

WATER MANAGEMENT BOARD

October 29 - 31, 2019
LRC Conference Room 414
State Capitol Building
500 E Capitol Avenue
Pierre SD

Scheduled hearing times are Central Time

Scheduled times are estimates only. Agenda items may be delayed due to prior scheduled items.
Live audio of the meeting can be heard at <http://www.sd.net/room414>

October 29, 2019

8:30 AM Call to Order
Adopt Final Agenda
Conflicts Disclosures and Requests for State Board Waivers
September 11, 2019 Board Minutes
October 3 – 4, 2019 Board Minutes
Set December 4 – 5, 2019 Meeting Date and Location

Public comment period in accordance with SDCL 1-25-1

Consider Approval of Prehearing Officer's Orders Issued on Motions

- Elizabeth Lone Eagle's Motion to Schedule Witnesses
- MniWakan Nakicijinpi's Motion to Schedule Witnesses
- Dakota Rural Action's Motion to Compel Discovery from Chief Engineer
- Dakota Rural Action's Motion to Compel Discovery from Tom and Lori Wilson
- Dakota Rural Action's Motion to Compel Discovery from Wink Cattle Company
- Chief Engineer's Motion in Limine - TransCanada Keystone Pipeline applications
- Chief Engineer's Motion in Limine - Application No. 1963A-1, Tom and Lori Wilson
- Chief Engineer's Motion in Limine – Application No. 1975A-1, Wink Cattle Company
- TransCanada's Motion to Streamline Witness Testimony and Confirm Deadline to Complete Evidentiary Hearing – Application Nos. 1986-1, 2792-2 and 2793-2
- Dakota Rural Action's Motion for Subpoenas Duces Tecum to the Chief Engineer – Application Nos. 1986-1, 2792-2 and 2793-2
- Yankton Sioux Tribe's Motion for Time Certain for Witness Testimony – Application No. 1963A-1
- Yankton Sioux Tribe's Motion for Time Certain for Witness Testimony – Application No. 1963A-1

Continue with Witnesses and Testimony Regarding:

- Water Permit Application No. 1986-1, TransCanada Keystone Pipeline LP
- Water Permit Application No. 2792-2, TransCanada Keystone Pipeline LP
- Water Permit Application No. 2793-2, TransCanada Keystone Pipeline LP

Water Permit Application No. 1975A-1, Wink Cattle Company

Water Permit Application No. 1963A-1, Tom and Lori Wilson

(continued)

The hearing will be conducted in accordance with the Prehearing Officer's Amended Order on Hearing Procedure.

The Board will recess for breaks, lunch and for the evening at their discretion. The Board meeting will continue on October 30th and 31th as needed to complete testimony.

ADJOURN

Board members are reminded they are subject to SDCL 3-23-1 to 3-23-5 (Disclosure Laws) which address the disclosure of any conflicts of interest a member may have regarding contracts with the State of South Dakota. Board members should report any potential conflicts to the board and seek a waiver where appropriate.

Notice is given to individuals with disabilities that this meeting is being held in a physically accessible location. Please notify the Department of Environment and Natural Resources at (605) 773-3352 at least 48 hours before the meeting if you have a disability for which special arrangement must be made.

MINUTES OF THE 217th MEETING OF THE
WATER MANAGEMENT BOARD
LEGISLATIVE RESEARCH COUNCIL ROOM 414
IN THE STATE CAPITOL
500 EAST CAPITOL AVENUE
PIERRE, SOUTH DAKOTA
OCTOBER 3 & 4, 2019

CALL TO ORDER: Chairman Hutmacher called the meeting to order at 8:41AM central time.

Julie Smith conducted a roll call of members present. Present were Peggy Dixon, Leo Holzbauer, Everett Hoyt, Rodney Freeman and Jim Hutmacher. Chad Comes and Tim Bjork were absent.

Chairman Hutmacher announced that the meeting was streaming live on SD.net, a service of South Dakota Public Broadcasting.

ADOPT FINAL AGENDA:

Motion by Rodney Freeman, second by Peggy Dixon for adoption of final agenda for the October 3 – 4, 2019, meeting. Motion carried by roll call vote.

CONFLICTS DISCLOSURES AND REQUEST FOR STATE BOARD WAIVERS: None

APPROVAL OF BOARD MINUTES FOR JULY 17, 2019:

Motion by Rodney Freeman, second by Leo Holzbauer to approve the minutes as amended. Motion carried unanimously by roll call vote.

Chairman Hutmacher stated administering the oath to DENR staff will occur when the court reporter is present.

ORDER APPOINTING BOARD MEMBER PREHEARING OFFICER AND ALTERNATE PREHEARING OFFICER FOR UPCOMING YEAR:

Regarding the order appointing Board's Prehearing Officer and alternate Prehearing Officer for upcoming year, Ann Mines Bailey stated at the July meeting the Board voted to appoint Rodney Freeman as the prehearing officer for the upcoming year. This order will formalize the Board's decision.

Motion by Everett Hoyt, second by Peggy Dixon to adopt the amended order to appoint Rodney Freeman as Board prehearing officer for the upcoming year and authorize the chairman to sign the order. Motion carried by roll call vote.

PUBLIC COMMENT PERIOD IN ACCORDANCE WITH SDCL 1-25-1

Public Commenters:

- John Schmidt, Woonsocket SD
- Joni Tobacco, Oglala Sioux Tribal member

At 10:00 AM, Chairman Hutmacher indicated that they were going to go back through the same motions as at 8:30 AM since the court reporter is now present.

The following attended the meeting:

DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES (DENR): Jeanne Goodman, Eric Gronlund, Karen Schlaak, Vickie Maberry, Kim Drennon, Mark Rath, Adam Mathiowetz, Whitney Kilts, Ron Duvall with the Water Rights Program; Julie Smith with the Drinking Water Program.

ATTORNEY GENERAL'S OFFICE: Ann Mines Bailey, Water Rights Program Counsel and David McVey, Board Counsel

LEGISLATIVE OVERSIGHT COMMITTEE: Representative Mary Duvall

OTHERS:

In the matter of the TransCanada applications (spelling of names is a best effort from interpreting the sign-in sheet)

Elizabeth Lone Eagle, petitioner
Zora Lone Eagle, petitioner
Merle John Lone Eagle petitioner
Tatanka Lone Eagle, petitioner
Thomasina Real Bird, counsel for Yankton Sioux Tribe
Cindy Myers, petitioner
Mahmud Fitol, petitioner
Jason Shald, petitioner
Tracey Zephier, Attorney General, Cheyenne River Sioux Tribe
Bruce Ellison - Counsel for Dakota Rural Action
John Taylor - Counsel for TransCanada Keystone Pipeline
James Moore - Counsel for TransCanada Keystone Pipeline
William Taylor – Counsel for TransCanada Keystone Pipeline
Jung Hoe Hopgood
Greg Tencer
Matt Naasz - Counsel for Tom & Lori Wilson and Wink Cattle Company
Bob Mercer, reporter

Peter Capossela, counsel for Great Plains Tribal Water Alliance

Rebecca Terk

Jim Aamot

Teryl Cruse

Paul Seamans, petitioner

Matt Maher

Faith Spotted Eagle

Kip Spotted Eagle

Jon Schmidt

Jennifer Baker

Mike Novotny

V Wicks

John Kessler

U ElkLooke Bade

Clad Elk

Loren Locher

Doug Crow Ghost

Barry Le Bean

Paula Sutoure

Joseph Robertson

Bryan Gortmaker

Michael Walters

James Dowling

Joe Bliss

Buckley Wright

Joni Tobacco

Caroline Binder

Frank Diceshre

Ricky Gray Grass

Annita Lucchesi

Wichup King

Elizabeth Wakoman

Julie Smith conducted a roll call vote of Board members present. Peggy Dixon, Everett Hoyt, Tim Bjork, Leo Holzbauer, Rodney Freeman and Jim Hutmacher were present. Chad Comes was unable to attend.

ADOPT FINAL AGENDA FOR OCTOBER 3-4, 2019

Motion by Rodney Freeman, second by Tim Bjork, to adopt the final agenda. Motion carried unanimously by roll call vote.

CONFLICTS DISCLOSURES AND REQUEST FOR STATE BOARD WAIVERS: None

APPROVAL OF BOARD MINUTES FOR JULY 17, 2019:

Motion by Rodney Freeman, second by Leo Holzbauer to approve the minutes as amended.
Motion carried unanimously by roll call vote.

ADMINISTER OATH TO DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES STAFF: Carla Bachand, the court reporter, administered the oath to the DENR employees who intended to testify.

ORDER APPOINTING BOARD MEMBER PREHEARING OFFICER AND ALTERNATE PREHEARING OFFICER FOR UPCOMING YEAR:

Ann Mines Bailey stated at the July meeting the Board voted to appoint Rodney Freeman to act as the Prehearing Officer for the upcoming year and Everett Hoyt as alternate Prehearing Officer. Ms. Bailey stated she prepared an order to this effect, which the Board needs to adopt and sign. This order will formalize the Board's decision.

Motion by Tim Bjork, second by Leo Holzbauer to adopt the amended order to appoint Rodney Freeman as Board prehearing officer for the upcoming year and authorize the chairman to sign the order. Motion carried by roll call vote.

CONSIDER APPROVAL OF PREHEARING OFFICERS ORDERS AND ISSUED MOTIONS.

Mr. McVey stated the following documents were sent to the Board members in the packet.

- Yankton Sioux Tribe's Motion for Reconsideration of the Board's Denial of Tribe's Motion for Preparation of an EIS and Request for Oral Argument.
- Yankton Sioux Tribe's Motion for Time Certain for Expert Testimony.
- Yankton Sioux Tribe's Motion for Protective Order.
- Orders issue since July 17, 2019, meeting on motions.
- Publication Documents regarding Application Nos. 1986-1, 2792-2, 2793-2.
- Staff report and recommendation on Application No. 1986-1, TransCanada Keystone Pipeline LP.
- Petitions to intervene on Application No. 1986-1.
- Staff report and recommendation on Application No. 2792-2, TransCanada Keystone Pipeline LP.
- Petitions to intervene on Application No. 2792-2
- Staff report and recommendation on Application No. 2793-2, TransCanada Keystone Pipeline LP.
- Petitions to intervene on Application No. 2793-2
- Staff report and recommendation on Application No. 1963A-1, Tom and Lori Wilson
- Petitions to intervene on Application No. 1963A-1.

- Publication documents on Application No. 1963A-1.
- Staff report and recommendation on Application No. 1975A-1, Wink Cattle Company
- Petitions to intervene on Application No. 1975A-1.
- Publication documents on Application No. 1975A-1.
- Order for hearing procedure

CONSIDER APPROVAL OF ISSUED PREHEARING OFFICER'S ORDERS:

- Order on Yankton Sioux Tribe's Motion for Reconsideration of the Board's Denial of the Tribe's Motion for Preparation of an EIS and Request for Oral Argument
- Order on Yankton Sioux Tribe's Motion for Time Certain for Expert Testimony
- Order on Yankton Sioux Tribe's Motion for Protective Order

Motion by Everett Hoyt, second by Tim Bjork to approve and adopt the Prehearing Officer's Orders as entered in the documents previously enumerated by Board Counsel. Motion carried unanimously by roll call vote.

Bruce Ellison stated in the matter for reconsideration of Yankton Sioux Tribe's motion for reconsideration of requiring an EIS, Dakota Rural Action had joined to support the motion for reconsideration.

Chairman Hutmacher asked for appearances in the matters of:

- Water Permit Application No. 1986-1, TransCanada Keystone Pipeline LP
- Water Permit Application No. 2792-2, TransCanada Keystone Pipeline LP
- Water Permit Application No. 2793-2, TransCanada Keystone Pipeline LP

David McVey, Board Counsel stated the March 15, 2019, order set forth how the hearing will proceed. In terms of examination of witnesses, what will be allowed is a direct examination, cross examination, and redirect examination. In terms of objections, when making the objection, state the basis for that objection. There will be no argument on the objection unless it is requested by the Board.

Ann Mines Bailey counsel for Jeanne Goodman, Chief Engineer and the Water Rights Program.

Trans Canada Keystone Pipeline LP.

William Taylor - Counsel
James Moore - Counsel
John Taylor - Counsel

Matt Maher - Counsel

Intervenors –

Bruce Ellison - Counsel for Dakota Rural Action

Peter Capossela – Counsel for Great Plains Tribal Water Alliance and the Rosebud Sioux Tribe.

Jennifer Baker - Counsel for Yankton Sioux Tribe

Thomasina Real Bird – Counsel for Yankton Sioux Tribe

Opening Remarks:

Ann Mines Bailey, representing the Water Rights Program

Ann Mines Bailey stated the State Legislature has determined for any appropriation of water to be granted in this state, there are four factors that must be satisfied. First there must be reasonable probability that unappropriated water is available for the application. The second, the application cannot unlawfully impair an existing right. The third, it must be for beneficial use as defined by statute. The fourth, it must be in the public interest.

The applicant bears the burden of proof on those four factors. However, the statutes also provide that the Chief Engineer and her staff are to review the application. The Board has the final determination as to whether the application meets those four criteria.

Ms. Mines Bailey stated that Mark Rath who conducted the technical analysis, will present evidence. Mark Rath has been with the Department of Environment and Natural Resources for about 30 years. During those 30 years, Mark has been intimately involved with the management of the state's surface water. Mark will testify that he looked at the historic water availability of waters on these three separate water sources and determined that there is unappropriated water available for appropriation. Mr. Rath has reviewed potential unlawful impairment to existing rights. Mr. Rath believes with certain qualifications on the applicant's use, that the water can be put to beneficial use without unlawfully impairing existing rights.

Jeanne Goodman, Chief Engineer will also testify. As Chief Engineer, Ms. Goodman must review the technical analysis and decide as to whether the application should be recommended for approval or denial. Ms. Goodman's recommendation is based on her experience as an engineer, experience with this Board, and this Board's past decisions. Ms. Goodman has conducted that review and agreed with Mr. Rath that there is unappropriated water available, that it would not unlawfully impair any existing rights, that it would be for beneficial use as defined by statute, and it would be in the public interest.

William Taylor representing TransCanada Keystone Pipeline LP.

Mr. Taylor stated the applicant is asking to appropriate waters from the Cheyenne River, the Bad River and the White River to be used in construction of the Keystone Pipeline. Keystone Pipeline is the last segment to be constructed in an international pipeline system that begins in Hardisty, Alberta Canada then runs east across Canada, through North Dakota, South Dakota, Nebraska, and east to Illinois. The pipeline will have lateral pipeline connections that reach to Cushing Oklahoma, which is the world's largest hub for the distribution sale in trading of crude oil. The pipeline then travels south from the Cushing Oklahoma hub to the gulf coast of Texas. In Texas, there are extensive refinery complexes built for refining heavy crude oil. Hardisty Alberta Canada has the world's second largest deposit of crude oil.

The Keystone Pipeline will transport, in conjunction with the rest of the system, crude oil produced in the Athabasca Tar sands and in addition, will allow oil from the Bakken Formation located in the Williston Basin in North Dakota to be added to the pipeline and transported to Cushing and south to the refinery complex.

The Keystone Pipeline today consists of about 1,800 miles of pipeline. TransCanada operates something on the order of 35 thousand miles of pipeline in North America. This includes a major gas pipeline along the northern border that crosses South Dakota from Aberdeen to Brookings.

The pipeline project as proposed will enter South Dakota in Harding County, northwest of Buffalo and exit South Dakota in Tripp County, south of Colome. In South Dakota, a number of pumps stations will be constructed. Mr. Taylor stated the applications are asking for appropriation of water for the fabrication of concrete and other uses in the pump station process. In addition to that, in the course of construction, TransCanada asks for water for dust suppression along the pipeline route.

Mr. Taylor stated the applications are also asking for an appropriation of water from the three rivers for hydrostatic testing of the pipeline. Federal law requires that before the pipeline be put into service, that it be filled with water, pumped to attain a given pressure and allowed to sit to prove that it maintains that pressure within the pipeline. The water used in hydrostatic testing is borrowed water not consumed water. The water is returned to the watershed from where it was taken.

In addition to the hydrostatic testing, the construction and the dust suppression, some water will be used for what is called horizontal direction drilling. Horizontal direction drilling (HDD) is a method by which the pipeline company bores a hole underneath the major roads and pulls the pipe after it has been molded together and assembled. There will be four uses of the water in the course of the pipeline construction.

Mr. Taylor stated that they will demonstrate through their proof, compliance with the four factors contained in the Statue 46-2A-9 as previously stated by Ms. Mines Bailey. By way of witness in this first segment of the proceeding, Mr. Taylor stated they will adopt the testimony of Mr. Rath and the Chief Engineer and will offer testimony from the company in support of the applications.

Bruce Ellison representing Dakota Rural Action.

Bruce Ellison stated that Dakota Rural Action has challenged the three water permit applications that TransCanada is seeking from this board. Water Permit Applications Nos. 1986-1, 2792-2, 2793-2 are requesting a large amount of our surface water for one purpose - to build a hazardous materials pipeline in a diagonal across agriculture lands and some unstable lands. With the flooding we have been having, the instability of much of these lands should be of an importance.

TransCanada has stated that they want to use this pipeline to develop the oil reserves in the tar sands. If this pipeline is approved, it will allow for that development and over 800,000 barrels of prime world oil will be coming across our lands. It would be one thing if this was a company that had a track record of doing a good job in planning, designing, construction, inspection, and protection of its pipelines.

Counsel for TransCanada has mentioned all the gas pipe lines that TransCanada maintains. Counsel did not mention the one pipeline in Pennsylvania that blew up last year seven days after it started in operation.

This oil will not be for domestic use and will instead all be exported. We are transporting a foreign company's oil, as well as fracked oil, across our state at great risk. There have been two large spills in South Dakota the last four years. This is oil from which we get virtually no benefit and take all the risk.

There are four factors that this Board must consider under SDCL 46-2A-9. Is there enough water for wildlife habitat, beneficial uses, public interest, and future generations?

Peter Caposella representing the Great Plains Tribal Water Alliance and the Rosebud Sioux Tribe.

Mr. Caposella stated he represents the Great Plains Tribal Water alliance, which is a non-profit organization consisting of Standing Rock, Ogallala, Rosebud and Flandreau Santee Sioux Tribes, working together to protect their water rights. He is representing tribal communities and water users from throughout the state of South Dakota.

Mr. Caposella stated they are asking for the board to deny the TransCanada applications on the grounds that they cannot demonstrate the capacity to put the water into beneficial use for the Keystone Pipeline. They lack the federal permits to build the Keystone Pipeline. They are not going to be able to demonstrate to the Board during these proceedings that Keystone Pipeline is in compliance with federal law. Until that happens and they can come in and show that they are in complete compliance with the Federal Law there should be no approval of the water permit applications. These applications are not for beneficial use and their approval would be a waste of water. If the permits are approved and the diversion take places, negative environmental consequences will occur. Keystone Pipeline may never go online in operation. Waste of water is impermissible under South Dakota water law. The permits should be denied on that basis. The Tribe has reserved water rights that they have yet to develop that need to be taken into consideration. Diversions from surface water may impact groundwater and wildlife in the area. There are concerns with pipeline failures, including crimes against women.

Jennifer Baker representing the Yankton Sioux Tribe.

Jennifer Baker stated she was present on behalf of the Yankton Sioux Tribe. Ms. Baker stated an application can only be approved if all four criteria are met. The Yankton Sioux Tribe will show that TransCanada cannot meet the criteria. The Tribe will also show that the Chief Engineer did not take into account the Tribe's Winters Rights. There is a possibility the tribe's water use and others may be impacted by a spill if there is a pipeline failure. The water use is not in the public interest or a beneficial use. The Chief Engineer's recommendation only considers the technical aspects and does not consider the public interest and beneficial use considerations.

Intervenors with an Opening Statement:

Cindy Myers stated she is from Stuart, Nebraska and is an individual intervenor. In 2009, she heard about the potential pipeline construction near their pristine well. Any use of water for this risky project is not in the public interest. TransCanada Keystone Pipeline will increase the potential contamination in South Dakota.

