I understand. But, Mr. Smith,
3 this whole witness is talking about proposed changes of
4 Findings of Fact. You're not suggesting that I can't ask
5 him about the Findings of Fact, are you?

6 MR. SMITH: Well, again, they did that and put
7 that in there. I think that was just to -- there's not
8 going to be any changes of Findings of Fact. We've
9 already ruled that. It wasn't requested, and they're not
10 going to be done.

11 All that exhibit does is show how there's been
12 some changes, you know, in the situation now from what it
13 was then. That's it.

14 MR. ELLISON: Sir, perhaps I'm mistaken, but
15 I thought that at the last hearing that we had
16 Chairman Nelson said he wanted to have these Findings be
17 part of this process because he wanted to use it as some
18 part of a guideline or whatnot.

19 MR. SMITH: That's true.

20 MR. ELLISON: I also want to point out
21 SDCL 1-26-19.2. A party may conduct cross-examinations
22 required for a full and true disclosure of the facts.
23 That's the limitation of cross-examination under our
24 state administrative procedural rules.

25 And so I think that that's what -- my question

1 is not -- I'm not trying to be facetious. I'm not trying
2 to be superficial. I'm trying to understand from what
3 this witness is saying -- because to say that only a
4 de minimis amount of oil is designed for export when
5 probably anybody who watches the news knows that
6 TransCanada lobbied to prevent an amendment that would
7 have prohibited export of this oil so that it would be,
8 in fact, what TransCanada touts, that this is for our
9 energy independence and not shippers and producers and
10 transporters' profits to foreign markets which pay a lot
11 more money per barrel.

12 MR. TAYLOR: I move that counsel's comments be
13 stricken from the record. There will be a time at the
14 end of the case for argument.

15 MR. ELLISON: I can move on.

16 MR. SMITH: In terms of stricken, I'm not going
17 to strike. But we will note that counsel's statements
18 such as that are not evidence in the case.

19 MR. TAYLOR: Thank you, Mr. Smith.

20 Q. Finding No. 19 of the proposed tracking changes has
21 to do with mainline valves. Can you take a look at that,
22 please.

23 A. Well, actually I think Finding No. 19 has to do with
24 operating pressure, not mainline valves.

25 Q. Oh, you're absolutely right. Do you know which one

1 it is that talks about the -- that it's going to be for
2 20 mainline valves?

3 I'm sorry. It is 20.

4 A. That's correct.

5 Q. Excuse me. Originally TransCanada proposed 16
6 mainline valves; is that correct, sir?

7 A. That is.

8 Q. I have -- when I read a lot of the TransCanada
9 materials I see -- and especially the testimony, I keep
10 hearing this expression of TransCanada's commitment to
11 having the safest possible pipeline to be constructed.

12 Is that a fair statement of what your public
13 position is?

14 A. I use those words often.

15 Q. Okay.

16 A. And I use those, might I add, because of the
17 59 Special Conditions that we've agreed to that no other
18 pipeline has been built to and that are included in
19 Appendix Z of the Final Supplemental Environmental Impact
20 Statement which was published by Department of State.

21 And one of those Conditions, I will add again, is
22 the requirement that we have valves spaced no more than
23 20 miles apart, which is the reason we went from
24 16 valves to 20 valves.

25 Q. The purpose of those valves is what?

1 A. The purpose of those valves is to segment the
2 pipeline in the event that the pipeline has to be shut
3 down as a result of an incident and to minimize the
4 amount of crude oil that's released from the pipeline and
5 protect sensitive areas.

6 Q. Again, those HCAs?

7 A. HCAs would be one sensitive area.

8 Q. What would be another?

9 A. You know, for example, you know, rivers, which would
10 normally be in HCAs, yes.

11 Q. TransCanada agreed to 20 valves because PHMSA said
12 they wanted 20 valves, not the 16 that you proposed;
13 correct?

14 A. PHMSA suggested that we include that as a special
15 Condition, yes. And we agreed to it.

16 Q. Okay. And more valves means greater protection.

17 A. Generally that's the case. But that's not a linear
18 relationship. It's not a one-for-one relationship.

19 The number of valves that you install on a pipeline,
20 you know, doesn't -- doesn't go up linearly -- the safety
21 doesn't go linearly up with the amount of valves you
22 install.

23 Q. How much -- if the pipeline is operating at full
24 capacity, how many barrels of oil -- of whatever the
25 stuff is -- is between valves that are 20 miles apart?

1 A. For a pipeline like this, there's about one barrel
2 per foot. I'm going to use round numbers. 5,000 barrels
3 per mile. And, therefore, 100,000 barrels per 20 miles.

4 But the amount that would be released in the event
5 of a spill takes in to consider many, many factors,
6 including the geography and the terrain the pipeline goes
7 through over those 20 miles.

8 Q. Sure. The permeability of the soil?

9 A. Well, that doesn't affect the release. It probably,
10 you know, affects the amount that's absorbed in the soil.

11 Q. Okay. Whether it's on a tributary or of a river or
12 a stream?

13 A. Those could be factors. Again, you're getting into
14 my -- you know, an area where I don't have the expertise,
15 and Heidi Tillquist might be able to give you more
16 information if you get down to the details.

17 Q. Are these valves expensive to put in?

18 A. They're not inexpensive but -- you know, a typical
19 valve might cost 2 million dollars to install.

20 Q. Okay. That's what, about half the profits you're
21 going to make a day if this pipeline goes in?

22 MR. TAYLOR: Objection. The question is
23 argumentative, assumes facts not in evidence.

24 MR. ELLISON: No. It goes to the resources this
25 company has to -- for this Commission to consider when

1 they decide not to put in more valves to do greater
2 protection, that they have the resources to do so and
3 choose not to.

4 And that's a consideration we would submit this
5 Commission needs to entertain to decide whether this
6 company is really capable of following the Conditions
7 that are set up.

8 MR. TAYLOR: Mr. Smith, do you want to hear
9 speaking objections?

10 MR. SMITH: Not really. Basically it was this,
11 that we -- that if I'm overseeing it, we would entertain
12 argument or at least discussion. And sometimes for me
13 that's necessary to understand what you're talking about.

14 MR. TAYLOR: But you'll invite it if you want to
15 hear it?

16 MR. SMITH: In general, yes. But, on the other
17 hand, in this case I guess it doesn't offend me to have
18 that discussion.

19 But do you have a response at all to what he's
20 said?

21 MR. TAYLOR: No. I'll stand on my objection.

22 MR. SMITH: I think I'll sustain the objection.

23 Q. One of the things that is part of your testimony, is
24 it not, sir, that as to cost, changes in the pipeline
25 from when it was originally proposed to this Commission

1 to today?

2 A. That is in my testimony.

3 Q. And am I correct in understanding that one of the
4 reasons why you thought it was important for the
5 Commission to understand that it was going to cost more
6 now was because you felt that somehow that would entice
7 us in South Dakota to be looking forward to increased tax
8 revenues as opposed to the lower cost figures?

9 MR. TAYLOR: Objection. The question's
10 argumentative. The statute requires that the value be
11 stated.

12 MR. SMITH: Sustained.

13 Q. You address in Finding 107, do you not, sir, that
14 although you're not a tax expert, that increased costs
15 would likely result in increased tax revenues?

16 A. That's correct.

17 Q. Could you tell us, sir, what the projected tax
18 revenues were for the XL Pipeline to the counties along
19 the eastern part of the state that the pipeline goes
20 through, both the ones that were promised to the people
21 in the state first?

22 MR. TAYLOR: Excuse me, Mr. Smith.

23 The XL Pipeline is the proposed project. The
24 Keystone base pipeline is the existing project.

25 MR. SMITH: Do you want to clarify?

1 MR. ELLISON: Yes, sir. Thank you, Mr. Taylor.

2 Q. The Keystone base project, sir. I mean, I've been
3 hearing like 10 million dollars on the radio. Okay?

4 Is that what TransCanada's been promising to the
5 counties in the eastern part of the state? Or is that
6 what was promised in the past, I should say, when the
7 pipeline was built.