Zora Lone Eagle stated she is part of MniWakan Nakicijinpi from Bridger SD. MniWakan Nakicijinpi will present their case at the time they present their witnesses.

Elizabeth Lone Eagle stated she is an individual intervenor from Bridger SD. She is here today to protect the lands that are sacred to them.

Jason Shald stated he was an individual intervenor that fears voices are not getting heard in this case. He is here to ask questions because this is an important issue. Based on the time given for these proceedings, Mr. Shald stated he was not sure how everyone's voice will be heard. He urged the Board to not rush to judgment and give these topics the proper time.

Mahmud Fital stated he is an individual intervenor from Omaha, Nebraska. TransCanada Keystone Pipeline tried to exclude the Nebraska intervenors. His concern is for the future generation that will be impacted. Climate change is real. The oil being transported through the pipeline will negatively impact the climate. Mr. Fital stated people cannot live without water as it is our most precious resource.

The Water Management Board began the evidentiary hearing on TransCanada Keystone Pipeline based on the two criteria in SDCL 46-2A-9 regarding whether there is a reasonable probability that unappropriated water is available and whether the proposed diversion can be developed without unlawful impairment of existing rights.

Water Permit Application No. 1986-1 (Cheyenne River) – TransCanada Keystone Pipeline.

Ann Mines Bailey offered Exhibit 1, which is the administrative record for Application No. 1986-1. The administrative record includes the application, report, recommendation, public notice and other pleadings in this matter. With no objections, Chairman Hutmacher accepts Exhibit No. 1 into the record.

In answer to questions from Ms. Mines Bailey, Mark Rath stated he was previously administered the oath. Mr. Rath stated he has been with DENR almost 30 years and currently is the lead surface water engineer for the Water Rights Program. Exhibit 2 is Mr. Rath's curricula vitae. With no objections, Chairman Hutmacher accepted Exhibit 2 into the record.

Mr. Rath stated water is for pipeline construction for TransCanada Keystone pipeline. The application seeks 6.68 cubic feet of water per second (cfs) from the Cheyenne River with an annual volume of 238.21 ac-ft/year.

Mr. Rath stated corrections to his report. The first correction is on page 7, in the paragraph under Figure 6 regarding review of existing water rights where the number of existing rights should be 7 instead of 5 existing water rights. Also, the cfs should be 25.52 cfs instead of 16.74 cfs. The correction does not change his conclusion. The second correction is on page 8 in the paragraph discussion and recommendation where it states the review found no record of shut-off orders issued in this reach due to low flows. A shut-off order was issued in 2006 for junior water rights.

Mr. Rath stated his review focused on the first two criteria in SDCL 46-2A-9. A groundwater application is reviewed based on the volume of water. A surface water application is reviewed based on whether water is available at the time of the use. In other words, review of a surface water application is diversion rate based. Mr. Rath looked at flow records from the USGS gaging station network. Exhibit 6 is an area map for the application. It was created using ARC-GIS. Ms. Mines Bailey moved admission of Exhibit 6. Bruce Ellison asked who created the Exhibit 6. Mr. Rath stated he created the map. Elizabeth Lone Eagle objected since there was missing data. Chairman Hutmacher accepted Exhibit 6 into the record.

Mr. Rath stated Exhibit 6 shows the diversion point proposed and the three gaging stations that were looked at as part of the review. Mr. Rath stated the Cheyenne River is a prairie stream that receives tributary inflow. The Cheyenne River meets up with the Belle Fourche River. This forms the lower end of the Cheyenne River.

Mr. Rath was shown Exhibit 8, which shows a percentile flow hydrograph for the gage on the Cheyenne River near Wasta. Elizabeth Lone Eagle objected because this does not count missing years of data. Mr. Rath stated he created the exhibit using the national flow data on USGS website regarding percentiles. USGS obtains the data from their gaging stations to create the statistical percentile. Mr. Rath stated this USGS data is relied upon by federal, state and local entities. Ms. Lone Eagle renewed her objection. Chairman Hutmacher overruled the objection and accepted Exhibit 8 into the record.

Referring to Exhibit 8, Mr. Rath stated he looked at the Wasta gage to look at the upper Cheyenne River portion that was contributing water. The period of record for this gaging station is 1963 to 2018. A longer period of record at a gaging station provides a greater reflection of flows that can be expected. Mr. Rath stated he looks at percentiles of flows as what can be expected from a statistical perspective. Mr. Rath indicated Exhibit 8 shows the stream at 50 percentile can expect flows coming out of winter at about 100 cfs. After the winter season, the flow increases until June and then decreases to about 100 cfs the remainder of the year. Based

on the 25 percentile shows flow coming out of winter at 60 cfs until February where flow increases to 120 cfs and then from June through the summer the flow is about 60 cfs. The 10 percentile flow is 40 cfs in January and February, then increasing to about 100 cfs through May, then decreasing to about 40 cfs.

Mr. Rath was shown Exhibit 9, which is the daily flow hydrograph for the Belle Fourche River near Elm Springs. Mr. Rath created Exhibit 9 from the USGS website. He used all the data available from the USGS site for the period of record. Ms. Lone Eagle objected to the foundation as this information was requested and DENR refused to disclose. Chairman Hutmacher overruled the objection and accepted Exhibit 9 into the record.

Regarding Exhibit 9, Mr. Rath stated he used the Belle Fourche River gage to show the contribution that can be expected from this portion of the drainage. The period of record for this gage is 1953 – 2018. The increased flows in the summer months is attributed to the return flows from the Belle Fourche Irrigation District, which is located upstream of this gage. This is a 57 thousand acre irrigation district that delivers water to irrigators. The run off from the irrigation district appears to affect the hydrograph and the timing of when the water is available in the stream.

The 50 percentile demonstrates lower flows of 30 – 50 cfs until about March and then an increase due to snow melt of about 200 cfs. Starting in May, there is an increase in flows from the Irrigation District until mid-June and then flow fluctuates from 250 – 300 cfs until mid-August. Then the flow drops off. This is likely due to the Irrigation District stopping delivery of water, and return flows slowly decrease until it reaches 30 cfs. The 25 percentile mimics the pattern of the 50 percentile at a lower level.

Mr. Rath was shown Exhibit No. 7, which is the daily percentile flow hydrograph for USGS gaging station on the Cheyenne River near Plainview. The period of record for this gage is 1950 to 2018. Ms. Lone Eagle objected. Chairman Hutmacher overruled the objection and accepted Exhibit 7 into the record.

Mr. Rath stated Exhibit No. 7 reflects the contribution from the Upper Cheyenne River and Belle Fourche River. The 50 percentile shows an increase of flow up to about 600 cfs and then a decrease to about 300 cfs until about mid-August, then drops off to about 100 cfs at the end of the year. The 25 percentile shows early summer flows of about 300 cfs and trickles off to about 100 cfs by the end of the year. The 10 percentile shows flows of about 100 cfs and dropping off to about 50 cfs by the end of the year.

Mr. Rath stated there are seven existing water rights downstream of the proposed diversion point to the Oahe Reservoir. The total appropriation of those water rights is 25.52 cfs. Irrigation rights are generally exercised from May through September.

Mr. Rath was shown Exhibit 10, which is a graph representing appropriations for irrigation and the amount of reported irrigation water use. Mrs. Lone Eagle renewed her objection. Mr. Ellison requested latitude for pro se intervenors. Chairman Hutmacher accepted Exhibit 10 into the record.

Mr. Rath testified that Exhibit No. 10 shows less water is used for irrigation than is appropriated.

Mr. Rath stated that under the Winters Rights, when a reservation was created by Congress they envisioned reserving water for the reservation's purpose. Winter Rights have not been quantified in South Dakota and therefore were not factored into his review. Once quantified, Winter Rights would likely be senior to other appropriative rights.

Mr. Rath stated there is a reasonable probability water is available and that existing rights, based on the qualifications proposed, will not unlawfully impair existing rights. The recommendation provides for low flows and prior rights be bypassed and diversions are subject to written orders issued by the Chief Engineer.

Mr. Ellison objected to Mr. Rath speaking on behalf of the Chief Engineer. Ms. Mines Baily asked the question again. Mr. Rath stated water is available and the project can be developed without unlawful impairment of existing rights with the qualifications proposed in the recommendation.

William Taylor's cross examines Mark Rath.

Yankton Sioux Tribe objects to calling Mr. Rath as an expert for TransCanada. Mr. Rath was not listed as an expert for TransCanada. Chairman Hutmacher overruled the objection as Mr. Rath testified for the state and they are only adopting that testimony.

Mr. Rath stated there was one water right that was not included in his initial review. This right was a US water withdrawal, and he does not know if the water has been used historically.

Mr. Ellison and Mr. Caposella objected to TransCanada's cross examination. Chairman Hutmacher overruled the objection.

Mr. Taylor questioned Mr. Rath about his knowledge of the Mni Wasta. Mr. Rath stated it is a rural water system that he believes is operated by the Cheyenne River Sioux Tribe. This was also in the past known as the Tri County system. Mr. Rath stated the system was not considered in his analysis because the source of water is considered the Missouri River. During the mid-2000s, the diversion point was changed to the northeast where it was in deeper water. Mr. Rath stated the Mni Wasta was not an appropriation from the Cheyenne River.

In response to a question, Mr. Rath stated Mni Wiconi is the tribal component of the Mni Wiconi - West River/Lyman Jones rural water system. The intake is near Ft. Pierre. Mr. Caposella and Mr. Ellison objected to the questions in that Mr. Taylor is bringing up new questions. Chairman Hutmacher overruled indicating we are talking about availability of water.

Mr. Rath stated that the water source for the Mni Wiconi rural water system is the Missouri River and not the Cheyenne River.

Mr. Taylor directed Mr. Rath to Exhibit 10. Mr. Rath stated the blue lines on the exhibit represent the sum amount of water appropriated. The decrease in level of the blue line represents the cancellation of a water right or a reduction of acres irrigated during the licensing of a permit. An increase in the blue line represents a new water permit issued. The absence of red bars in a year reflect that irrigation was not reported from those water rights in that specific year. The red bar represents the amount of water reported as being used in each year. The Y coordinate indicates the acre feet either appropriated or used depending on the color of the bar. In answer to a question, Mr. Rath stated there are no known water rights for other than irrigation below the proposed diversion point on the Cheyenne River to the Missouri River.

Mr. Rath estimated he has prepared a few hundred reports on applications that he has reviewed. Mr. Rath listed the factors that he looks at when reviewing an application. The method for preparing a report is standard with how other staff within the Water Rights Program review water permit applications.

Mr. Rath explained that a gaging station is a site where the USGS maintains a water measuring device. Mr. Rath considers USGS records reliable. Other states and government entities rely on this stream flow data. DENR uses the data from gaging stations for making determinations on when shut off orders are warranted and the Surface Water Quality Program of DENR uses flow data when analyzing water quality data.

Regarding the USGS gage on the Cheyenne River, the period of record Mr. Rath used is from 1963 to 2018.

The USGS gage on the Belle Fourche River was used as it is the lowest most gage on the Belle Fourche River to provide the best information on the quantity of flow attributable to the Belle Fourche River at the project site.

The third gage that was used is located at the Hwy 34 bridge near Bridger. It is representative of flows from the upper Cheyenne and Belle Fourche River that are the located near the proposed pump site. The proposed diversion point is located in the "four corners" area which is the area where corners of four counties come together.

Regarding the Winters Rights, Mr. Rath testified he did not take into account water rights associated with the Winters Rights. The reason is the Winters Rights have not been quantified. It is Mr. Rath's understanding that quantification of a claimed Winters Rights has to be approved by the US Congress.

Ms. Real Bird objects as Mr. Rath is not an expert on Winters Rights. Chairman Hutmacher sustained the objection.

Mr. Taylor inquired about an application for Lake Andes. Mr. Caposella and Ms. Real Bird objected to the relevance to the issue at hand. Chairman Hutmacher sustained the objection.

Mr. Taylor indicated TransCanada agrees to a condition that TransCanada is subject to Winters Rights when quantified. Ms. Real Bird stated that the Yankton Sioux Tribe is not willing to stipulate today to Mr. Taylor's proposal.

Mr. Rath stated there is a reasonable probability that water is available. If a dry year occurs, they can monitor based on flow conditions or someone can call and assert they are being impacted. The Chief Engineer may issue an order to limit water use under a priority basis. There are mechanisms in South Dakota law to enforce those orders.

Mr. Rath indicated he has prepared reports for rural water system pipelines but not on for an oil pipeline. The permits that were issued for prior oil pipelines were temporary permits for short term use of public water for construction purposes. Mr. Rath was involved in the issuance of the temporary permits for these prior oil pipelines. Chairman Hutmacher sustained the objection of Ms. Real Bird on relevance.

Mr. Rath indicated he was not aware of why those other permits were issued as temporary permits and these were now being requested as standard water permits.

Peter Caposella on behalf of Great Plains Tribal Water Alliance and Rosebud Sioux Tribe cross examines Mark Rath.

In answer to questions from Mr. Caposella, Mr. Rath stated he was not aware of the number of road miles that will need dust suppression. Mr. Rath indicated that a bypass will be required for downstream domestic use and existing rights. The proposed pumping rate for this application is 6.68 cfs which equates to 3,000 gallons per minute.

Mr. Caposella asked if there is consideration for instream flow rights. Mr. Rath indicated instream flow rights were not considered in his review. He did not know if there is a connection between groundwater and surface water at this location.

Regarding the period of flow records, Mr. Rath testified that longer periods of records provide greater reliability of what to expect for flow. It does not provide what might occur in the near future. Mr. Caposella asked if using long trends skew what are recent trends. Mr. Taylor objected. Chairman Hutmacher asked Mr. Rath to answer if able. Mr. Rath stated that longer terms provide more reliability on anticipated flows.

Mr. Caposella inquired whether using the past five years of data provides what is available in the river. Mr. Rath stated he did not think that is the case.

Thomasina Real Bird on behalf of Yankton Sioux Tribe cross examines Mr. Rath.

Mr. Rath stated to determine if water is available, he looked at the yield of the source, the timing of use and present diversions from the source. He does not use future projection reports in determining if water is available. Regarding impairment of existing rights, DENR looks at whether a proposed diversion limits someone else's ability to satisfy their senior water rights.

Mr. Rath indicated he was unaware that any agricultural producer along the route would be provided a "tap" to water from TransCanada. Mr. Rath indicated his analysis was directed solely to quantity of water to be used and not quality of the water. Mr. Rath had no opinion whether a leak from the pipe could impair existing rights.

Mr. Rath stated there was a shut off order issued in 2006 to junior rights due to a lack of water in the river at that time. Shut off orders are tailored to the specific situation.

Thomasina Real Bird asked whether DENR considered Yankton Sioux Tribe's water right. Mr. Rath stated he was unaware that the Yankton Sioux Tribe held a water right on the Cheyenne River.

Mr. Rath stated his review of the application was for only the quantity of water. He did not review impairment to roads or erosion that may result during construction of the project. Mr. Rath did not look at how the discharge of water could impact existing rights.

Referring to Yankton Sioux Tribes Exhibit 104, Ms. Real Bird questioned if the proposed diversion point location was generally correctly depicted on the map. Mr. Rath concurred that the map shows the general location of the proposed diversion point.

Mr. Ellison cross examines Mr. Rath.

Mr. Rath testified he did not consider public interest or beneficial use as part of his review. To prepare for today he looked at his report, gaging stations, and past water use. Mr. Rath's review did not look at the content of the pipeline. Mr. Rath did not contact Game Fish and Parks or US Fish and Wildlife Service regarding this application. He did not discuss impacts on other resources if there was a leak. The Corps of Engineers was not contacted about their regulations regarding the water use. Mr. Rath did not review the Montana court decision. Ms. Mines Bailey and Mr. Taylor objected. Chairman Hutmacher sustained the objections.

Mr. Rath stated he is aware of a stay issued by the Montana judge but is not aware of the details. Responding to a question, Mr. Rath described a trench cut across a water body. A trench is cut, and the pipe is laid in place and backfilled or allowed to refill. Mr. Rath stated he does not know if the applications for TransCanada are of great importance to the state of South Dakota.

Mr. Rath indicated he discovered the error on Page 7 of his report about one to two months after writing the report. He also discovered that he missed the most recently issued permit and the US withdrawal right. The changes did not change the conclusions in his report.

Mr. Rath has reviewed the Treaty of 1868 but that was not part of his review of this application.

Mr. Ellison asked Mr. Rath if he knew that TransCanada would need to cross perennial streams. Mr. Rath was aware there would need to be river crossings but not the precise streams. Mr. Rath is not aware of number of ephemeral streams that will be crossed. Mr. Ellison said there were over 300 water body crossings. Mr. Taylor objected as Mr. Rath has indicated he did not know the water sources crossed. Chairman Hutmacher sustained the objection.

Mr. Ellison approached Mr. Rath with pages 73, 74, and 75 from the maps submitted with the application. They are denoted as Exhibit 1A, 1B, and 1C. Mr. Ellison indicated sheet 73 is the location for horizontal directional drilling. The map does not identify the river as the Cheyenne River. In response to a question from Chairman Hutmacher, Mr. Ellison stated the exhibits do not show the major streams as the Cheyenne River is not identified. Chairman Hutmacher asked to keep his questions quantity of water oriented.

Mr. Ellison indicated that page 74 (Exhibit 1B) shows Ash and Bridger Creek. He asked if Mr. Rath can tell if the creek flows into the Cheyenne River. Mr. Rath indicated he could not tell from the maps where the creek confluence with the Cheyenne River is located.

Mr. Ellison indicated page 75 (Exhibit 1C) and again asks the same question. Mr. Rath stated he cannot tell where the creeks flow into the Cheyenne River. Mr. Ellison asked if the diversion of water may interfere with the process of nature. Mr. Rath indicated he did not understand the point Mr. Ellison is attempting to make.

Mr. Ellison asked if DENR ever recommended that TransCanada use the Missouri River instead of the Cheyenne River. Mr. Rath stated that we did not make any such recommendation to TransCanada.

Mr. Ellison moved Exhibit 1A, 1B, and 1C be admitted. Chairman Hutmacher indicated they are admitted.

Mr. Ellison questioned whether there was a requirement for a monitoring point right below the proposed diversion point. Mr. Rath stated that was not a qualification included in the recommendation for this application. Mr. Rath stated there is not a requirement to monitor the instantaneous flow being diverted. He indicated they are required to report annually the amount diverted.

In response to Mr. Ellison's question, Mr. Rath stated that after the diversion point, the Cheyenne River flows along the southern edge of the reservation boundary. Mr. Rath indicated he did not look at the total amount of water flowing by the Cheyenne River diversion point.

Zora and Tataka Lone Eagle cross examine Mark Rath.

Ms. Mines Bailey stated that entities must be represented by counsel. This is a group that is under 18 years old, and Ms. Mines Bailey has concerns with getting questioned by multiple individuals for the same entity. Chairman Hutmacher stated they cannot question until they have an attorney since they are a group.

Mr. Ellison indicated this Board has a large amount of discretion under the administrative procedure statutes and asked that the Lone Eagle children be allowed to ask some questions.

Board Counsel David McVey stated the Board is bound by state law, and groups must be represented by counsel. Also, as minors they are not eligible to ask questions. The Board simply does not have discretion in this matter.

Elizabeth Lone Eagle strenuously objected and this was never ruled on.

The Lone Eagle children were not allowed to ask questions.

Thomasina Real Bird asked for latitude for the Lone Eagle's children to obtain legal counsel by tomorrow. Chairman Hutmacher indicated if the Lone Eagle children are represented by counsel they can participate.

Elizabeth Lone Eagle cross examines Mark Rath.

Mrs. Lone Eagle asked if Mr. Rath considered spiritual use of the water. Mr. Rath said he did not consider the spiritual use of water. Mrs. Lone Eagle inquired whether Mr. Rath was aware that the actual four corners of the county boundaries are not precisely at the bridge. Mr. Rath indicated he was not aware of the precise location of four corners and is not aware that the site is a spiritual location to the Lakota people.

Mrs. Lone Eagle stated that one of the factors is if there is unlawful impairment to existing rights and whether tribal rights were taken into consideration. Mr. Rath did not consider tribal water rights. Mr. Rath is generally aware of the process for quantification of tribal rights under the Winters Rights.

Mr. Rath stated he has been involved in crafting of rules involving water rights, specifically regarding changing a diversion point location. Mr. Rath has not attended training regarding laws that have changed. Mrs. Lone Eagle asked Mr. Rath if he was aware of SDCL 1-54-5 requiring consultation with tribal governments regarding issues that may affect tribal government. Mr. Rath stated he is not aware of the statute. Ms. Mines Bailey and Mr. Taylor objected. Chairman Hutmacher upheld the objection but will give some latitude.

In response to questions, Mr. Rath said he did not know how many water rights have been processed between 2007 to 2018. Mr. Rath reviews about 2 – 5 applications each year that end up being contested. Mr. Rath stated engineers individually review applications. There is no budgetary consideration for processing an application. Mr. Rath has stated that he has attended a law conference that involved Winters Rights and has researched Winters Rights to some degree. Mr. Rath did not conduct any cultural resource surveys as part of his review of this application. Mr. Rath did not look at any geographical surveys as part of his review. He has no knowledge of Chief Big Foot's last camp.

Board recessed for the day.

The Board reconvened at 8:30 AM on Friday, October 4, 2019.

Jason Shald cross examines Mark Rath.

Mark Rath stated the application is for a diversion rate with an annual volume limitation. This is enforced based on self-reporting of water use.

Ms. Mines Bailey stated she had no re-direct. Ms. Mines Bailey stated that is the last witness on Application No. 1986-1 regarding water availability and impairment of existing rights.

Water Permit Application No. 2792-2 (White River) – TransCanada Keystone Pipeline

Ms. Mines Bailey offered the administrative record in the matter of Application No. 2792-2 as Exhibit 1. Chairman Hutmacher accepted Exhibit 1 into the record.

Mr. Rath testified he has been with DENR about 30 years. He is the lead surface water engineer who reviews applications and deals with lakes, droughts and flood issues. Ms. Mines Bailey offered Mr. Rath's curriculum vitae as Exhibit 2. Chairman Hutmacher accepted Exhibit 2 into the record.

Mr. Rath stated that Application No. 2792-2 proposes a diversion of 6.68 cfs with annual volume of 223.68 ac-ft of water from the White River.

Mr. Rath directed the Board to page 7 of his report. The figure on this page should be Figure 5. Then in the paragraph under Figure 5 where it states "15 existing rights" is should be "14 existing water rights". On page 8 under review of existing water rights and reported water use the reference should be to Figure 6 instead of Figure 5 and on page 9 the reference to Figure 5 should be Figure 6.

Mr. Rath identified Exhibit 6 as an area map he compiled for this application. Ms. Mines Bailey offered Exhibit No. 6. Chairman Hutmacher accepted Exhibit 6 into the record.

Mr. Rath indicated the point of diversion location on the map. He also indicated the location of the USGS gaging stations on the Little White River, the White River upstream of the proposed diversion, and the location of the USGS gaging station near Oacoma, which is downstream of the diversion point. The White River is a prairie stream located west of the Missouri river that flows east and confluences with the Missouri River.

Mr. Rath described Exhibit 7 as the percentile flow hydrograph for the Little White River. Chairman Hutmacher accepted Exhibit 7 into the record.

The period of record for the gage is 1949 – 2019. The longer period of record provides a better overview of expected flows in the stream. Mr. Rath described the difference between "median" and "mean". This analysis uses median flows. This gage represents the flow component coming from the Little White River. The hydrograph shows the Little White River provides significant flow to the White River.

The hydrograph used the 50, 25 and 10 percentiles. Mr. Rath describes the flows that can be anticipated throughout the year based on the hydrograph for the various percentiles.

Mr. Rath described Exhibit 8 as the percentile flow hydrograph for the White River gage near White River. Mr. Hutmacher accepted Exhibit 8 into the record.

The period of record for this gage is 2001 – 2018, which is a shorter record than other gages that have been referenced. This gage demonstrates that during a good portion and late portion of the year there is not a lot of flow. Due to snow melt and rain in the spring and early summer, there is good flow. Based on the 10 percentile the river has about no flow until March, then has flow until mid-June before drops off sharply for the rest of the year.

Mark Rath described Exhibit 9 as the percentile flow hydrograph for the White River gage near Oacoma, which is downstream of the proposed diversion point. Mr. Hutmacher accepted Exhibit 9 into the record.

The period of record for this gage is 1928 – 2018. This gage is a number of miles downstream of the proposed diversion point. Mr. Rath looked at the 50, 25 and 10 percentile flows. This is a gage DENR has used for regulatory purposes when qualifying other water rights. For the 50 percentile, flows show about 600 cfs in mid-March and dropping off to about 300 cfs before dropping off significantly after July 1st. Mr. Rath went on to describe anticipated flows based on the 25 and 10 percentiles. Mr. Rath testified there are 14 existing rights below the proposed diversion totally 30.83 cfs.

Mr. Rath described Exhibit 10 as the appropriated water from the White River and reported irrigation water use below the proposed diversion point to the White River's confluence with the Missouri River. Chairman Hutmacher accepted Exhibit 10 into the record.

The chart shows that there is far greater water appropriated than actually used in this reach. It is common for there to be more water appropriated than is used. In this reach, there is a qualification for a June 1st shutoff on the White River. Mr. Rath indicated that Water Rights looks at quantity when determining if there is an impairment of existing rights. Mr. Rath stated he did not account for Winters Rights since they have not been quantified in South Dakota. If Winters Rights existed, they would likely be senior. Mr. Rath testified that with the proposed qualifications, diversions under this application could be developed without impairment of existing rights. Mr. Rath also testified that unappropriated water is available. Mr. Rath then read the proposed qualifications on the recommendation into the record.

Mr. Taylor cross examines Mr. Rath.

Mr. Rath stated the gage at Oacoma is on the highway bridge on what he believes is Highway 47 southeast of Oacoma. This gage is used in a regulatory capacity because DENR wanted to make sure there is at least 20 cfs flow in the river. This restriction is enforced by DENR. If there is good flow in the river after June 1st, DENR has the ability to allow an irrigator to continue to pump for a certain period of time. In 2019, there was one water right holder that made a request to pump beyond June 1st.

There are other gages on the White River and Little White River that are further upstream of the gages referenced and used as part of Mr. Rath's review. The headwaters of the Little White River are located in Oglala Lakota County. The headwaters are within the reservation boundaries. To Mr. Rath's knowledge the Rosebud and Pine Ridge Tribes have not quantified their reserved water rights for the Little White River. As for the White River, it also flows through the Rosebud Sioux Tribe. Mr. Rath is not aware that the Tribe has quantified its reserved water rights for the White River.

Mr. Taylor asked Mr. Rath to look at Exhibit 10, which shows appropriative rights being greater than use. Mr. Rath states that irrigation rights are allowed 2 ac-ft of water per acre. During licensing of a water permit, DENR can reduce the diversion rate or number of acres based on the level of development. Mr. Rath stated there is an abandonment provision in law based on use, but there are also provisions for legal excuse for the nonuse of water.

Mr. Caposella cross examines Mr. Rath.

Mr. Rath has not seen the cultural and paleontology surveys. Mr. Rath does not know the number of road miles to have water applied for dust suppression. The Little White River gaging station is about 57 miles upstream of the proposed diversion. The distance between the proposed diversion point and the Oacoma gaging station is about 55 miles downstream. Mr. Caposella questioned the use of gaging stations that are 57 miles upstream and 55 miles downstream of the proposed diversion point.

Mr. Rath is not aware of the groundwater and surface water interrelationship in the area. Mr. Rath stated it is possible that surface water is lost to the groundwater. However, he has no knowledge of that in this area.

Mr. Caposella inquired whether the shorter periods of record better reflect water availability. Mr. Rath responded he did not believe so. Mr. Rath indicated he was not aware that there are Rosebud Sioux Tribal lands that abut the White River in the area of the proposed diversion. Mr. Caposella indicated there are thousands of acres of tribal land in close proximity to the proposed diversion.

Mr. Rath stated his understanding is when the reservations were created there was water reserved for the reservation's use. Those rights need to be quantified and ratified by Congress. Mr. Rath indicated the tribes likely could make a Winters Rights claim but that the right would need to be quantified. Mr. Rath indicated that tribes are not generally coming to the state for water permitting. This is because the tribes are their own sovereign nation.

Mr. Rath stated a permit holder can only exercise his right to pump if there is 20 cfs at the Oacoma gage when pumping is occurring. This is a real time gage that DENR can monitor at any time on the internet to see if the bypass requirement is being met.

Mr. Rath indicated he works on Missouri River issues and has had interactive relations with tribes regarding the Missouri River.

Thomasina Real Bird cross examines Mark Rath.

Mr. Rath stated that he reviewed his report, gaging station information, and documents on Winters Rights to prepare for this hearing. He talked to the Chief Engineer and Ms. Mines Bailey. He also talked to Mr. Taylor regarding a water right on the Missouri River regarding the Tri County water right on whether it is Missouri River or Cheyenne River. Mr. Rath indicated he had not spoken with Governor Noem or her staff regarding the application.

Mr. Rath took into consideration water rights on file with the State of South Dakota. He did not look at other water rights that possibly could be held by tribes. Mr. Rath only accounts for existing water rights. Ms. Real Bird asked why DENR's review only looks at existing water rights when the statutes provide there cannot be an unlawful impairment of existing rights. Ms. Real Bird made the assertion that rights other than those dealing with water rights need to be taken into consideration.

Regarding the qualification, Mr. Rath testified the June 1st shut-off was based off a prior Board determination. DENR continued with the standard qualification used on the White River permits. There must be 20 cfs flowing at the Oacoma gaging station before diversion may take place under this proposed diversion. The gage is a real time station that can be viewed on-line. The gage reading is updated every 15 minutes. Mr. Rath stated he was not sure if this was a gage that DENR cooperates with USGS to maintain.

Mr. Rath indicates the permit holder is required to report to the Chief Engineer the amount diverted each year. The permit holder is responsible to report use. Mr. Rath described various methods that can be used by the permit holder to determine the amount of water diverted such as a flow meter or known pump rate and period of use.

Mr. Rath testified the proposed qualifications are not intended to deal with a pipeline leak. Mr. Rath is aware of a pipeline leak that occurred in eastern South Dakota but does not know the details. Mr. Rath stated his review did not analyze how the amount of water available could be affected by a spill. This was not a factor in review of this application. Water quality is not a factor in the review of a water permit application.

Mr. Rath stated that a shut-off order is issued by the Chief Engineer and requires the water right holder to cease the use of water.

Referring to Exhibit 10, the blue line is the total appropriation of irrigation water rights from the White River below the proposed diversion point. The same level on the blue line of Exhibit 10 indicates there was not a change in the appropriation of water from the source. Mr. Rath indicated the proposed qualifications do not address the potential of a pipeline spill.

Mr. Rath verified that the proposed diversion point on Ms. Real Bird's map is generally accurate.

Mr. Ellison cross examines Mr. Rath.

In the preparation of the report Mr. Rath stated he did not contact Game, Fish and Parks, US Fish and Wildlife Service or Corps of Engineers regarding their concerns with the application. Mr. Rath is involved with drought and flooding issues as part of his job. As part of his review, he did not look at potential flooding issues as it was not a concern regarding water availability for this application. He did not look at what would occur if there was a frack out. He did not look at contamination due to trench cutting that may occur across streams that the pipeline will cross.

Mr. Rath testified the state is the trustee of the waters of the state. Protecting the water is important to the state.

Mr. Ellison requested an offer of proof regarding emails between staff and TransCanada and Mr. Rath's involvement in those communications. Mr. Ellison offered Exhibit 311 which is a log of communications for his offer of proof.

Mr. Rath stated he did not necessarily look at all the streams or watercourses that the pipeline may cross. He is generally aware of the High Plains or Ogallala aquifer but is not aware of the role the White River plays in recharge to those aquifers.

Mr. Ellison referred Mr. Rath to Exhibit 6. Mr. Rath indicated that TransCanada wants to be able to divert from either side of the White River at the proposed site. Mr. Rath is not aware of natural withdrawals that may be occurring between the upstream gages and the downstream gages. The gage at Oacoma may reflect a higher flow than is actually present at the proposed diversion point.

Mr. Ellison presented Exhibit 1B to Mr. Rath. The exhibit is the application showing the volumes of water being requested.

Mr. Rath agreed that DENR's responsible to protect against the waste of water. Mr. Rath stated the permit is issued for a maximum volume; they may use less. Mr. Ellison moved admission of Exhibit 1B. Chairman Hutmacher accepted Exhibit 1B into the record.

Mr. Ellison stated TransCanada is requesting 151.02 acre feet in 2019 and 72.66 acre feet in 2020 for a total of 223.68 acre feet of water. Mr. Ellison questioned why are we giving them 223.68 acre feet when they are only asking for only 72.66 acre feet of water? Mr. Rath stated we recommended what TransCanada requested for water use.

Mr. Ellison inquired why the bypass amount was not set above the 20 cfs amount to account for existing rights to which Mr. Rath stated that was not necessary. If after June 1st, TransCanada approached DENR to continue pumping, Mr. Ellison inquired if parties would be notified. Mr. Rath indicated that DENR would look at flows, and the qualification gives the Chief Engineer the ability to issue written orders.

Elizabeth Lone Eagle cross examines Mark Rath.

Mrs. Lone Eagle inquired about flow of the Little White River and White River. Mr. Rath indicated he is not aware of cultural or burial sites along the river. Mrs. Lone Eagle asked if a

decrease in flow in the White River will affect flows in the Missouri River. Mr. Rath stated that can occur. Mr. Rath does not know what cultural resources may be exposed due to lower levels.

Mrs. Lone Eagle inquired about Exhibit 10. Mr. Rath stated this information was used to determine reported irrigation water use that was part of his review. The irrigation permit holder is required to report water use, and this information is considered reliable. Permit holders are not required to report the method they use to report their water use. There is oversight from the fact they must report but not oversight in the manner that they report. DENR relies on the individual water right holder to accurately report. We do not have direct oversight over their reporting. Mrs. Lone Eagle requested the exhibit be stricken due to unreliable data. Chairman Hutmacher stated the exhibit will not be stricken.

Jason Shald cross examines Mark Rath.

Mr. Rath stated he reviews the real time streamflow gaging station data at least a couple days each week. There are no specific rules on how often the flows be monitored. Mr. Rath indicated there have been times when flow has dropped off and where DENR has not issued any extension of pumping past the June 1st shut off date.

Mahmud Fitol cross examines Mark Rath.

Mr. Fitol questioned if Mr. Rath was aware of other tribal use of the White and Little White River and if he was aware the Rosebud Tribe hold parcels of land along the White and Little White River. Mr. Rath is not aware of tribal land holdings. The Water Rights Program does not have dealings with discharging the water back to a source. That is handled by the Surface Water Quality Program.

Mr. Rath stated the amount of water pumped is self-reported. The water right holder is limited by diversion rate and not the number of pumps they use. Mr. Rath indicated the White River's flow can be impacted by drought. Mr. Rath stated that quantified Winters Rights would likely be senior to other water rights.

Mr. Rath stated if we are in a drought condition and the flow is less what is authorized, a shut off order can be issued.

Ms. Mines Bailey did not conduct re-direct of Mr. Rath.

Water Permit Application No. 2793-2 (Bad River) - TransCanada Keystone Pipeline

Ms. Mines Bailey explained the documents in the administrative record for Application No. 2793-2. Ms. Bailey offered Exhibit 1, the administrative record. Chairman Hutmacher accepted Exhibit 1 into the record.

Mr. Rath stated he has been with DENR for about 30 years. He is the lead surface water engineer for the Water Rights Program. His job duties include review of water permit applications, dealing with stream and lake issues as well as flood and drought conditions. Ms.

Mines Bailey offered Exhibit 2, which is Mr. Rath's curriculum vitae. Chairman Hutmacher accepted Exhibit 2 into the record.

Mr. Rath stated this application proposes to divert 0.67 cfs from the Bad River with an annual volume of 50.44 acre feet of water. His review was regarding water availability and if the diversion can be developed without unlawful impairment of existing water rights. As part of his review, Mr. Rath looked at gaging information and existing uses from the stream.

Mr. Rath explained that Exhibit 6 is the area map for Application No. 2793-2. The exhibit shows the watershed, gaging station locations, and the proposed diversion point. Ms. Mines Bailey offered Exhibit 6. Chairman Hutmacher accepted Exhibit 6 into the record. The cross hatched area on the exhibit indicates the watershed.

Mr. Rath explained that Exhibit 7 represents the daily percentile flow hydrograph for the gaging station near Ft. Pierre. Ms. Mines Bailey moved admission of Exhibit 7. Ms. Lone Eagle objected. Chairman Hutmacher denied the objection and accepted Exhibit 7 into the record.

The exhibit shows the 50 percentile and 25 percentile for the gaging station, which was operational from 1928 – 2018. It is the only gage downstream from the diversion point.

Mr. Rath explained that Exhibit 8 represents the daily percentile flow hydrograph for the gaging station near Midland. Ms. Mines Bailey moved admission of Exhibit 8. Chairman Hutmacher accepted the Exhibit 8 into the record.

The exhibit shows the 50 and 25 percentile flows. The exhibit shows during drier conditions there is little or no flow in the Bad River. There is flow in the spring to mid-summer. At the 25 percentile there is only minimal flow during the late spring to early summer.

Exhibit 7 is the only gaging station on the Bad River downstream of the diversion point; the 50 percentile shows flows peak in the third week of March, maintains until June, and then tapers off to be about dry by the first of August.

There are three appropriations downstream that appropriate a total of 6 cfs. Ms. Mines Bailey provided Exhibit 9 to Mr. Rath, which is the water appropriation and use from the three downstream water rights. Ms. Mines Bailey offers Exhibit 9. Chairman Hutmacher accepted Exhibit 9 into the record.

Mr. Rath indicated the blue bars are the appropriation while the red bar shows the use reported by the irrigation water rights. It is common for a water permit holder not to use the entire amount appropriated. The Bad River is not a reliable source for irrigation. Existing rights are looked at to ensure that they will not be unlawfully impaired if the proposed diversion is developed.

Mr. Rath has a general understanding of Winters Rights. He indicated the Winters Rights have not been quantified. However, Winters Rights have not been quantified by any of the South Dakota tribes.

Mr. Rath stated water will generally only be available during the early part of the year. Therefore, there is a proposed qualification for a 6 cfs bypass at the proposed diversion point. The applicant will be required to construct a measuring device. TransCanada would need to provide the design of the measuring device to the Chief Engineer for approval prior to pumping water. The upper gaging station is not reliable during low flow conditions since there has been construction of a bridge. The qualification also requires a low flow bypass, and the permit is subject to written orders of the Chief Engineer.

Mr. Taylor cross examines Mr. Rath.

Mr. Rath stated the difference between prior applications and this application is that this is a much smaller diversion rate and the use is primarily for dust suppression. There is no provision for hydrostatic testing or pump station construction.

Mr. Rath said the bridge reconstruction on Highway 63 by DOT caused USGS to question the reliability of the gaging station near Midland during low flow conditions. Therefore, DENR's recommendation is for TransCanada to provide some type of gaging at the diversion point. Mr. Rath described how gages are calibrated to create a rating table to determine flow and the reliability of the data.

Referring to Exhibit 9 it appears there may have been some abandonment or forfeiture of water rights over the years based on the blue bars on the graph. If an irrigator quits irrigating the water right becomes subject to abandonment, and the matter comes before this Board for cancellation consideration.

Mr. Rath stated the qualifications for this application are more restrictive than the other applications. This recommendation requires installation of a flow measuring device. It is likely that water will only be available during the spring period. There will have to be a bypass of 6 cfs when pumping. DENR has no objection to TransCanada installing a metering device to measure the flow being pumped. Mr. Rath stated the Bad River does not pass through the reservation.

Mr. Caposella cross examines Mr. Rath.