8 A. Well, I think our original estimate of what we
9 thought we were going to pay was about 6 and a half
10 million dollars for the base Keystone. That was
11 subsequently increased to 9.1 million dollars when the
12 cost of the project increased from some 300 million
13 dollars for the 220 miles associated with base Keystone
14 across the State of South Dakota to about \$500 million.

15 Q. Per year?

16 A. That's correct.

17 Q. I'm sorry. \$500 million a year for the base?

18 A. No. No. \$500 million was the cost of the project
19 which increased our estimated tax to 9.1 million dollars.

20 Q. And could you tell us, sir, last year did
21 TransCanada pay 9.1 million dollars?

22 A. We did not.

23 Q. What did you pay?

24 A. Last year we paid -- and this is estimated because
25 we haven't actually paid it yet.

1 Q. All right.

2 A. It's 4.3 million dollars.

3 Q. Okay.

4 A. And the reason that we didn't pay as much as
5 originally expected is because the State, the Department
6 of Revenue, decided to use a different assessment
7 methodology than we were expecting when we put together
8 our estimates.

9 Q. Okay. And what -- so did you inform people then in
10 those counties -- you being TransCanada. Did you inform
11 people in the eastern part of the state that, look, we're
12 really only going to give you less than half of what we
13 told you we would?

14 Did you do that?

15 A. Well, I think they would have found out when they
16 got the information from the Department of Revenue on
17 what the assessment was. And I'm sure that they would
18 have talked to us about that.

19 Q. And some people, I imagine, are not very happy about
20 that.

21 A. I think generally the counties have been very happy
22 with the revenue from the base Keystone Project. And I
23 attended a function just this week where we talked about
24 the five-year anniversary of the operation of the
25 pipeline. And the counties -- a number of counties who

1 were there -- talked about how that revenue was
2 welcomed.

3 Q. Okay.

4 Was Keystone involved at all in the lobbying to
5 change the methodology of the determination of the tax
6 rate?

7 A. Not to my knowledge.

8 Q. Who would know that?

9 A. I'm not sure that -- well, I guess our tax
10 department would know that.

11 Q. Is there anybody here from your tax department, sir?

12 A. There is not.

13 Q. If this Commission had further questions about that,
14 who should they inquire of?

15 A. I think Mr. Marsh from our tax department would have
16 additional information.

17 MR. ELLISON: Can I have one moment?

18 (Pause)

19 Q. Just a couple of questions, sir.

20 On the turnover when you go from construction to
21 operation, what's the process to ensure, for example,
22 that there's been proper cathodic protection?

23 A. Well, first of all, under the regulations the
24 cathodic protection system doesn't have to be operational
25 when a pipeline goes into service.

1 It's actually required to be in service within six
2 months, I believe, of placing the project into operation.
3 As such, there wouldn't be any requirement to determine
4 if the cathodic protection system were fully operational
5 at that time.

6 Q. What's the purpose of the cathodic protection
7 systems?

8 A. The cathodic protection system is there to manage or
9 minimize the amount of corrosion that occurs externally
10 on a pipeline if there are issues with the coating that's
11 been applied to the pipeline.

12 And generally that corrosion occurs at a very, very
13 slow rate, and that's why the cathodic -- that's why the
14 regulators do not require the cathodic protection system
15 to be installed until after the pipeline's in operation.

16 Q. Isn't that rate somewhat sped up if it's close to a
17 foreign utility?

18 A. It can be.

19 Q. Are you aware that -- that one of the Mni Wiconi
20 pipelines -- we're talking about metal pipes; right?

21 It doesn't work with plastic. You don't have to
22 worry about plastic with cathodic issues; right?

23 A. That's right. Stray current interference generally
24 is only with other metal pipelines.

25 Q. You're aware that one of the pipelines that's going

1 to be crossed is the Mni Wiconi Project, which includes a
2 metal pipe?