Mr. Rath has not seen the survey of cultural resources mentioned in the report. Mr. Rath does not know the number of road miles that will be associated with dust suppression or where the horizontal drilling will take place.

The 10 percentiles were not shown on Exhibit 8 because for the most part the river will be dry. Under the 25 percentile the river will be dry about one half of the time. It is up to the applicant to decide what type of metering device to submit to the Chief Engineer for approval.

Mr. Caposella requested the Board to take judicial notice of DENR's integrated report. Mr. Taylor and Ms. Mines Bailey objected based on relevance. Chairman Hutmacher sustained the objection.

Mr. Caposella inquired if a Winters Rights has not been quantified whether the Tribe still has a right to divert water. Mr. Rath stated they would have rights to divert within their boundaries.

Ms. Thomasina Real Bird cross examines Mark Rath.

Mr. Rath stated his definition of Indian County was a reference to the exterior boundaries of the reservation. To prepare for today's hearing Mr. Rath reviewed his report, the water use data and gaging information, and two documents on Winters Rights. He talked to the Chief Engineer and Ms. Mines Bailey in preparation for the hearing. He did not speak to Governor Noem or members of her staff regarding the application.

Mr. Rath stated he only took into account state water rights and domestic use in his review of the application. For domestic use, the recommendation includes that they maintain a flow in the river to satisfy domestic use for livestock watering. In this case that is set as a 6 cfs bypass. Mr. Rath indicated he is unaware of any tribal water rights on the Bad River.

Ms. Real Bird questioned if a cut-off date for diversions similar to the application from the White River was considered. Mr. Rath indicated that was not included on the application for the Bad River appropriation. The Chief Engineer's recommendation includes a qualification that the permit holder report annual water use. The Water Rights Program will review the reports.

Mr. Rath indicated that water used for dust suppression would not return to the source. He did not know whether water will be returned to the source under hydraulic directional drilling. Factors considered in whether to issue a shut off order includes the number of permits and domestic use downstream and what is the water availability of the water source.

Based on Figure 5 from the staff report, there has been no irrigation occurring from the Bad River from 2007 through 2017. The graph does not include domestic use. Domestic use is not reported to the Water Rights Program.

Mr. Rath verified that the diversion point is generally the location of the Bad River diversion point shown on Exhibit 104.

Mr. Ellison cross examines Mr. Rath.

Mr. Rath stated he spoke to the Chief Engineer regarding the testimony on the application. The discussion was not specific to this application. In preparation for today, Mr. Rath reviewed his report and the application. Mr. Rath testified that the only part of his review dealt with water availability and not degradation by potential contamination. He dealt with quantity not quality when reviewing this application.

Mr. Ellison handed Mr. Rath Exhibit 1B, which is page 4 of the application. The exhibit states water use will only be used as a short term temporary permit. Mr. Ellison offers Exhibit 1B. Chairman Hutmacher accepted the exhibit into the record.

The exhibit also shows water discharges. Mr. Rath stated that a majority of water to be used from the Bad River is for dust control. While the exhibit states a majority of water being discharged in the vicinity of the diversion, the use being mostly used for dust control, indicates that a majority of water will not be discharged back to the vicinity of the diversion.

Mrs. Lone Eagle cross examines Mr. Rath.

Mr. Rath stated his general knowledge of quantifying a water right is that a tribe must make a request, then a federal team is assembled, and stakeholders meet. Courts may be able to adjudicate the water rights.

Mrs. Lone Eagle inquired whether Mr. Rath was aware of the Seven Council Fires of the Sioux Nation and the Lakota Alliance. Mr. Rath stated his understanding is it refers to the seven Sioux Nations. Mr. Rath is not aware of cultural or burial sites along the Bad River.

Referring to Exhibit 6, Mr. Rath responded the headwater of the Bad River is just west of the town of Philip. Two forks come together that form the Bad River. Mr. Rath is not aware of the sources to the Bad River. Mr. Rath is aware that there is livestock water use from the river.

Referring to Exhibit 8, Mr. Rath indicated this was the percentile flow hydrograph for the downstream gage hydrograph near Ft. Pierre. The flow is higher on the downstream gage. Mrs. Lone Eagle inquired whether that is an indication of contributing flow entering the Bad River below the gaging station near Midland. Mr. Rath concurred.

Mr. Rath stated we do not know that the water right holder is always reporting the correct amount of water use. Mrs. Lone Eagle moves to strike the exhibit for lack of reliable data. Chairman Hutmacher denied the motion.

Jason Shald cross examines Mr. Rath.

Mr. Rath indicated that the water permit is just one regulatory issue. The permit holder will also have to deal with the Surface Water Quality Program. To protect the volume of water in the stream, a water permit for an instream flow will need to be obtained. The rights would be administered based on priority.

Mahmud Fital cross examines Mr. Rath.

Mr. Rath stated he did not take into consideration if the water source is contaminated with bitumen, dilbit or tar sands. Mr. Fital asked if the desire of one water right holder trumps all other water right holders. Mr. Taylor objected, and Chairman Hutmacher sustained the objection.

Ms. Mines Bailey stated she has no re-direct.

Mr. Ellison stated he wants to interpose in an objection to Ms. Goodman not getting called to the witness stand on the first two criteria of the three applications up for consideration. Chairman Hutmacher noted the objection.

Motion by Mr. Freeman seconded by Mr. Bjork amending the Order on Hearing Procedure dated August 27, 2019, in the matter of Application Nos. 1963A-1 and 1975A-1. The proposed amendment is to move Item 4. b. (Closing statements for all TransCanada applications) to Item 4.j. and relabel present Item 4. j. and 4. k. to 4. k. and 4. l., respectively. Motion carried unanimously by roll call vote.

Motion by Mr. Freeman, seconded by Mr. Holzbauer that the meeting be adjourned. Motion carried unanimously by roll call vote.

Chairman Hutmacher declared the meeting adjourned at approximately 5:28 PM.

A Court reporter was present and a transcript of the hearing may be obtained by contacting Carla Bachand, PO Box 903, Pierre, SD 57501, and (605) 224-7611.

Approved the _____ day of October 2019

Water Management Board

Witness

ATTENDANCE SHEET
 WATER MANAGEMENT BOARD
 Date 043, 2019

NAME (PLEASE PRINT)	MAILING ADDRESS	CITY, STATE & ZIP	ITEM OF INTEREST
Greg Tencer	5151 San Felipe 77056	Houston, TX 77056	
John Taylor	4820 E. 57th St, Stark Falls SD	57108	
James Moore	P.O. Box 827, Stark Falls, SD	57117	
Matt Maher	700 Louisiana St	Houston TX 77002	
Wm Taylor	4820 E 57th FSD	57108	
Jung-Hoe Hopgood	1300 Metropolitan Blvd	Tallahassee, FL 32317	
Jaw Schmidt	728 Breakers St	Wettersound FL 32461	
Matt Kartz	Po Box 1025	Rapid City, SD	
John Schmidt	Po Box 395	Wausocket S.D.	
Jason Shald	13906 Poppleton Circle	Omaha, NE	
Jennifer Baker	1900 Plaza Drive	Louisville, CO 80020	
MAHMUD FITIL	4949 S. 30th	Omaha, NE	
Thomasina Real Bird	1900 Plaza Dr.	Louisville, CO 80027	
Cindy Myers	PO Box 104; Stuart, NE 68780		
Mike Novotny	7811 Pierce Cir.	OMAHA NE 68124	

ATTENDANCE SHEET
 WATER MANAGEMENT BOARD
 Date Oct 3, 2019

NAME (PLEASE PRINT)	MAILING ADDRESS	CITY, STATE & ZIP	ITEM OF INTEREST
<u>Jim Amot</u>		<u>Brookings, SD 57016</u>	<u>General</u>
<u>Gryan Gortmaker</u>		<u>Pierre SD</u>	<u>RE permit</u>
<u>Teryl Cruse</u>	<u>PO Box 214</u>	<u>Pierre, SD</u>	<u>Self</u>
<u>Michael Walters</u>		<u>Aberdeen, SD</u>	<u>Self</u>
<u>James Dowling</u>		<u>Pierre</u>	<u>Self</u>
<u>Paul Scamro</u>	<u>27893 244th St</u>	<u>Draper SD</u>	<u>self</u>
<u>Joe Bliss</u>		<u>SD</u>	<u>_____</u>
<u>Mary Duvall</u>	<u>Box 453 Pierre</u>		<u>Log's Oversight</u>
<u>Lucy Wright</u>	<u>Pierre</u>		
<u>Peter Capossella</u>	<u>PO Box 10643</u>	<u>Eugene OR 97440</u>	<u>Rosebud Sioux</u>
<u>Nizbeth Walker</u>	<u>Box 255 Flandreau SD</u>	<u>Flandreau (Credit History with Flandreau Sioux Tribe)</u>	
<u>Joni Tobacco</u>	<u>PO Box 161 Pine Ridge SD</u>	<u>57770</u>	
<u>Elizabeth Lone Eagle</u>	<u>593 Big Foot Loop Rd</u>	<u>Bridges</u>	
<u>Tatanka Lone Eagle</u>	<u>"</u>	<u>"</u>	
<u>Marta John Lone Eagle</u>	<u>"</u>	<u>"</u>	
<u>Zora Lone Eagle</u>	<u>"</u>	<u>"</u>	

ATTENDANCE SHEET
 WATER MANAGEMENT BOARD
 Date Oct 3, 2019

<u>NAME (PLEASE PRINT)</u>	<u>MAILING ADDRESS</u>	<u>CITY, STATE & ZIP</u>	<u>ITEM OF INTEREST</u>
Barrie Ellison	PO Box 2908	Rapid City 57702	TC
Rebecca Turk	PO Box 549	Brookings, SD 57006	TC
V WICKS	216 E. Nowlin St	Rapid City	KXC
John Kessler	PO Box 1578	Eagle Butte	CRST
M. Elizabeth Baskin Clerk	Box 436	Parmelee SD	RST
Loren Locher	700 Louisiana St	Houston, TX 77002	TC
BOB MERCER	1810 Camden Court	Pierre SD	TC
Doug Crowlmost	PO BOX D	Ft. Yates ND	
Barry Le Beau	POB 574	Pierre	CRST
Paula Antares	Box 430	Rosch 505280	TC -
Zip Spott/Kayla	# 800 Smain SD	YST	TC
Jill Spott/Kayla	Bx 667 Lake Andes SD.	YST Treaty	TC
Dracyn Zepher	PO Box 590 Eagle Butte, SD ⁵⁷⁶²⁵	→	TC/KXL
Joseph Robertson	Bx 667 Lake Andes, SD	YST Treaty com	TC

Water Management Board
September 11, 2019

The audio recording for this meeting is available on the South Dakota Boards and Commissions Portal at <http://boardsandcommissions.sd.gov/Meetings.aspx?Boardid=106>

MINUTES OF THE 216th MEETING OF THE
WATER MANAGEMENT BOARD
FLOYD MATTHEW TRAINING CENTER
523 EAST CAPITOL AVENUE
PIERRE, SOUTH DAKOTA

September 11, 2019

Jeanne Goodman, Chief Engineer introduced the new Secretary of Department of Environment and Natural Resources, Hunter Roberts.

CALL TO ORDER: Chairman Hutmacher called the meeting to order at 11:00 a.m. Central Daylight time.

A quorum was present.

Chairman Hutmacher welcomed Legislative Oversight Committee Member, Representative Mary Duvall.

Chairman Hutmacher announced that the meeting was streaming live on SD.net, a service of South Dakota Public Broadcasting.

The following attended the meeting:

BOARD MEMBERS: Chad Comes, Jim Hutmacher, Leo Holzbauer, Rodney Freeman, and Peggy Dixon. Tim Bjork and Ev Hoyt were not at the meeting.

DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES (DENR): Jeanne Goodman, Eric Gronlund, Ron Duvall, Vickie Maberry, Mark Rath, Kim Drennon, Karen Schlaak with the Water Rights Program; Julie Smith with the Drinking Water Program.

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ATTORNEY GENERAL'S OFFICE: Ann Mines Bailey, Water Rights Program Counsel and David McVey, Board Counsel.

LEGISLATIVE OVERSIGHT COMMITTEE: Representative Mary Duvall
OTHERS:

Jason Petersen -Lake Thompson
Shelley Nelson- Lake Thompson
Delmer Walkow - Lake Thompson
Cindy Bau
Layne Stewart
Tom Puetz
Jay Gilbertson
Brad Preheim
Jon Kotilnek - Attorney for Dept of Game, Fish & Parks
Gregg Gass -Attorney for Kingsbury County
Jim Knight
E John Bruner – intervenor
Greg Protsch
Kent Terwilliger
Roger Weintrand
Steve Gordon
Ryan Tobin
Tyler Wrich
Bob Mercer
Hilary Meyer
John Lott
Tim Cowman

ADOPT FINAL AGENDA:

Motion by Mr. Holzbauer, second by Mr. Freeman, to adopt the final agenda. Motion carried unanimously by roll call vote.

CONFLICTS DISCLOSURES AND REQUEST FOR STATE BOARD WAIVERS: None

ADMINISTER OATH TO DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES STAFF: Carla Bachand, the court reporter, administered the oath to the DENR employees who intended to testify.

PUBLIC COMMENT PERIOD IN ACCORDANCE WITH SDCL 1-25-1:

David McVey, Board Counsel stated no parties or intervenors may make comments on the matters before the Board today. The Board cannot except testimony or evidence during public comment period. The public comment period will not be in the final record.

No one provided public comment.

CONSIDER MOTION FOR EXPEDITED HEARING ON THE MOTION TO ALLOW MAINTENANCE OF LAKE THOMPSON OUTLET:

Chairman Hutmacher stated the first matter before the Board is to consider the Motion for Expedited Hearing on the Motion to Allow Maintenance of Lake Thompson Outlet.

Chairman Hutmacher asked for appearances in the matter of Kingsbury County's two motions.

Ann Mines Bailey – Council for the Water Rights Program
Gregg Gass – Kingsbury County States Attorney
Greg Protsch - Miner County States Attorney
Jon Kotilnek – Attorney on behalf of Game, Fish and Parks
John Bruner – Pro se Intervenor

Mr. Gass stated the motion for expedited hearing is being requested because flooding conditions exist on Lake Thompson. The damage will increase if the lake levels remains at or near the current status. With the winter coming on and spring thaw that will follow, they are wanting improvements sooner than later.

David McVey went through the Board Packet:

Notice Scheduling hearing on Kingsbury County's Motion to allow for Maintenance on the Thompson Water Outlet

Kingsbury County's Motion to Allow Maintenance of Lake Thompson Outlet

Kingsbury County's Motion for Expedited Hearing

Exhibit A - Lake Thompson Outlet Maintenance Evaluation

Findings and Fact, Conclusions of Law and Final Decision from 2013 Hearing on Setting Outlet Elevation and Validation of Vested Water Right No. 707-3

Attachment 2 from Lynn Beck's 2013 Report

Stipulation Among Several Parties in the 2013 Case on Establishing an Outlet Elevation

Validated Vested Water Right No. 707-3

Lynn Beck's 2013 Report on Lake Thompson

The Board has received letters from Turner County and Clay County opposing the motion to allow maintenance before the board.

John Bruner asked to speak sometime on the issue as a private landowner and a past member of the Lake Thompson task force. Mr. Bruner said he did not want to miss his opportunity to speak.

Chairman Hutmacher stated the first matter before the Board is the motion for an expedited hearing on the motion to allow maintenance of Lake Thompson outlet.

Motion by Mr. Freeman, second by Ms. Dixon, that the Board approve the motion for expedited hearing and proceed to conduct the hearing. Motion carried unanimously by roll call vote.

CONSIDER MOTION TO ALLOW MAINTENANCE OF LAKE THOMPSON OUTLET:

Mr. Gass presented Exhibit 1 which is Civil Design Inc.'s (CDI) report on Lake Thompson outlet maintenance evaluation.

Mr. Gass stated that the county has authority to do maintenance on the outlet of Lake Thompson. However, the Board's order from 2013 provides that those activities are subject to the continued jurisdiction of the board. Mr. Gass requested the Board review and approve the plans as there is no intent to go below hard pan levels or to interfere with Game, Fish and Parks vested water right which set the outlet at 1687.5 feet mean sea level (fmsl) several years ago.

Mr. Gass called Jason Petersen as the county's first witness. Court reporter Carla Bachand administered the oath to Mr. Petersen.

Jason Petersen stated he works with Civil Design Inc. (CDI) as a civil engineer and a hydraulic engineer. He graduated from SDSU, is a registered professional Engineer, and has worked in the engineering field a little over 14 years.

Mr. Petersen stated he was hired to do a study and report on the outlet of Lake Thompson at the request of Kingsbury County commission.

Mr. Gass showed Mr. Petersen a copy of the CDI report, which is marked Exhibit A.

Mr. Petersen stated prior to preparing the report, CDI collected additional data, which included channel surveying downstream and upstream of the outlet. They surveyed the first structure downstream at 225th Street, which is approximately four miles south of the Kingsbury-Miner County border. Mr. Petersen stated the structure at 225th street is a four-cell box culvert. There are four cells 12 feet wide by 6 feet high. They gathered the hydraulic data sheet from the DOT office and then in their analysis also determined the flows. Based on modeling, they are consistent. The flow rate at 225th Street at the time of their survey, based on modeling, was 1,276 cubic feet of water per second (cfs).

Mr. Petersen stated as part of the engineering review process he became familiar with the Water Management Board's findings that were adopted in 2013. Mr. Petersen stated that the outlet elevation was set in 2013 at 1687.5 fmsl.

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Mr. Petersen stated he did a site visit of the outlet location. Mr. Petersen stated the most recent water level information of Lake Thompson's water level is 1694.13 fmsl, and the datum is NGVD 29. The water level elevation at the outlet was 1692.87 fmsl.

Mr. Petersen stated the water flowing out is the same as the water flowing out at 225th Street, which is the 1,276 cfs. Mr. Petersen stated the height of water going through the box culvert was 5.4 feet. Mr. Petersen stated two to three miles north of the outlet there is very little elevation difference.

Mr. Petersen stated a closed basin is a closed system. Water goes in and it needs to get up to a certain level before it will reach the outlet elevation and flow south. The outlet for Lake Thompson does not generally flow. The water from the outlet flows south into the East Fork of the Vermillion River. Mr. Petersen stated water then flows into parts of Miner, Lake, McCook, Clay, and Turner counties before ultimately flowing into the Missouri River.

Mr. Petersen stated that Lake Thompson is currently under flood stage conditions and causing problems such as flooding roads and homes. Mr. Petersen stated that high winds and potential high spring run-off are a further concern as well as what will happen when ice forms. This all adds to the potential for damage to homes, roads and structures next spring when the ice breaks up. Mr. Petersen stated the study did not consider the damage potential if lake levels remained high through this winter. The goal was to study the hydraulics and what would happen with the lake levels with maintenance and without maintenance.

Mr. Petersen stated his study considered what maintenance could be done at the outlet location to increase the flow of water. The study considered what could be done giving the parameters imposed by the Board in 2013. He feels the water level elevation can be reduced to 1687.5 fmsl this fall.

Mr. Petersen considered in his report two different maintenance operations that could be conducted. The two alternatives considered were removal of solely vegetation and removal of the vegetation and sediment down to the hard pan. The removal of solely vegetation will not provide significant relief. It may only reduce the time to reach the target elevation by one day.

Mr. Petersen stated the option of removing vegetation and silt will result in meeting the target water elevation by reducing the level by two feet two days sooner than current conditions. To obtain a three feet reduction in the water level with the vegetation and sediment option resulted in getting to that target elevation three to five days sooner.

Mr. Petersen stated his plan was to remove vegetation from 400 feet north to 400 feet south of the outlet location because when he viewed the outlet that appeared to be the area where the most vegetation was located.

Referring to Appendix B of his report, Mr. Peterson stated the report shows the channel configuration of the outlet of the renovations that were established by Ms. Beck and agency back in 2013. Referring to pages 1 and 2 of Appendix B, Mr. Petersen stated the triangles on the

graph refer to the area that sediment will be removed. Mr. Petersen indicated it does not allow for a lot of sediment removal. The plan is to redevelop the outlet channel down to the hard pan.