3 A. I'm aware of that.

4 Q. So you're saying you haven't even begun to worry
5 about that stuff because you haven't built the pipeline
6 yet?

7 A. That's correct.

8 Q. So for other pipelines that you have built, wait six
9 months because it's generally a slow process?

10 A. No. It's not generally a slow process. That's when
11 we're required to have the cathodic protection systems
12 operational. But we generally start the construction of
13 the cathodic protection systems at the end of
14 construction, and we have many of the systems available
15 for operation but not necessarily every one.

16 Q. Why would you do some and not others?

17 A. One of the reasons why you wait until the end of
18 construction is because the cathodic protection system is
19 kind of the last system to go into construction because
20 it's difficult to do so before the main construction of
21 the pipeline has been completed.

22 Q. Even though you're not required to actually have
23 that in place and operational for six months, are you
24 saying that you try and do it by day one?

25 A. We try -- we try and do it early, as early as we

1 can.

2 Q. What would prevent you from doing it from day one?

3 A. Again, if parts of the pipeline system have just
4 been completed, you may not have all of the cathodic
5 protection systems in place.

6 So, for example, if you have five miles left just
7 before you go into operation, you may not have the
8 cathodic protection associated with those last five miles
9 absolutely done by the time you go into operation.

10 Q. Are there coatings that are required to go on before
11 cathodic protection equipment?

12 A. The coatings are required to be installed before you
13 bury the pipeline.

14 Q. There have been some issues with some of the
15 TransCanada pipelines about them being buried with
16 various problems, weld problems, other problems that
17 could affect corrosion; is that correct?

18 A. Well, I'm not sure weld problems would affect
19 corrosion, no.

20 Q. Okay. What about line strikes?

21 A. Line strikes would affect corrosion potentially if
22 it damaged the coating.

23 Q. Weld splattering?

24 A. Could potentially affect the coating.

25 Q. And you would agree, would you not, that TransCanada

1 has actually put pipe into the ground and covered it all
2 up only later to have to go dig it back up again because
3 of such problems?

4 A. I'm aware that we've done that in the past. But our
5 quality assurance process prevented that system from
6 going into operation, and we subsequently repaired those
7 coating problems before the project was completed.

8 Q. How do you know you got them all?

9 A. We used our quality assurance process and the
10 inspection forms by our coating inspectors to determine
11 which ones had problems.

12 MR. ELLISON: Excuse me a moment, please.

13 (Pause)

14 MR. ELLISON: Thank you, Mr. Goulet. I have no
15 further questions.

16 MR. SMITH: Thank you. Since we're after 5:00,
17 unless Ms. Craven or Mr. Gough only have a question or
18 two, I think we will adjourn for the day and --

19 MS. CRAVEN: I have several questions so why
20 don't we adjourn for the day.

21 MR. SMITH: Mr. Gough.

22 MR. GOUGH: I have one question, if I may.

23 MR. SMITH: You have one question. Why don't we
24 deal with that now then.

25 MR. TAYLOR: Would you turn on your microphone.

1 MR. SMITH: Would you say that again, please.

2 MR. GOUGH: I have one question.

3 MR. SMITH: Why don't we proceed. We've got to
4 be done by 20 after due to a Commissioner conflict at
5 that point. If you could, please proceed.

6 CROSS-EXAMINATION

7 BY MR. GOUGH:

8 Q. Bob Gough, InterTribal Council On Utility Policy.

9 Coming out of the questions we just heard and your
10 responses, what control, if any, do you have over the
11 ultimate sale of the product?

12 A. Well, first of all, we don't own the product in the
13 pipeline. Our shippers own the product in the pipeline.
14 Therefore, we don't have control over the sale of the
15 product in the long run.