Mr. Petersen stated that sediment will be removed by use of an excavator sitting in the water. Data will be provided to the operator on the level to remove sediment. The process will include the need to survey the elevations to insure the Board's 2013 decision is followed. Mr. Petersen stated that equipment operators have told him they can feel when they hit hard pan. The sediment will be deposited in a high area such that it will not return to the public water.

Mr. Gass questioned if under the second option to remove the sediment was there an estimation as to what percent the flow of water from the outlet may increase. Mr. Petersen says the increase in flow rate at the outlet will be about 6% under this option. This means the current flow capacity of 1,276 cfs will increase to about 1,316 cfs. The plan is to monitor the flow rate at the downstream structure at the beginning and end of each day. The structure at 225th Street will be used as a safety control as the structure will not be allowed to overtop. They can also monitor water levels at the road at the 226th Street.

Mr. Petersen stated he believed the target elevation of a two feet reduction in the lake's water level can be attained about two days sooner and a three feet reduction in the lake's water elevation can be attained five days sooner than the current conditions will allow.

Mr. Petersen stated the water above 1687.5 fmsl is going to drain out at some point. There may be a benefit to lowering the lake's water level now instead of the potential of the lake rising further.

Mr. Petersen stated that the option he has outlined constitutes maintenance. Nothing planned is intended to alter the outlet elevation.

Mr. Gass offered Exhibit 2019 – A, which is the CDI report. The exhibit was admitted into the record.

Jon Kotilnek, counsel for Game, Fish and Parks, questioned Mr. Petersen regarding the triangles showing the sediment to be removed that are Appendix B of Exhibit 2019 - A, is there an approximation of the quantity of sediment to be removed. Mr. Petersen stated he does not have that information today. But that was incorporated into the modeling that was done. Mr. Peterson stated the study did not take into consideration downstream water saturation and channel capacities.

In answer to questions from Ann Mines Bailey, Mr. Petersen testified their study looked at how quickly the target elevation could be reached. The essential component in the modeling was the flow rate in the outlet channel. Estimated flow at 226th Street was 1,276 cfs. That flow estimate was reached by modeling of the channel and lake conditions. CDI ran the model to see if they were consistent. The flow rate use of 1,276 cfs was not a measured flow rate.

Ms. Mines Bailey inquired on page 5, the last paragraph, if the flow rate is significantly lower than 1,276 cfs whether that would alter the analysis. Mr. Petersen stated that the flows were

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consistent based on the modeling. If it were much lower flow such as 400 cfs the time to reduce to the target water level would be greater.

Ms. Mines Bailey indicated that page 6 of report states to reduce the lake's water level to no lower than 1687.48 fmsl and widen no more than 50 feet. Ms. Mines Bailey asked if that was an additional 50 feet in width. Mr. Petersen stated they were just trying to maintain the 50 feet width, not an additional 50 feet. Mr. Petersen further stated that work was to be conducted from four hundred feet north to four hundred feet south of outlet based on Mr. Petersen's visual observation.

Mr. Petersen stated that the cross sections of the channel in the report are from their survey using a boat with GPS equipment. They did not try to determine between sediment and hardpan during the survey. Mr. Petersen stated that about one foot of sediment will be removed. Removal of vegetation and sediment will result in about 6% increase in flow. Mr. Petersen stated he did review the inundation potential downstream. On the downstream structure, the water level will increase 1 – 2 inches. Impacts downstream would depend on channel configurations at the various locations.

Ms. Mines Bailey handed Mr. Petersen Exhibit 2019-1 which is the cross section at outlet from Beck report. Ms. Mines-Bailey inquired whether the elevation of the outlet varies and if so how will the proper elevation be marked. Mr. Petersen stated they were trying to get a 50 foot width consistent across the outlet at the target elevation. Some of the outlet area would be below the elevation of 1687.5 fmsl and in those locations no sediment would need to be removed. Mr. Petersen stated in his opinion excavating to the outlet elevation will not alter the hard pan.

Mr. Petersen stated the monitoring of downstream flow will be done by marking elevations at the beginning and end of the day at downstream structures. They will mark elevations on structures before work begins as a way of monitoring the increase in flow. If the flow exceeds the anticipated water level, they will ask that the contractor to stop work. The water level will also be checked at the end of work each day. The design plan for how the equipment would be staged would be left to the contractor.

In answer to questions from Mr. Gass, Mr. Petersen testified that the flow is a calculation of area and velocity. Water was moving rapidly through the structure. Mr. Petersen went through the calculation of flow through the structure.

In response to a question from Ms. Mines Bailey, Mr. Petersen stated the plan is to remove sediment to the 1687.48, fmsl but there are other areas that are naturally 1686.81 fmsl so at those locations there would be no removal of material.

Mr. Freeman stated that the criteria in the findings of fact from the 2013 Board decision allowed for maintenance. The testimony seems to contradict Mr. Petersen's report that they needed to come before the Board.

Mr. Gass interjected they had a DENR letter and out of an abundance of caution decided to bring this matter before the Board.

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Mr. Bruner inquired about the structure at 225th Street which Mr. Petersen testified is a 4-cell box culvert with each cell being 12 feet wide and six feet in height.

Mr. Holzbauer questioned if Mr. Petersen was concerned about the speed of flow of that water through 225th Street if they did excavations there. Mr. Petersen stated that was not a concern.

In answer to questions from Chairman Hutmacher, Mr. Petersen stated most of the outlet channel currently has vegetation. Regarding whether inflow and outflow from Lake Thompson have equalized yet, Mr. Petersen stated there have been ups and downs depending on the weather on the balance between inflow and outflow. Regarding why with the current flow the sediment is not naturally being removed, Mr. Petersen stated there is minimal slope and a minimal velocity in the outlet channel.

Mr. Petersen stated in reply to a question from Mr. Comes, they were hoping to get approval from the Board before proceeding to final design and bidding. The plan is to conduct the work before winter.

Mr. Gass called Dr. James Knight. Carla Bachand, the court reporter, administered the oath to Dr. Knight.

Dr. Knight stated he has studied various aspects of wetland flooding as part of his past jobs. He became concerned with flooding on Lake Thompson this last spring. Dr. Knight stated that until last week they were unable to get to their home except by 4-wheeler. He contacted East Dakota Water Development District this summer, and they helped him take water surface elevations to determine where the blockage was occurring.

Dr. Knight stated he has been at the outlet. The lake elevation drops 0.8 inches per mile north of outlet and below the outlet the slope is 6 feet per mile. The outlet was located about a half mile north of 225th Street.

Dr. Knight felt vegetation was blocking flow. He determined that if cattails were removed the flow could be increased by 20% which would be significant relief. The outlet is a large flat area, and the restriction is preventing the flow.

Dr. Knight believes the relief requested will be minimal, but two inches of drop in the water level is significant to the homeowners. The biggest concern is this winter because the cattails will die. Next spring when everything thaws that water will not be held back by cattails and will move out quickly. Downstream could receive significantly more flooding than the small relief currently being requested by Kingsbury County. Currently, some homes on Lake Thompson have water, and future ice issues will result in significant damage. If routine maintenance is conducted this fall, it will lessen the impact of possible damage downstream next spring. Dr. Knight stated the maintenance of cattails has not occurred the past few years.

In response to a question from Mr. Holzbauer, Dr. Knight stated 225th Street is on the south side of Lake Thompson. The box culverts are in place for the road. The restriction is not the road at 225th Street. The outlet is upstream of 225th Street.

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Ms. Mines Bailey called Mark Rath to the stand. Mr. Rath was earlier administered the oath.

Mr. Rath stated he was familiar with Lake Thompson from back in the 1990's when he was involved with water level increases at the lake. He has reviewed the file and is familiar with Beck's 2013 report. In 2019, he has made three visits to Lake Thompson with the most recent being last Thursday, September 5th.

Ms. Bailey, asked Mr. Rath to give a general description of Lake Thompson. Mr. Rath stated that Lake Thompson is the bottom lake in a chain of lakes that ultimately drain into Lake Thompson. Water from Lake Thompson's outlet flows into East Fork of the Vermillion River.

Exhibit 2019-2 is an area map of Lake Thompson. Ms. Mines Baily moved admission of the exhibit. Chairman Hutmacher accepted the exhibit into the record.

Mr. Rath used the exhibit to orient Board members as to where the outlet and roads that have been discussed are located. Lake Thompson is primarily located in Kingsbury County. The southern portion of the lake narrows down and goes into Miner County where the outlet is located.

Exhibit 2019-3 is aerial imagery of the area. Ms. Mines Bailey moved admission of the exhibit. Chairman Hutmacher accepted the exhibit into the record.

Mr. Rath explained what was shown on the exhibit.

Exhibit 2019-4 is hydrograph of water levels on Lake Thompson with the outlet elevation also shown by a red line. The elevations are measured by Water Rights Program staff. Ms. Mines Bailey offered Exhibit 2019-4. Chairman Hutmacher accepted the exhibit into the record.

Mr. Rath described how the water levels have varied over the years due to climatic conditions. The peak DENR recorded water level this year was 1693.91 fmsl in July. Mr. Rath stated the outlet level is the elevation of the outlet channel's lowest point and the point where water spills out of Lake Thompson.

Exhibit 2019-5 is a photo taken from a drone in May of 2019 of the outlet area. Ms. Mines Bailey moved admission of 2019-5. Chairman Hutmacher accepted the exhibit into the record.

Exhibit 2019-6 is a picture of the box culvert at 225th Street taken Thursday September 5, 2019. Ms. Mines Bailey moved admission of 2019-6. Chairman Hutmacher accepted the exhibit into the record.

When visiting the site, Mr. Rath stated he was accompanied by a DENR staff person that assisted in taking flow rate measurements. At the time, the water was 8 inches below the top of the culvert at 225th Street.

Exhibit 2019-7 shows the flow measurements. Ms. Mines Bailey moved admission of 2019-7. Chairman Hutmacher accepted the exhibit into the record.

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The lake elevation in May 2019 was 1693.51 fmsl.

The lake elevation in July 2019 was 1693.91 fmsl.

The lake elevation last Thursday was 1693.66 fmsl.

USGS measured flow in May 2019 at a downstream bridge. The flow was 435 cfs.

DENR also measured flow last Thursday at the same bridge, and the flow was 347 cfs.

The flow rate measurement at 225th Street on September 5, 2019, was 328 cfs.

Exhibit 2019-8 is a picture of the bridge deck on 226th Street looking south showing the East Fork of the Vermillion River was out of its bank on May 30, 2019. Ms. Mines Bailey moved admission of Exhibit 2019-8. Chairman Hutmacher accepted the exhibit into the record.

Exhibit 2019-9 is a picture of same bridge deck taken Thursday September 5, 2019. Mr. Rath helped orient the Board members as this picture was taken from a little different angle from the previous exhibit. Ms. Mines Bailey moved admission of Exhibit 2019-9. Chairman Hutmacher accepted the exhibit into the record.

Exhibit 2019-10 contains representative pictures of downstream township roads. Ms. Mines Bailey moved admission of Exhibit 2019-10. Chairman Hutmacher accepted the exhibit into the record.

Mr. Rath stated the pictures represent the flooding issues occurring with area roads. Mr. Rath stated the channel capacity of the East Fork of the Vermillion River is about 347 cfs.

In answer to questions from Mr. Gass, Mr. Rath stated there was about 8 inches of capacity remaining at the box culvert. The design capacity according to Mr. Petersen was about 1600 cfs. Mr. Rath stated he did not look at the design capacity, he measured the flow. Mr. Rath stated the culvert was 85 – 90% full at the time of his visit.

Mr. Rath testified the distance from the inside top of the culvert to the roadway bed is about four feet. When full, the road acts somewhat like a dam. But once full, the head pressure increases the velocity through the culverts.

Mr. Gass stated Exhibit 2019-5 shows the cattails that have been ignored at the outlet section. Mr. Rath testified that cattails usually do not grow at a depth greater than 3 ½ to 4 feet. Dr. Knight had testified the cattails were present in six feet deep water.

Mr. Kotilnek inquired whether DENR conducted a study like what CDI performed. Mr. Rath responded that DENR commonly reviews studies similar to the report. Conducting the study and work proposed by Kingsbury County is not something DENR generally undertakes as we are a regulatory branch of DENR. Mr. Rath believes it is prudent to have final plans on how the project would be performed.

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In answer to questions from Ms. Mines Bailey, Mr. Rath stated that the Board's prior 2013 decision does not allow excavation into the hard pan or change to the channel configuration. If the project maintained the outlet elevation but widened the outlet channel it could significantly increase the flow.

Chad Comes inquired whether there would be a review of plans by DENR. Mr. Rath responded DENR could review the plans to insure the criteria that is set forth are met.

John Bruner is administered the oath by the court reporter.

Mr. Bruner stated he lives in the area of Lake Thompson and has 300 acres of land under water in Kingsbury County. He purchased the land in 1980. Lake Thompson went dry in the 1930's. That is when many of the roads were constructed and culverts placed. No engineering was conducted when installing culverts. Lake Thompson is a natural meandered lake. The flooding occurring today is manmade. Four roads that are upstream of the outlet are under water. From the outlet north, you do not see any flow because the channel is too broad. The natural ability of the flow from Lake Thompson has been limited. Mr. Bruner stated he supports cleaning the cattails out of the outlet. Until the flow constraints caused by the roads are fixed, Lake Thompson will continue to have flooding issues. If we do not fix the flow capacities at the road there will not be a true solution to the problem.

In response to a question from Mr. Holzbauer, Mr. Bruner stated the roads he is referring to are county roads.

Mr. Holzbauer asked Mr. Bruner if the short-term solutions should be pursued now because the long term solution might take longer. Mr. Bruner stated he agreed with proceeding with the short term solution at this time.

Mr. Comes questioned Mr. Bruner whether he approached local officials to find a solution to which Mr. Bruner stated he has discussed his solution with local officials.

Chairman Hutmacher questioned the location of the Oldham grade. Mr. Bruner said the Oldham grade is 7 miles north of 225th Street on 218th Street.

Mr. Holzbauer commented that you cannot defer the natural flow of water.

Chairman Hutmacher called for closing remarks.

Gregg Gass indicated that time is urgent in this instance. Is it better to drain over a period of time or wait to see what happens in the future? Kingsbury County's motion is for routine maintenance, but they just did not want to go out and start digging. Even with the conditions as written, they believed the Board had jurisdiction and therefore brought the motion. Kingsbury County understands too much water is not good for anyone. Mr. Gass questioned how many reports are needed to be able to proceed. There is enough information before the Board to allow the county to conduct the proposed maintenance.

Water Management Board
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Gregory Protsch, Miner County State's Attorney, stated that Miner County does not have a concern as long as the work is only maintenance and in accordance with the conditions of the Board's 2013 order.

Jon Kotilnek, counsel for Game, Fish and Parks said the department has a vested water right on Lake Thompson. Recreational opportunities provide a large economic impact to the area. The motion does not contain enough information to act upon. Kingsbury County asks that the Board rely on the CDI report. However, how the maintenance is performed really determines if the outlet is altered. If the Board grants motion, Game, Fish and Parks requests that a plan be submitted and approved by the proper agency.

Ann Mines Bailey on behalf of DENR stated there is no question removing vegetation and sediment is maintenance. The devil is in the details. The removal of sediment depends on the manner it is removed and how that is monitored. There is not enough information to determine whether the channel configuration will be changed. DENR is not in a position to say either way based on the information presented today.

Mr. Holzbauer stated time is running out and they need to get something done. It needs to be done legally or they should be fined. He was surprised a contractor was not present to discuss how the work will be performed. He added that DENR has a responsibility to monitor the work.

Mr. Freeman moved to go into executive session under contested case provisions set forth in SDCL 1-26 and 1-25-2(3) to consult with Board Counsel regarding possible pending litigation. Second by Leo Holzbauer. Roll call vote to go into executive session passed unanimously.

Chairman Hutmacher declared the Board out of executive session and back in order.

Motion by Mr. Comes for approval of the motion for ordinary maintenance subject to DENR approval of a proposal demonstrating that the maintenance plan does not amount to any structural changes or excavation of the hard bottom of the channel. Such a plan should at a minimum include measurement and disposal of material consistent with Corps of Engineer requirements and any other matter DENR may require for approval. Second by Mr. Freeman.

Mr. Comes stated it is important to be consistent with the past stipulation and get more detail on how the work will be performed, which seems to be lacking in the testimony provided today.

Mr. Freeman stated he understands the need to move forward but wants the experts from DENR to look at the details of how the county plans to do the work. Giving DENR authority to approve the plan will mean the matter does not have to come back before the Board prior to proceeding with the work.

Mr. Gass asked if only vegetation is removed, would they still need to go to DENR for approval. Chairman Hutmacher stated he believed that it should remain with DENR to grant approval. The request for removal of vegetation may be as simple as contacting DENR by phone. However, if mobilizing equipment is contemplated then more detailed plans are needed.

Water Management Board
September 11, 2019 Meeting Minutes

Mr. Freeman stated that nothing done today changes the Board's 2013 decision that any structural changes to the outlet will need to come back before the Board.

Mr. Comes stated he believes the removal of vegetation would be something as simple as Mr. Freeman mentioned. However, if we are going to mobilize a piece of equipment and be out there excavating to hard bottom to 1687.5 fmsl more detailed plans need to be provided.

Chairman Hutmacher called for the vote. Motion carried unanimously by roll call vote.

David McVey stated he would draft a written order.

Motion to adjourn from Holzbauer, second by Freeman. Motion carried unanimously by roll call vote.

Chairman Hutmacher declared the meeting adjourned at approximately 4:11PM.

A court reporter was present and transcript of the hearings may be obtained by contacting Carla Bachand, PO Box 903, Pierre, SD 57501, and (605) 224-7611.

Approved the _____ day of October, 2019

Water Management Board

Witness

ATTENDANCE SHEET
 WATER MANAGEMENT BOARD
 Date Sept. 11, 2019

<u>NAME (PLEASE PRINT)</u>	<u>MAILING ADDRESS</u>	<u>CITY, STATE & ZIP</u>	<u>ITEM OF INTEREST</u>
Jason Petersen	691 Main Ave S.	Brookings, SD 57006	Lake Thompson
Shelia Nelson	PO Box 325	Lake Preston SD	Lake Thompson
Delmer Walkow	503 Front St NE	Desmet, SD	Lake Thompson
Cindy Bau	P.O. Box 232	De Smet, SD	Lake Thompson
LAYNE STEWART	15 WASHINGTON ST.	VERMILION 57069	LAKE THOMPSON
Tom Puetz	1315 N. Main St, Ste 103	Mitchell 57301	Lake Thompson
Jay Gilbertson	1323 Airport A, EDWID	Brookings, SD 57006	Lake Thompson
BRAD Peterson	1111 Railway #2	Centerville 57014	LAKE THOMPSON
Jon Kotilsky	523 E. Capitol, ^{GFD} Pierre SD	Pierre, SD	Lake Thompson
Greg Gass	PO Box 35	De Smet SD	Lake Thompson
Jim Knight	2212 Twin Lakes Rd	Lake Preston, SD	Lake Thompson
E John Bruner	22289 442nd Ave	Winfred, SD	Winfred SD
Mary Duggall	Box 453	Pierre SD	Legis Oversight
Maureen	Box 623	Howard SD	LAKE THOMPSON
Kent Terwilliger	P.O. Box 91	Howard S.D. 57349	Lake Thompson

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

IN THE MATTER WATER)
APPLICATION NOS. 1986-1,)
2792-2, AND 2793-2)
TRANSCANADA,)
KEYSTONE, LP)

MOTION
TO SCHEDULE WITNESSES

Interested Party ELIZABETH LONE EAGLE, respectfully, hereby moves to schedule my witnesses for testimony to October 29, 30 or both, for, but not limited to, the following reasons:

1. The recent order regarding how the hearings will be conducted, stated that scheduling will take place on the October hearing date. The lack of a set schedule has become problematic for me in making arrangements for my witnesses. If I know, more specifically that my witnesses will be testifying on either the 29th, 30th, or both, it will make scheduling their appearance easier.
2. I have very limited resources and scheduling my witnesses for the 29th, 30th, or both will ease the stress on the resources I have available for presenting witnesses.
3. If I am required to have my witnesses present with out knowing that they will testify it would be a waste of my very limited resources.

For the above, and other reasons, *pro se* petitioner, ELIZABETH LONE EAGLE therefore requests my motion be granted.

Submitted this 26th day of September, 2019.

/s/Elizabeth Lone Eagle
593 Big Foot Loop Road
Bridger, SD 57748
bethcbest@gmail.com

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of ELIZABETH LONE EAGLE'S Motion to Schedule Witnesses was filed by email to those listed with an email address, and U.S. postage paid, to listed with no email address, and to: Jeanne Goodman, Chief Engineer, DENR, 523 E. Capitol, Pierre, SD 57501 and to the Chief Engineer of the DENR c/o eric.gronlund@st.sd.us .

APPLICANT

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/s/Elizabeth Lone Eagle
Elizabeth Lone Eagle

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
WATER MANAGEMENT BOARD

IN THE MATTER WATER APPLICATIONS)
NO. 1986-1, 2792-2, and 2793-2,)
TRANSCANADA)
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ORDER ON MOTION TO SCHEDULE
WITNESSES

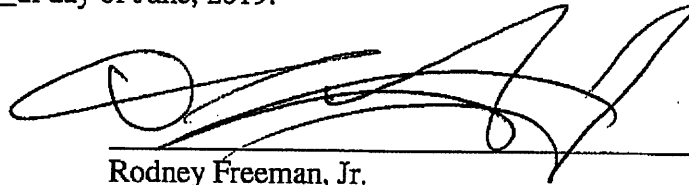
WHEREAS, Elizabeth Lone Eagle filed a Motion to Schedule Witnesses; and

WHEREAS, the Motion requests that Lone Eagle's witnesses be scheduled to provide testimony to the Board on October 29, 2019 or October 30, 2019 or both days.

NOW THEREFORE, upon information and belief, neither the Applicant nor the DENR oppose Lone Eagles' Motion, and the Board has no objection.

Elizabeth Lone Eagle Motion to Schedule Witnesses is hereby **GRANTED** and she is directed to have her witnesses available to provide testimony on October 29, 2019 and October 30, 2019.

Dated this 30 ^{September} ~~th~~ day of ~~June~~, 2019.



Rodney Freeman, Jr.
Hearing Officer
South Dakota Water Management Board

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

IN THE MATTER WATER)
APPLICATION NOS. 1986-1,)
2792-2, AND 2793-2)
TRANSCANADA,)
KEYSTONE, LP)

MOTION
TO SCHEDULE WITNESSES

Pro Se Petitioner, MNIWAKAN NAKICIJINPI, respectfully moves to schedule our witnesses for testimony to October 29, 30 or both, for, but not limited to, the following reasons:

1. The order regarding how the agenda for the hearings will be scheduled, said that scheduling will take place on the October 3rd hearing date. Not scheduling witnesses before the hearings begin has become a problem for us. Knowing that our witnesses will be testify either the 29th, 30th, or both, it will make it easier.
2. Our expert witnesses and Cheyenne River Sioux Tribe witnesses in the Wilson permit hearing are the same people. It would be easier for us to schedule our witnesses together.
3. We have the same limited resources as our *Ina*, Elizabeth Lone Eagle, who is also a *pro se* petitioner in the TransCanada water permit applications. We have the same financial constraints and concerns as she does.

For the above, and other reasons, *pro se* petitioner, MNIWAKAN NAKICIJINPI, request our motion be granted.

Submitted this 26th day of September, 2019.

/s/Tatanka Itancan Lone Eagle
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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of MNIWAKAN NAKICIJINPI's Motion to Schedule Witnesses was filed by email to those listed with an email address, and U.S. postage paid, to listed with no email address, and to: Jeanne Goodman, Chief Engineer, DENR, 523 E. Capitol, Pierre, SD 57501 and to the Chief Engineer of the DENR c/o eric.gronlund@st.sd.us .

APPLICANT

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/s/ Tatanka Itancan Lone Eagle
Tatanka Itancan Lone Eagle

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

IN THE MATTER WATER APPLICATIONS)
NO. 1986-1, 2792-2, and 2793-2,)
TRANSCANADA)
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ORDER ON MOTION TO SCHEDULE
WITNESSES

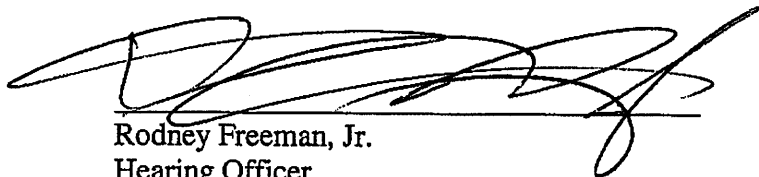
WHEREAS, Mniwakan Nakicijipi filed a Motion to Schedule Witnesses; and

WHEREAS, the Motion requests that Lone Eagle's witnesses be scheduled to provide testimony to the Board on October 29, 2019 or October 30, 2019 or both days.

NOW THEREFORE, upon information and belief, neither the Applicant nor the DENR oppose Mniwakan Nakicijipi's Motion, and the Board has no objection.

Mniwakan Nakicijipi's Motion to Schedule Witnesses is hereby **GRANTED** and they are directed to have her witnesses available to provide testimony on October 29, 2019 and October 30, 2019.

Dated this 30 September day of ~~June~~ 2019.



Rodney Freeman, Jr.
Hearing Officer
South Dakota Water Management Board

**BEFORE THE WATER MANAGEMENT BOARD
OF THE DEPARTMENT OF ENVIRONMENT AND NATURAL
RESOURCES**

**IN RE APPLICATIONS 1986-1, 2792-2, 2793-2 BY
TRANSCANADA FOR APPROPRIATION OF CHEYENNE,
WHITE, AND BAD RIVER WATERS, FOR USE
TO CONSTRUCT THE KEYSTONE XL
HAZARDOUS MATERIALS PIPELINE**

**DAKOTA RURAL ACTION'S MOTION AND MEMORANDUM TO
COMPEL DISCOVERY FROM CHIEF ENGINEER OF WATER
MANAGEMENT BOARD OF DEPARTMENT OF ENVIRONMENT AND
NATURAL RESOURCES OR IN THE ALTERNATIVE, ISSUANCE OF
SUBPOENAS**

Pursuant to SDCL §1-26-18, §1-26-19, and §15-6-37(a), Dakota Rural Action (hereinafter, "DRA"), by and through the below-signed Attorney, hereby moves the Water Management Board (hereinafter, "WMB" or "Board") of the Department of Environment and Natural Resources (hereinafter, "DENR") for an Order compelling the Chief Engineer to provide documents requested in certain of DRA's First Interrogatories to Chief Engineer regarding communications between DENR officials

and staff¹ with officials and staff in the Offices of Governors' Daugaard and Noem, and with officials and others regarding matters related to permit applications pending before this Board.

DRA respectfully submits the information sought and documents requested to be produced are relevant and discoverable or would likely lead to discoverable substantive or impeaching evidence regarding issues of relevance in the above-pending Applications before the Board.

Factual Background

In 2018, Applicant the Canadian TransCanada Co., dba TransCanada Keystone Pipeline, LP, now calling itself TransCanada Energy ("hereinafter, "TCE" or "Applicant") submitted Applications for Water Appropriation Permits (WAP) 1986-1, 2792-2, and 2793-2 for appropriation of over a quarter billion gallons of public river water removed from the Cheyenne, the White, and the Bad Rivers for 2019 and a greater amount in 2020 to construct the KXL pipeline across some 315 miles of South Dakota. The foreign private venture's Applications state TCE's interest in appropriating the People's water in order to most cheaply construct its large-scale hazardous materials transportation pipeline. The foreign private venture TCE wants

¹ Including the Secretary of the DENR, the Chief Engineer, along with other staff members who are noticed witnesses in scheduled Hearing on these permits.

to use public water to make drilling mud to be able to engage in Horizontal Directional Drilling (“HDD”) operations to place pipe under South Dakota rivers and flowing streams throughout the route, construct seven (7) pump stations in some six Counties, conduct hydrostatic tests, and to attempt dust control over the entire length of the proposed pipeline to run through Harding, Butte, Perkins, Meade, Pennington, Haakon, Jones, Lyman, and Tripp Counties. Most of the water would be lost in the process with a smaller amount, with most contaminants to be filtered

As part of the construction effort, abet indirectly through Applicants Tom and Lori Wilson (Proposed WAP 1963A-1) and the Wink Cattle Company (Proposed WAP 1975A-1), TCE has secured indefinite temporary (life of camp) use of public water to sustain its construction workers housed respectively in man camps in Harding and Meade County. Through its surrogates, it now seeks approval of a dramatic expansion of the locations within and without South Dakota TCE to use this public water also as the backup water supply for a total of six worker camps. The man camps would house a changing and varying number of out of state workers TransCanada is bringing into South Dakota to construct the hazardous materials pipeline.

If constructed, the KXL pipeline would transport up to 830,000 bbls per day of highly toxic and carcinogenic components of fracked Williton Bakkan crude oil

and Alberta, BC, Canada, tar sand bitumen, together with lubricants, through some of South Dakota's most unstable lands as well as some of its most fertile and productive agricultural lands - for decades. The pipeline route as proposed includes some 15 perennial water bodies of major stream and river crossings including the Little Missouri, the South Fork Grand, the North and South Forks of the Moreau, Cheyenne, Bad, and White Rivers, together with Pine, Sulphur, and Clark Creeks, as well as new locations chosen since PUC hearings in 2009 and 2014. It further plans to cross approximately 129 intermittent water bodies and 206 ephemeral streams. As reflected in federal Pipeline Hazardous Materials Safety Administration ("PHMSA") reports, TransCanada is a historic violator of environmental and safety regulations and related permit conditions involving the design, planning, location, materials, and construction flaws of the Keystone Pipeline system to date, resulting in numerous spills and near spills of bitumen, crude oil, and accompanying chemicals, including two large spills in eastern South Dakota.

DRA respectfully submits the importance of these Applications seeking public water in order to construct the KXL pipeline is of great interest and significance to the people of South Dakota and the Native Tribes within its borders - particularly on behalf of our future generations and including our agricultural economy.

By Order Regarding Dakota Rural Actions' Motion and Memorandum to

Compel Discovery, dated May 10, 2019, the Hearing Officer authorized the Parties, including DRA, to serve interrogatories.

DRA served Interrogatories on the Chief Engineer, seeking disclosure from the DENR of documents reflecting communications between the DENR and the current and former Governors' Offices, and between Applicant-TCE and the permitting agency. In the Chief Engineer's Response to DRA's Interrogatories (hereinafter, "Response"), the staff for the Permitting Agency are claiming that release of the requested documents would violate the "Deliberative Process Privilege" and "Attorney-Client Privilege." See, Privileged Document Logs, Chief Engineer's Response to DRA's Interrogatories, Interrogatory No. 14, Supplement to Response, and Privilege Log updated to July, 2019, attached to the respective Response to DRA Interrogatories regarding Applications 1986-1, 2792-2, and 2793-2. The Chief Engineer has withheld documents and numbered them Bates WR_000001 through WR_000311.

As Trustee of our water, DRA respectfully contends that complete transparency is imperative in these permit application proceedings and nothing less than full disclosure is warranted by law, due process, and public interest. DRA respectfully submits that the asserted privileges are inapplicable and/or do not prevent disclosure of the following withheld documents and that due process of law requires this Motion

to Compel be granted, compelling the Chief Engineer (DENR) to disclose the documents or authorize issuance of a subpoena to compel its forthwith production to DRA for use as potential evidence in the scheduled Final Hearing in these Permit Applications.

**THE CHIEF ENGINEER SHOULD BE COMPELLED
TO DISCLOSE THE REQUESTED DOCUMENTS**

DRA Has Due Process And Statutory Rights To Discovery, Including Evidence Potentially Showing Interest, Bias, Or Material Information In Conflict With Offered Testimonial and Documentary Evidence.

“It is certainly correct that due process rights apply to contested cases before administrative agencies.” *Matter of South Dakota Water Management Board.*, 351 N.W.2d 119 (S.D. 1984) [citing, *Application of Union Carbide Corp.*, 308 N.W.2d 753 (S.D. 1981)]. See, *Daily v. City of Sioux Falls*, 2011 S.D. 48, ¶18, 802 N.W.2d 905 [citing with approval, *Carey v. Piphus*, 435 U.S. 247, 262 (1978) (“One ‘purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly’ ...”)].

In the exercise of its due process rights, the Legislature has provided that in contested cases, such as this one, a party has the right to a “reasonable opportunity

to inspect **all** documentary evidence.” (Emphasis added). §SDCL 1-26-18(2).² The statute further gives a party the right to cross-examine witnesses [“ required for a full and true disclosure of the facts,” SDCL §1-26-19(2)], use the subpoena power for witnesses and evidence, and to present evidence “in its interest” [SDCL §1-26-18(2)]. See, *Application of Union Carbide, supra*; *Valley St. Bank v. Farmers St. Bank*, 87 S.D. 614, 213 N.W.2d 459 (1973).

To assist in this process, DENR Administrative Rule ARSD 74:09:01:12 [citing, SDCL §§1-26-18 and 1-26-19.1], authorize the Hearing Chair to issue a subpoena, where required “for pre-hearing **discovery.**” (Emphasis added). Therefore, to the extent necessary for the Chair and/or Board to promote the truth finding process by ensuring disclosure by the Chief Engineer of the withheld discovery, a subpoena to appropriate DENR employees and custodians of records is hereby requested to secure pre-hearing testimony or documents sought in DRA’s First Interrogatories to the Chief Engineer.

The Legislature has recognized that the ability of a party to engage in meaningful and complete discovery is an essential component to affording parties to

² As noted by the Supreme Court, in contested cases before an administrative agency: “Discovery rules are designed ‘to compel the production of evidence and to promote, rather than stifle, the truth finding process’.” *Dudley v. Huizenga*, 2003 S.D. 84, ¶11, 667 N.W.2d 644 [quoting, *Magbuhat v. Kovarik*, 382 N.W.2d 43, 45 (S.D. 1986) (citing *Chittenden & Eastman Co. v. Smith*, 286 N.W.2d 314, 316 (S.D. 1979)].

proceedings due process rights. SDCL §15-6-26(b) addresses the scope of discovery:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of evidence. (Emphasis added).

DRA respectfully contends the information sought is relevant, would be admissible in the scheduled Hearing before this Board, and/or potentially impeaching of testimony and evidence the Applicants and DENR staff intend to present.

The South Dakota Supreme Court has ruled that the discovery rules are to be accorded a “broad and liberal treatment.” *Kaarup v. St.Paul Fire and Marine Insurance Co.*, 436 N.W.2d 17, 21 (S.D. 1989). “A broad construction of the discovery rules is necessary to satisfy the three distinct purposes of discovery:

(1) narrow the issues; (2) obtain evidence for use at trial; (3) secure information that may lead to admissible evidence at trial.” *Ibid*, 436 N.W.2d at 21 [citing, 8 C.Wright and A.Miller, Federal Practice and Procedure, §2001 (1970)].

A party’s due process rights become meaningless without discovery as are a party’s related confrontation rights afforded in SDCL §1-26-19. The right to proper

cross-examination embodied in SDCL §1-26-19, necessarily includes utilization of contrary or conflicting documents for impeachment as well as evidence or basis for questions related to bias or interest of the Chief Engineer and Staff witnesses, as well as witnesses for Applicants TCE, Wilson and/or Wink, or their employees and agents who might testify before this Board. See, SDCL §§19-19-607 thru 19-19-613; *Wendt v. Chicago, St. P., M. & O. Ry. Co.*, 4 S.D. 476, 57 N.W. 226 (1893) (“a party’s right to cross examine a witness without leave of court is...subject to any question showing the bias or prejudice of the witness, or laying the foundation to admit evidence of contradictory statements”); *Plank v. Heirigs*, 83 SD 173, 156 N.W.2d 193, (1968) (“An adverse witness on cross-examination may be required to disclose any facts which tend to show bias and interest in the action so that the trier of fact may consider it in weighing his testimony”).

In its Response, the Chief Engineer cited the “Deliberative Process Privilege” and/or “Attorney-Client Privilege” as the basis for withholding documentation of communications between TCE, the Applicant seeking public river (and indirectly public aquifer) water appropriations and the staff of the public Agency from which TCE currently seeks approval of permits. It claimed similar privileges with regard to communications between the Agency and Offices of Governors Daugaard and Noem (See, e.g., Privilege Log, 3/4/19 email, Bates Nos. WR-000065-0000077).

DRA has openly stated that it intends, where warranted, to challenge any evidence presented by the Permitting Agency Staff or Applicants regarding the four factors to be decided by the WMB for the five related water appropriation permit applications for or on behalf of TCE to obtain public water under SDCL §46-2A-9 or §46-2A-12. It is evident that a major concern of DRA's include whether the use of public water being sought by TCE would be a beneficial use thereof and if so, whether it would be in the public interest.

There are many reasons why disclosure of the withheld communications involving the DENR, two Governor's Offices, and TCE is required to afford DRA due process and in pursuit of a full disclosure of the truth surround the matters before the Board, including: the previous actions by Governor Daugaard to directly influence the Public Utilities Commission (hereinafter, "PUC") including a letter to that Agency at the start of the Re-Certification Permit Hearing to approve the TCE construction permit before it; the on-the-record assertions by PUC staff of a attorney-client privilege with the Applicant as a basis for refusing to disclose their communications; the continued assertion of attorney-client privilege here by the Chief Engineer regarding communications with the Governors' Offices and/or TCE staff; the openly partisan statements and actions of Governor Noem to let it be known her Administration is behind the private venture by this foreign, hazardous transportation

materials company despite the absence of apparent material benefits to the State; and the many communications reflected in the DENR Staff's Privilege Log which directly involve witnesses noticed by the Chief Engineer and the Applicants.

DRA is therefore, and with all due respect, serious concerned about efforts to impact the independence of this Board and any part of the process due to improper pressure resulting in influence in the Recommendations of the Chief Engineer, the Reports to the Chief Engineer, and including noticed witnesses in the pending application proceedings. In addition to potential of evidence of bias and interest of the noticed witnesses regarding various matters related to the processes of the DENR surrounding the pending permits, the withheld documents are also relevant prior statements related to their anticipated testimony including that process. When SDCL §1-26-2 expressly authorizes the public's right to inspect "all...intra-agency memoranda, together with all other materials, written statements of policy or interpretations formulated, adopted or used by the agency in the discharge of its functions," DRA wonders how the Chief Engineer can seriously argue that the numerous logged and preserved communications between the Agency and the Applicant, and the Agency and Governors' offices on these and related public permit applications and agency witnesses were not relevant and were privileged so as to prohibit disclosure to DRA in these proceedings. See Privilege Logs attached to

Chief Engineer's Response to Dakota Rural Actions Interrogatories for Applications for Water Appropriation Permits 1963A-1, 1975A-1, 1986-1, 2792-2, and 2793-2.

For example, for a withheld e-mail dated 3/7/19 (Privilege Log Bates Nos. WR_00062-00064) whose thread reportedly involved the Chief Engineer, the Director of the DENR, DENR staffers Eric Gronlund and Patel Neha, Governor Noem's aid Rachel Graves and the Governor's policy advisor Jason Simmons, it is hard to understand how such communications involving KXL and the DENR would involve or be protected from disclosure under the "attorney-client" privilege or what the Chief Engineer alternatively or simultaneously claimed under a so-called "deliberative privilege." There is no attorney named or cced in the communication and the nature of any attorney client communication is not apparent from the description in the Privilege Log. Also, it would seem that unless the WMB has an attorney-client relationship with the Governor or her staff, any such privilege was waived through third party communications with persons not covered under the privilege. If there truly is such a relationship, in any way, shape, or form between the Permitting Agency, the Applicant, and/or the Governors' Offices, it would be a troubling situation regarding the appearance of the DENR's independence. Transparency necessary for understanding and public confidence in these proceedings requires disclosure prior to the scheduled hearing and this Board determination of

what weight to give the evidence presented by Applicants and the WMB staff, including the alleged substance and credibility of any witness or the evidence from the witness.