16 They pay us a toll to transport the product on our
17 pipeline and own the product while it's in our pipeline.

18 MR. GOUGH: Thank you very much.

19 MR. SMITH: Mr. Dorr.

20 MR. DORR: Yes. I won't be able to be here
21 throughout this week. I just have a couple of questions
22 real quick.

23 MR. SMITH: Does anybody have an objection to
24 proceeding any longer then?

25 Okay. We're not adjourned for the day. Please

1 proceed then, Mr. Dorr.

2 CROSS-EXAMINATION

3 BY MR. DORR:

4 Q. Mr. Goulet, you testified that you had met with
5 tribal members on pump tours, and you repeatedly stated
6 you met with Cheyenne River?

7 A. It was actually a camp tour, not a pump station
8 tour. And I said Cheyenne River members were present
9 during the -- that tour.

10 Q. Okay. Did you ever meet with an assembled quorum of
11 the Cheyenne River Sioux Tribe, the Rosebud Sioux Tribe,
12 the Lower Brule Sioux Tribe, or the Crow Creek?

13 MR. TAYLOR: Is your question, Mr. Dorr, did
14 Mr. Goulet himself meet with those groups?

15 MR. DORR: Excuse me.

16 MR. TAYLOR: Or is it aimed at TransCanada?

17 MR. DORR: I can't hear. Could you speak up,
18 please.

19 MR. TAYLOR: I guess my question is are you
20 asking if Mr. Goulet met with those Tribes, or are you
21 asking if TransCanada met with the Tribes?

22 MR. DORR: Mr. Goulet said "we" when he said
23 that. He said we met with them. So I'm asking if he met
24 with an assembled quorum of any of those Tribes.

25 A. Mr. Dorr, I have not met with an assembled quorum of

1 those Tribes that you listed.

2 Q. Okay.

3 A. But TransCanada may have. I'm just not aware of
4 that meeting.

5 Q. Okay. And, again, to get the terminology, it's
6 Tribal Council.

7 Did you meet with an assembled quorum of the Tribal
8 Council which represents the government?

9 A. I have not personally, no.

10 Q. Do you have any knowledge that any of TransCanada
11 has met with any assembled quorum of the Tribal Council?

12 A. I'm not aware if we have or have not.

13 MR. DORR: All right. Thank you.

14 MS. LONE EAGLE: I just now stepped back into
15 the room. And I also had some more questions for the
16 witness so will we be able to continue that in the
17 morning then?

18 MR. SMITH: Yes. We're just adjourned for the
19 night, and we will resume questioning of the witness in
20 the morning.

21 MS. LONE EAGLE: Okay. Thank you very much.

22 MR. MARTINEZ: Mr. Smith, I do have one
23 question, though, of Mr. Taylor and the TransCanada team.
24 What is tomorrow's order of battle?

25 I mean, which witnesses do you anticipate

1 calling after Mr. Goulet's testimony finishes?

2 MR. TAYLOR: Our second witness will be
3 David Diakow. Our third witness will be Rick Perkins.
4 Our fourth witness will be John Schmidt. Our fifth
5 witness will be Dan King. Sixth, Heidi Tillquist,
6 seventh, Meera Kothari.

7 MR. MARTINEZ: Thank you.

8 MR. SMITH: We're adjourned.

9 (The hearing is adjourned at 5:10 p.m.)

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STATE OF SOUTH DAKOTA)

COUNTY OF SULLY)

:SS CERTIFICATE

I, CHERI MCCOMSEY WITTLER, a Registered Professional Reporter, Certified Realtime Reporter and Notary Public in and for the State of South Dakota:

DO HEREBY CERTIFY that as the duly-appointed shorthand reporter, I took in shorthand the proceedings had in the above-entitled matter on the 27th day of July, 2015, and that the attached is a true and correct transcription of the proceedings so taken.

Dated at Onida, South Dakota this 30th day of August, 2015.

Cheri McComsey Wittler,
Notary Public and
Registered Professional Reporter
Certified Realtime Reporter

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