By way of another example, the next withheld communication between the DENR staff and officials and the Governor's Office dated March 4, 2019 (Bates Nos. WR-000065-000077) included the Chief Engineer and the Secretary of the DENR regarding a report to the Governor about "pending litigation" and "TransCanada proceedings before the WMB" and hearing schedules. How such matters are non-discoverable as either protected by the attorney-client privilege or any deliberative or decision-making process is not explained by the general response.

The Chief Engineer also cited SDCL §1-27-1.9 in its Response for failing to disclose communications "used for the purpose of the decisional or deliberative process relating to any decision arising from that person's official duties." However, there is no explanation how communications between senior DENR officials, including the Secretary and the Chief Engineer with the Governor's office involve the independent Secretary's and Chief Engineer's decisional or deliberative process. If anything, it suggests the existence of relevant emails between the DENR and the Governor's office which, respectfully, may include evidence of collusion and/or bias or interest on the part of the decision-makers and noticed witnesses for the Hearings

on these permit applications.

DRA notes that SDCL §1-26-26 describes ex-parte communications exempt from compelled disclosure or testimony by agency personnel in contested cases, such as these. The exemptions are not applicable here. However, under the Statute, disclosure is also necessary and warranted since DENR staff participants in the ex-parte communications may be precluded from then testifying in these proceedings, including the Chief Engineer, Eric Gronlund, Brian Walsh, Ron Duvall, Mark Roth.

SDCL §19-19-401 states that evidence is relevant if: “(a) It has any tendency to make a fact more or less probable than it would be without the evidence; and (b) The fact is of consequence in determining the action.” See, SDCL §1-26-19 (“the rules of evidence as applied under statutory provisions...shall be followed”).

DRA respectfully submits the withheld evidence is relevant and discoverable.

DRA seeks a Motion to Compel to require disclosure of the documents listed in the Chief Engineer’s Privilege Log, submitted as part of its Responses to DRA’s Interrogatories in Application Nos. 1986-1, 2792-2, and 2793-2. DRA contends that it has a right to obtain documents which appear to relate to issues pending before the Board. Disclosure is further warranted since the documents involve matters addressed to or prior statements from the various DENR witnesses scheduled to

appear before this Board at the scheduled permit Hearings. The documents further may lead to evidence reflecting potential bias and/or interest in the witness, as well as sources of direct and indirect efforts to influence any part of the decision making process.

Due process, including the Right to Confrontation requires disclosure of these documents for which a privilege from discovery is improperly asserted and for which is otherwise required for a full presentation of the truth and fair proceedings.

DRA respectfully requests an opportunity to submit a reply to any response(s) to this Motion and at that time may request a hearing on the details of each document the Permitting Agency wants to withhold from public disclosure and potential use as evidence in these proceedings.

Dated this 23rd day of September, 2019.

/s/ Bruce Ellison
BRUCE ELLISON
Attorney for Dakota Rural Action
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Rapid City, SD 57709
belli4law@aol.com

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of DRA's Motion to Compel Discovery was filed with the Chief Engineer of the DENR c/o Eric Gronlund at eric.gronlund@state.sd.us and by U.S. mail to DENR Water Rights Program, Foss Building, 523 E. Capitol, Pierre, SD 57501 by first class mail. Also a copy was sent and served via email to:

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Sioux Falls, SD 57117-5027
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Dated this 23rd day of September, 2019.

/s/ Bruce Ellison

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

IN THE MATTER WATER	)	ORDER ON DAKOTA RURAL
APPLICATIONS NO. 1986-1, 2792-2, and	)	ACTION'S MOTION TO COMPEL
2793-2, TRANSCANADA	)	DISCOVERY FROM THE CHIEF
	)	ENGINEER OF THE DEPARTMENT OF
	)	ENVIRONMENT AND NATURAL
	)	RESOURCES
)	
)	

WHEREAS, on September 23, 2019, Dakota Rural Action (“DRA”) filed a Motion and Memorandum to Compel Discovery from the Chief Engineer of Water Management Board of Department of Environment and Natural Resources (“DENR”) or in the Alternative, Issuance of Subpoenas; and

WHEREAS, on September 27, 2019, the Chief Engineer filed her Response to Dakota Rural Action’s Second Motion to Compel Discovery.

NOW THEREFORE, no party requesting an oral argument and the issue being fully briefed by the Parties and intervenors and upon consideration of the papers filed herein, the following Order shall be entered in the above captioned action.

DISCUSSION

First, under the rules of discovery, a motion to compel is appropriate if “a party fails to answer an interrogatory[.]” *See* SDCL § 15-6-37(a)(2). However, the Chief Engineer fully answered the Interrogatories submitted to the Chief Engineer on June 9, 2019 by the DRA. To the extent DRA’s interrogatories could be construed as a request for documents, the Interrogatories, and subsequent motion

to compel, are improper under the Prehearing Chairman's Order regarding discovery which is dated May 10, 2019. Within that Order, it states as follows:

5. The Hearing Officer may issue any subpoena necessary for the conduct of any prehearing discovery or the hearing for witnesses to appear and give testimony and to produce records, books, papers and documents relating to any matters in these contested cases and likewise issue subpoenas for such purposes for persons interested therein as provided by § 15-6-45. Any party or intervenor wishing to obtain a subpoena from the Hearing Officer shall submit a written request and a proposed subpoena to the Hearing Officer.

6. Pursuant to the Board's authority to order additional discovery as set forth in SDCL § 1-26-19.2, any party or intervenor any serve upon any party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, in accordance with the requirements of SDCL § 15-6-33(a). Any interrogatory served must also be served on the Hearing Officer. All interrogatories which are going to be served must be served within 30 days of the date of this Order.

7. Except as expressly stated herein, no other discovery devices are available to the parties.

Order dated May 10, 2019, p. 5 (emphases added). Thus, under the Order allowing discovery, DRA was permitted to submit only interrogatories to the Chief Engineer or any other party and not requests for production of documents. A motion to compel contemplates the existence of an obligation to comply with a requested action. Here, due to the May 10, 2019 Order, there was no obligation for the Chief Engineer to produce documents as the DRA did not comply with the terms of the Order for document production.

Further, DRA's Motion fails to comply with the requirements of the law. DRA is making this motion pursuant to SDCL §15-6-37(a) under the Rules of Civil Procedure. This rule provides in pertinent part, as follows:

If . . . a party fails to answer an interrogatory submitted under § 15-6-33 . . . the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action.

SDCL § 15-6-37(a)(2) (emphasis added). The South Dakota Supreme Court has held that “such a certification requires the moving party to convey to the court ‘essential facts sufficient to enable the court to make a preliminary judgment on the adequacy and sincerity of the conferment.’” *Krueger v. Grinnell Mutual Reinsurance Co.*, 2018 S.D. 87, ¶ 24, 921 N.W.2d 689, 696 (citations omitted). The conferment must be more than just a demand for compliance but rather a “two-way communication”. *See id.* ¶¶ 16-19, 921 N.W.2d at 695. DRA’s Motion to Compel fails to include a certification that it conferred or attempted to confer with counsel for the Chief Engineer in good faith to resolve the discovery issues. “A failure to fulfill the meet and confer requirement in good faith often serves as a basis for denying the motion to compel.” *See id.* ¶ 20 (citations omitted).

DRA asserts that all “documents listed in the Chief Engineer’s Privilege Log” should be disclosed. *See* DRA Motion to Compel, p. 14. However, DRA does not further specify the documents counsel believes are not privileged and therefore should be disclosed.

The deliberative process privilege is codified in SDCL § 1-27-1.9 and provides “No elected or appointed official or employee of the state or any political subdivision may be compelled to provide documents, records, or communications used for the

purpose of the decisional or deliberative process relating to any decision arising from that person's official duties." "[D]eliberative process covers 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated[.]'"

Department of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8, 121 S. Ct. 1060, 1065-66, 149 L.Ed. 2d 87 (2001). *See also Boneshirt v. Hazeltine*, D.S.D. Civ. 01-3032 (Order Denying Motion to Compel dated December 30, 2003); and SDCL § 1-27-1.9. "The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance 'the quality of agency decisions,' by protecting open and frank discussion among those who make them within the Government[.]" *Klamath Water Users Protective Ass'n*, 532 U.S. at 8-9, 121 S. Ct. at 1066 (citations omitted).

Likewise, the attorney-client privilege protects communications regarding the legal advice, including advice of counsel as to legal strategies and potential outcomes. The attorney-client privilege applies to communications not just between the lawyer and the client but also between representatives of the client. *See* SDCL § 19-19-502. Discussions regarding pending litigation between representatives of the executive state agency involved in the litigation and the State's top executive fall within the protections of the privilege. Thus, it is clear that the discussions regarding the drafting of answers to questions and legal documents, and discussions of pending litigation are entitled to protection.

The documents listed in the Privilege Log deal with deliberations as to drafting of documents and answers and discussions about policy and how to deal with future proceedings and litigation. These documents are not necessary for DRA to conduct an effective cross examination. DRA has not demonstrated a compelling need for these documents.

DRA further implies that the documents must be disclosed pursuant to SDCL § 1-26-2 because the communications constitute “all other materials . . . used by the agency in the discharge of its functions[.]” (*See* Motion at 11.) DRA additionally asserts that DENR staff may be precluded from testifying under the same. South Dakota Codified Law, section 1-26-2 provides as follows:

Each agency shall make available for public inspection all rules, final orders, decisions, opinions, intra-agency memoranda, together with all other materials, written statements of policy or interpretations formulated, adopted, or used by the agency in the discharge of its functions. An agency shall hold confidential materials derogatory to a person but such information shall be made available to the person to whom it relates.

With regard to whether this statute requires the disclosure of the documents listed in the Privilege Log, the South Dakota Supreme Court has held that:

SDCL ch 1-26 is the South Dakota Administrative Procedures Act. . . Applying the principle of *eiusdem generis*, “all other materials” is limited to the context of promulgation of administrative rules and resolution of administrative proceedings. Construing the language “all other materials” to provide public inspection of any document in the possession of an agency would be an absurd and unreasonable application of the statute.

Argus Leader v. Hagen, 2007 S.D. 96, ¶ 19, 739 N.W.2d 475, 481. Here, the communications at issue were not made in “the context of promulgation of administrative rules and resolution of administrative proceedings.” *See id.* Thus,

DRA's argument that documents must be disclosed pursuant to SDCL §1-26-2 is without merit.

Finally, DRA contends that the documents should be disclosed to determine if the individuals who participated in these privileged communications should be precluded from testifying pursuant to SDCL § 1-26-26. South Dakota Codified Law, section 1-26-26 provides:

Unless required for the disposition of ex parte matters authorized by law, members of the governing board or officers or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. If one or more members of a board or commission or member or employee of an agency, who is assigned to render a decision in a contested case, took part in an investigation upon which the contested case is based, he shall not participate in the conduct of the hearing nor take part in render the decision thereon, but he may appear as a witness and give advice as to procedure. If, because of such disqualification, there is no person assigned to conduct the hearing or render the decision, the agency shall appoint someone pursuant to § 1-26-18.1 to fulfill those duties. A person assigned to render a decision:

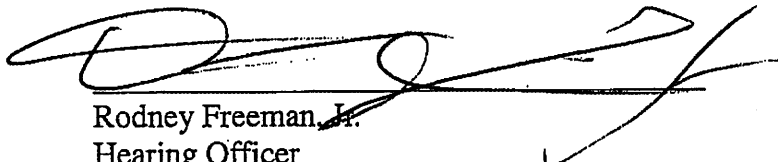
- (1) May communicate with other members of the agency; and
- (2) May have the aid and advice of one or more personal representatives.

(Emphasis added). In this instance, neither the Chief Engineer nor members of the Water Rights staff are charged with rendering a decision or issuing findings of fact or conclusions of law in a contested case regarding water appropriation. Rather, the Chief Engineer makes a determination which is then publicly noticed. *See* SDCL §§ 46-2A-2, 46-2A-3. The matter does not become a contested case unless is it noticed pursuant to SDCL § 46-2A-23 wherein the Chief Engineer has determined it

is a matter which should be brought before the Board or if it is noticed pursuant to SDCL § 46-2A-4 and petitions to intervene are submitted. Neither the Chief Engineer nor any member of the DENR staff are rendering a decision or findings in this contested case. Accordingly, SDCL § 1-26-26 is inapplicable to this situation.

For the reasons set forth herein, DRA's Motion to Compel Discovery from the Chief Engineer is hereby **DENIED** in its entirety. The Alternative relief requested by the DRA is likewise **DENIED** as the DRA failed to comply with the requirements of the Order of the Prehearing Chairman dated May 10, 2019.

Dated this 30th day of September, 2019.



Rodney Freeman, Jr.
Hearing Officer
South Dakota Water Management Board

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
WATER MANAGEMENT BOARD

IN THE MATTER WATER	)	ORDER ON DAKOTA RURAL
APPLICATIONS NO. 1986-1, 2792-2, and	)	ACTION'S MOTION TO COMPEL
2793-2, TRANSCANADA	)	DISCOVERY FROM TRANSCANADA
)	
)	
)	
)	
)	

WHEREAS, on August 27, 2019, Dakota Rural Action (“DRA”) filed a Motion and Memorandum to Compel Discovery from TransCanada and/or Issuance of Subpoenas; and

NOW THEREFORE, no party requesting an oral argument and upon consideration of the papers filed herein, the following Order shall be entered in the above captioned action.

DISCUSSION

First, under the rules of discovery, a motion to compel is appropriate if “a party fails to answer an interrogatory[.]” *See* SDCL § 15-6-37(a)(2). To the extent DRA’s interrogatories could be construed as a request for documents, the Interrogatories, and subsequent motion to compel, are improper under the Prehearing Chairman’s Order regarding discovery which is dated May 10, 2019.

Within that Order, it states as follows:

5. The Hearing Officer may issue any subpoena necessary for the conduct of any prehearing discovery or the hearing for witnesses to appear and give testimony and to produce records, books, papers and documents relating to any matters in these contested cases and likewise issue subpoenas for such purposes for persons interested therein as provided by § 15-6-45. Any party or intervenor wishing to obtain a subpoena from the Hearing Officer shall submit a written request and a proposed subpoena to the Hearing Officer.

6. Pursuant to the Board's authority to order additional discovery as set forth in SDCL § 1-26-19.2, any party or intervenor may serve upon any party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, in accordance with the requirements of SDCL § 15-6-33(a). Any interrogatory served must also be served on the Hearing Officer. All interrogatories which are going to be served must be served within 30 days of the date of this Order.

7. Except as expressly stated herein, no other discovery devices are available to the parties.

Order dated May 10, 2019, p. 5 (emphases added). Thus, under the Order allowing discovery, DRA was permitted to submit only interrogatories to TransCanada or any other party and not requests for production of documents. A motion to compel contemplates the existence of an obligation to comply with a requested action. Here, due to the May 10, 2019 Order, there was no obligation for TransCanada to produce documents as the DRA did not comply with the terms of the Order for document production.

Further, DRA's Motion fails to comply with the requirements of the law. DRA is making this motion pursuant to SDCL §15-6-37(a) under the Rules of Civil Procedure. This rule provides in pertinent part, as follows:

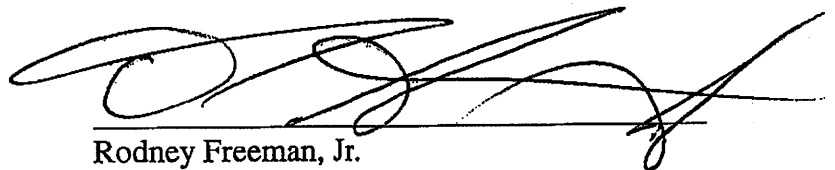
If . . . a party fails to answer an interrogatory submitted under § 15-6-33 . . . the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action.

SDCL § 15-6-37(a)(2) (emphasis added). The South Dakota Supreme Court has held that "such a certification requires the moving party to convey to the court 'essential facts sufficient to enable the court to make a preliminary judgment on the adequacy

and sincerity of the conferment.” *Krueger v. Grinnell Mutual Reinsurance Co.*, 2018 S.D. 87, ¶ 24, 921 N.W.2d 689, 696 (citations omitted). The conferment must be more than just a demand for compliance but rather a “two-way communication”. *See id.* ¶¶ 16-19, 921 N.W.2d at 695. DRA’s Motion to Compel fails to include a certification that it conferred or attempted to confer with counsel for TransCanada in good faith to resolve the discovery issues. “A failure to fulfill the meet and confer requirement in good faith often serves as a basis for denying the motion to compel.” *See id.* ¶ 20 (citations omitted).

For the reasons set forth herein, DRA’s Motion to Compel Discovery TransCanada is hereby DENIED in its entirety. The request for issuance of subpoenas by the DRA is likewise DENIED as the DRA failed to comply with the requirements set forth in the Order of the Prehearing Chairman dated May 10, 2019 regarding document production.

Dated this 30th day of September, 2019.



Rodney Freeman, Jr.
Hearing Officer
South Dakota Water Management Board

**BEFORE THE WATER MANAGEMENT BOARD
OF THE DEPARTMENT OF ENVIRONMENT AND NATURAL
RESOURCES**

**IN RE APPLICATION OF TOM AND LORI
WILSON FOR WATER PERMIT NO. 1963A-1
FOR USE AS BACKUP WATER SUPPLY
FOR TRANSCANADA MAN CAMPS**

**DAKOTA RURAL ACTION'S MOTION AND MEMORANDUM TO
COMPEL DISCOVERY FROM TOM AND LORI WILSON OR FOR
ISSUANCE OF SUBPOENAS**

Pursuant to SDCL §1-26-18, §1-26-19, and §15-6-37(a), Dakota Rural Action (hereinafter, "DRA"), by and through the below-signed Attorney, hereby moves the Water Management Board for an Order compelling the Applicant to provide answers to certain of DRA's First Interrogatories to the Wilsons and to produce related documents. The Applicant seeks to divert public aquifer water for use as the backup water supply for all the man camps in South Dakota and two in Montana that TransCanada Energy (hereinafter, "TCE") wants to build to house out-of-state workers constructing the KXL hazardous materials transportation pipeline.

DRA has sought by Interrogatories information and documents related to conversations regarding and agreement(s) that Applicant has made with TCE to purchase the public water previously appropriated by the Water Management Board (hereinafter, "WMB") to Applicant has appropriated for other purposes

under WAP 1963-1, together with other benefits and considerations provided, offered, or reasonably expected by the Wilsons from TCE for use of Applicants' land for a TCE man camp or other related matters.

The Applicants, in Tom and Lori Wilson's Answers to DRA's First Interrogatories 18-22, in largely refusing to answer these Interrogatories or produce related documents, claimed the answers were not relevant to the matters before this Board and would not lead to discovery of admissible evidence. It also asserted that agreements as to compensation paid a landowner for things like sale of public water would be a "trade secret" since it would hide from other landowners what the Wilsons have been and have been promised in total by TCE, a rather self-interested and curious position for a SD landowner and not TCE to assert in this proceeding - which suggests evidence of bias and interest in the outcome.

DRA respectfully submits the information sought and documents requested are relevant, discoverable, and admissible, or would reasonably lead to discoverable and consequential evidence related to whether the proposed use of water for which this Board's approval is sought would be a beneficial use and if so, whether it would be in the public interest under SDCL §46-2A-12. Such answers and documents would also constitute evidence reflecting a bias and/or interest in Applicant's favorable testimony regarding the credibility of the Applicant or the Applicant's evidence regarding other factors to be determined at the scheduled Hearing regarding this Permit Application. The information and document sought by DRA are specific and cannot seriously be claimed to be a "fishing expedition," which would be improper.

SDCL §19-19-401 states that evidence is relevant if: "(a) It has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) The fact is of consequence in determining the action.” See, SDCL §1-26-19 (“the rules of evidence as applied under statutory provisions...shall be followed”).

In *Application of Union Carbide Corp.*, 308 N.W.2d 753 (S.D. 1981), the Supreme Court held that in permit proceedings before the South Dakota Conservation Commission [a predecessor to the DENR], a new permit hearing was required where the Commission failed to afford an environmental organization and various individuals their due process rights under the South Dakota Administrative Procedures Act SDCL Chapter 1-26 (including SDCL §§1-26-18 and 1-26-19). As the Supreme Court affirmed in *Matter of South Dakota Water Management Board.*, 351 N.W.2d 119 (S.D. 1984): “It is certainly correct that due process rights apply to contested cases before administrative agencies.” *Ibid* [citing, *Application of Union Carbide Corp.*, 308 N.W.2d 753 (S.D. 1981)]. See, *Daily v. City of Sioux Falls*, 2011 S.D. 48, ¶18, 802 N.W.2d 905 [citing with approval, *Carey v. Piphus*, 435 U.S. 247, 262 (1978) (“One ‘purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly’ ...”)].

In the exercise of its due process rights, the Legislature has provided that in contested cases, such as this one, a party has the right to a “reasonable opportunity to inspect **all** documentary evidence” [SDCL §1-26-18(2)]¹ encompassing a party’s right to cross-examine witnesses [“ required for a full and true disclosure of the facts,” SDCL §1-26-19(2)], use the subpoena power for witnesses and

¹ As noted by the Supreme Court, in contested cases before an administrative agency: “Discovery rules are designed ‘to compel the production of evidence and to promote, rather than stifle, the truth finding process’.” *Dudley v. Huizenga*, 2003 S.D. 84, ¶11, 667 N.W.2d 644 [quoting, *Magbuhat v. Kovarik*, 382 N.W.2d 43, 45 (S.D. 1986) (citing *Chittenden & Eastman Co. v. Smith*, 286 N.W.2d 314, 316 (S.D. 1979)].

evidence, and to present evidence “in its interest” [SDCL §1-26-18(2)]. See, *Application of Union Carbide, supra; Valley St. Bank v. Farmers St. Bank*, 87 S.D. 614, 213 N.W.2d 459 (1973).

To assist in this process, DENR Administrative Rule ARSD 74:09:01:12 [citing, SDCL §§1-26-18 and 1-26-19.1], authorize the Hearing Chair to issue a subpoena, where required “for pre-hearing **discovery.**” (Emphasis added). Therefore, to the extent necessary for the Chair and/or Board to promote, rather than stifle the truth finding process by ensuring disclosure of withheld or refused discovery requested by DRA, a subpoena to the Wilsons or appropriate Wilson employees and custodians of records is hereby requested to secure pre-hearing testimony or documents sought in DRA’s First Interrogatories to TCE.

The Legislature has recognized that the ability of a party to engage in meaningful and complete discovery is an essential component to affording parties to proceedings due process rights. SDCL §15-6-26(b) addresses the scope of discovery:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the

discovery of evidence. (Emphasis added).

The South Dakota Supreme Court has ruled that the discovery rules are to be accorded a “broad and liberal treatment.” *Kaarup v. St.Paul Fire and Marine Insurance Co.*, 436 N.W.2d 17, 21 (S.D. 1989). “A broad construction of the discovery rules is necessary to satisfy the three distinct purposes of discovery:

(1) narrow the issues; (2) obtain evidence for use at trial; (3) secure information that may lead to admissible evidence at trial.” *Ibid*, 436 N.W.2d at 21 [citing, 8 C.Wright and A.Miller, Federal Practice and Procedure, §2001 (1970)].

A party’s due process rights become meaningless without discovery as are a party’s related confrontation rights afforded in SDCL §1-26-19. The right to proper cross-examination embodied in SDCL §1-26-19, necessarily includes utilization of contrary or conflicting documents for impeachment as well as evidence or basis for questions related to bias or interest of Applicants Wilson and Wink, or their employees and agents who might testify due to financial or other considerations offered, provided, or reasonably expected by witness in return for cooperative and TCE friendly testimony before this Board. See, SDCL §§19-19-607 thru 19-19-613; *Wendt v. Chicago, St. P., M. & O. Ry. Co.*, 4 S.D. 476, 57 N.W. 226 (1893)(“a party’s right to cross examine a witness without leave of court is...subject to any question showing the bias or prejudice of the witness, or laying the foundation to admit evidence of contradictory statements”); *Plank v. Heirigs*, 83 SD 173, 156 N.W.2d 193, (1968) (“An adverse witness on cross-examination may be required to disclose any facts which tend to show bias and interest in the action so that the trier of fact may consider it in weighing his testimony”).

DRA Interrogatories 18-22 seek the Wilsons’ knowledge and the

identification

and disclosure of documents reflecting what agreement(s) they have with TransCanada, and related contacts or communications regarding financial and related agreements for the proposed use of their land on which to construct and operate a man camp, related to their application for public water appropriation permit(s) or amendments obtained, as well as being pursued herein, and regarding the compensation they have or expect to receive from TCE by selling public water from their wells.

Since such compensation and related matters negotiated and pending between the Wilsons and TCE involving the sale and use of public water would further relate to whether the proposed use to divert water also for use for six or more man camps rather than one, would be a beneficial use by the Applicant and whether it would be in the public interest of the Peoples of South Dakota would be relevant to the determination of the Board of whether to grant or deny the Application under SDCL §46-2A-12.

Information regarding pending or final negotiations and agreements between the Applicants and their financially interconnected Applicant TCE related water appropriation permit applications for additional uses of public water (in this case no financial compensation per gallon for the State or the People), it would be reasonably calculated to lead to the location of potential impeaching evidence including regarding potential bias or interest of the Wilsons and TransCanada staff witnesses at the hearing on the merits of and thus relevant to the pending Applications. Due process requires the Wilsons be compelled to fully answer the Interrogatories and provide documents related thereto.

Dated this 18th day of September, 2019.

/s/ Bruce Ellison
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Attorney for Dakota Rural Action

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of DRA's Motion to Compel was filed with the Chief Engineer of the DENR c/o Eric Gronlund at eric.gronlund@state.sd.us and with a hard-copy to be placed in U.S. mail to DENR Water Rights Program, Foss Building, 523 E. Capitol, Pierre, SD 57501 by first class mail. Also on this day, a copy was sent and served via email to:

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Dated this 18th day of September, 2019.

/s/ Bruce Ellison

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TATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

IN THE MATTER WATER	)	ORDER ON DAKOTA RURAL
APPLICATION NO. 1963A-1, TOM	)	ACTION'S MOTION TO COMPEL
AND LORI WILSON	)	DISCOVERY FROM TOM AND LORI
	)	WILSON
)	
)	
)	
)	

WHEREAS, on August 27, 2019, Dakota Rural Action (“DRA”) filed a Motion and Memorandum to Compel Discovery from Tom and Lori Wilson (the “Wilsons”) and/or Issuance of Subpoenas; and

NOW THEREFORE, no party requesting an oral argument and upon consideration of the papers filed herein, the following Order shall be entered in the above captioned action.

DISCUSSION

First, under the rules of discovery, a motion to compel is appropriate if “a party fails to answer an interrogatory[.]” See SDCL § 15-6-37(a)(2). To the extent DRA’s interrogatories could be construed as a request for documents, the Interrogatories, and subsequent motion to compel, are improper under the Prehearing Chairman’s Order regarding discovery which is dated May 10, 2019.

Within that Order, it states as follows:

5. The Hearing Officer may issue any subpoena necessary for the conduct of any prehearing discovery or the hearing for witnesses to appear and give testimony and to produce records, books, papers and documents relating to any matters in these contested cases and likewise issue subpoenas for such purposes for persons interested therein as provided by § 15-6-45. Any party or intervenor wishing to obtain a subpoena from the Hearing

Officer shall submit a written request and a proposed subpoena to the Hearing Officer.

6. Pursuant to the Board's authority to order additional discovery as set forth in SDCL § 1-26-19.2, any party or intervenor any serve upon any party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, in accordance with the requirements of SDCL § 15-6-33(a). Any interrogatory served must also be served on the Hearing Officer. All interrogatories which are going to be served must be served within 30 days of the date of this Order.

7. Except as expressly stated herein, no other discovery devices are available to the parties.

Order dated May 10, 2019, p. 5 (emphases added). Thus, under the Order allowing discovery, DRA was permitted to submit only interrogatories to the Wilsons or any other party and not requests for production of documents. A motion to compel contemplates the existence of an obligation to comply with a requested action. Here, due to the May 10, 2019 Order, there was no obligation for the Wilsons to produce documents as the DRA did not comply with the terms of the Order for document production.

Further, DRA's Motion fails to comply with the requirements of the law. DRA is making this motion pursuant to SDCL §15-6-37(a) under the Rules of Civil Procedure. This rule provides in pertinent part, as follows:

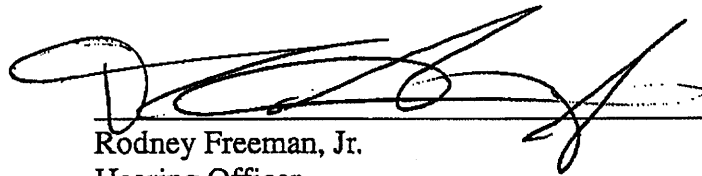
If . . . a party fails to answer an interrogatory submitted under § 15-6-33 . . . the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action.

SDCL § 15-6-37(a)(2) (emphasis added). The South Dakota Supreme Court has held that "such a certification requires the moving party to convey to the court 'essential

facts sufficient to enable the court to make a preliminary judgment on the adequacy and sincerity of the conferment.” *Krueger v. Grinnell Mutual Reinsurance Co.*, 2018 S.D. 87, ¶ 24, 921 N.W.2d 689, 696 (citations omitted). The conferment must be more than just a demand for compliance but rather a “two-way communication”. *See id.* ¶¶ 16-19, 921 N.W.2d at 695. DRA’s Motion to Compel fails to include a certification that it conferred or attempted to confer with counsel for the Wilsons in good faith to resolve the discovery issues. “A failure to fulfill the meet and confer requirement in good faith often serves as a basis for denying the motion to compel.” *See id.* ¶ 20 (citations omitted).

For the reasons set forth herein, DRA’s Motion to Compel Discovery from the Wilsons is hereby **DENIED** in its entirety. The request for issuance of subpoenas by the DRA is likewise **DENIED** as the DRA failed to comply with the requirements set forth in the Order of the Prehearing Chairman dated May 10, 2019 regarding document production.

Dated this 30 day of September, 2019.



Rodney Freeman, Jr.
Hearing Officer
South Dakota Water Management Board

**BEFORE THE WATER MANAGEMENT BOARD
OF THE DEPARTMENT OF ENVIRONMENT AND NATURAL
RESOURCES**

**IN RE APPLICATION OF WINK CATTLE CO. C/O
DEAN WINK FOR WATER PERMIT NO. 1975A-1
FOR USE AS BACKUP WATER SUPPLY
FOR TRANSCANADA MAN CAMPS**

**DAKOTA RURAL ACTION'S MOTION AND MEMORANDUM TO
COMPEL DISCOVERY FROM WINK CATTLE CO. C/O DEAN WINK
OR FOR ISSUANCE OF SUBPOENAS**

Pursuant to SDCL §1-26-18, §1-26-19, and §15-6-37(a), Dakota Rural Action (hereinafter, "DRA"), by and through the below-signed Attorney, hereby moves the Water Management Board for an Order compelling the Applicant to provide answers to certain of DRA's First Interrogatories to the Wink Cattle Company c/o Dean Wink (hereinafter, "Wink") and to produce related documents. The Applicant seeks to divert public aquifer water for use as the backup water supply for all the man camps in South Dakota and two in Montana that TransCanada Energy (hereinafter, "TCE") wants to build to house out-of-state workers constructing the KXL hazardous materials transportation pipeline through South Dakota.

DRA has sought by Interrogatories information and documents related to communications regarding and agreement(s) that Applicant has made or is still negotiating with TCE to purchase the public water previously appropriated by the Water Management Board (hereinafter, "WMB") to Applicant for other purposes under WAP 1975-1, together with other benefits and considerations provided, offered, or reasonably expected by Wink from TCE's purchase of public water through and from Applicant, the financial net enhancement which would result by a granting of the diversion of public water to service up to six or more other man camps in South Dakota and Montana.

In the Wink Cattle Company's Answers to DRA's First Interrogatories 18-20, Applicant largely refused to answer or produce related documents and claimed the answers were not relevant to the matters before this Board and would not lead to discovery of admissible evidence. It also asserted that agreements as to compensation paid a landowner for things like sale of public water would be a "trade secret" since it would hide from other landowners what Wink has received and has been promised in total by TCE, a rather self-interested and curious position for a SD landowner and not TCE to assert in this proceeding - which suggests itself the existence of evidence reflective of an existing bias and interest in the outcome by the Applicant and therefore discoverable.

DRA respectfully submits the information sought and documents requested are relevant, discoverable, and admissible, or would reasonably lead to discoverable and consequential evidence related to whether the proposed use of water for which this Board's approval is sought would be a beneficial use and if so, whether it would be in the public interest under SDCL §46-2A-12. Such answers and documents would also constitute evidence reflecting a bias and/or interest in Applicant's favorable testimony regarding the credibility of the Applicant or the Applicant's evidence regarding other factors to be determined at the scheduled Hearing regarding this Permit Application. The information and document sought by DRA are specific and cannot seriously be claimed to be a "fishing expedition," which would be improper.

SDCL §19-19-401 states that evidence is relevant if: "(a) It has any tendency to make a fact more or less probable than it would be without the evidence; and (b) The fact is of consequence in determining the action." See, SDCL §1-26-19 ("the rules of evidence as applied under statutory provisions...shall be followed").

As the Supreme Court affirmed in *Matter of South Dakota Water Management Board*, 351 N.W.2d 119 (S.D. 1984): "It is certainly correct that due process rights apply to contested cases before administrative agencies." *Ibid* [citing, *Application of Union Carbide Corp.*, 308 N.W.2d 753 (S.D. 1981)]. See, *Daily v. City of Sioux Falls*, 2011 S.D. 48, ¶18, 802 N.W.2d 905 [citing with approval, *Carey v. Piphus*, 435

U.S. 247, 262 (1978) (“One ‘purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly’...”).

In a statutory guarantee of due process rights, the Legislature has provided that in contested agency permit cases, such as this one, a party has the right to a “reasonable opportunity to inspect **all** documentary evidence” [SDCL §1-26-18(2)]¹ encompassing a party’s right to cross-examine witnesses [“required for a full and true disclosure of the facts,” SDCL §1-26-19(2)], use the subpoena power for witnesses and evidence, and to present evidence “in its interest” [SDCL §1-26-18(2)]. See, *Application of Union Carbide, supra*; *Valley St. Bank v. Farmers St. Bank*, 87 S.D. 614, 213 N.W.2d 459 (1973).

To assist in this process, DENR Administrative Rule ARSD 74:09:01:12 [citing, SDCL §§1-26-18 and 1-26-19.1], authorize the Hearing Chair to issue a subpoena, where required “for pre-hearing **discovery.**” (Emphasis added). Therefore, to the extent necessary for the Chair and/or Board to promote, rather than stifle the truth finding process by ensuring disclosure of withheld or refused discovery requested by DRA, a subpoena to Wink or appropriate Wink employees

¹ As noted by the Supreme Court, in contested cases before an administrative agency: “Discovery rules are designed ‘to compel the production of evidence and to promote, rather than stifle, the truth finding process’.” *Dudley v. Huizenga*, 2003 S.D. 84, ¶11, 667 N.W.2d 644 [quoting, *Magbuhat v. Kovarik*, 382 N.W.2d 43, 45 (S.D. 1986) (citing *Chittenden & Eastman Co. v. Smith*, 286 N.W.2d 314, 316 (S.D. 1979)].

and custodians of records is hereby requested to secure pre-hearing testimony or documents sought in DRA's First Interrogatories to TCE.

The Legislature has recognized that the ability of a party to engage in meaningful and complete discovery is an essential component to affording parties to proceedings due process rights. SDCL §15-6-26(b) addresses the scope of discovery:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of evidence. (Emphasis added).

The South Dakota Supreme Court has ruled that the discovery rules are to be accorded a "broad and liberal treatment." *Kaarup v. St.Paul Fire and Marine Insurance Co.*, 436 N.W.2d 17, 21 (S.D. 1989). "A broad construction of the discovery rules is necessary to satisfy the three distinct purposes of discovery: (1) narrow the issues; (2) obtain evidence for use at trial; (3) secure information that may lead to admissible evidence at trial." *Ibid*, 436 N.W.2d at 21 [citing, 8 C.Wright and A.Miller, Federal Practice and Procedure, §2001 (1970)].

A party's due process rights become meaningless without discovery as are a

party's related confrontation rights afforded in SDCL §1-26-19. The right to proper cross-examination embodied in SDCL §1-26-19, necessarily includes utilization of contrary or conflicting documents for impeachment as well as evidence or basis for questions related to bias or interest of Applicant Wink, or its employees and agents who might testify due to financial or other considerations offered, provided, or reasonably expected by witness in return for cooperative and TCE friendly testimony before this Board. See, SDCL §§19-19-607 thru 19-19-613; *Wendt v. Chicago, St. P., M. & O. Ry. Co.*, 4 S.D. 476, 57 N.W. 226 (1893)("a party's right to cross examine a witness without leave of court is...subject to any question showing the bias or prejudice of the witness, or laying the foundation to admit evidence of contradictory statements"); *Plank v. Heirigs*, 83 SD 173, 156 N.W.2d 193, (1968) ("An adverse witness on cross-examination may be required to disclose any facts which tend to show bias and interest in the action so that the trier of fact may consider it in weighing his testimony").

DRA Interrogatories 18-20 seek the Wink's knowledge and the identification and disclosure of documents reflecting what agreement(s) they have with TransCanada, and related contacts or communications regarding financial and related agreements for the proposed use of their land on which to construct and operate a man camp, related to their application for public water appropriation permit(s) or

amendments obtained and regarding the compensation they have or expect to receive from TCE by selling public water from their wells.

Since such compensation and related matters negotiated and pending between the Wink and TCE involving the sale and use of public water would further be related to whether the proposed use to divert water also for use for six or more KXL pipeline worker construction camps rather than one, would be a beneficial use by the Applicant and whether it would be in the public interest of the Peoples of South Dakota and therefore would be relevant to the determination of the Board of whether to grant or deny the Application under SDCL §46-2A-12.

Information regarding pending or final negotiations and agreements between the Applicants and their financially interconnected Applicant-TCE, related water appropriation permit applications for additional uses of public water (with no financial compensation per gallon for the State or the People), would reasonably be calculated to lead to the location of potential impeaching evidence including regarding potential bias or self-interest of Wink and TransCanada staff witnesses at the hearing on the merits of and thus relevant to the pending Applications. Due process requires Wink be compelled to fully answer the Interrogatories and provide documents related thereto.

Dated this 23rd day of September, 2019.

/s/ Bruce Ellison

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P.O. Box 2508
Rapid City, SD 57709
belli4law@aol.com

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of DRA's Motion to Compel was filed with the Chief Engineer of the DENR c/o Eric Gronlund at eric.gronlund@state.sd.us and with a hard-copy to be placed in U.S. mail to DENR Water Rights Program, Foss Building, 523 E. Capitol, Pierre, SD 57501 by first class mail. Also on this day, a copy was sent and served via email to:

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Dated this 23rd day of September, 2019.

/s/ Bruce Ellison

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STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

IN THE MATTER WATER) APPLICATION NO. 1975A-1, WINK) CATTLE COMPANY))))))))	ORDER ON DAKOTA RURAL ACTION'S MOTION TO COMPEL DISCOVERY FROM WINK CATTLE CO. C/O DEAN WINK
--	---	---

WHEREAS, on September 23, 2019, Dakota Rural Action ("DRA") filed a Motion and Memorandum to Compel Discovery from the Wink Cattle Co. ("Wink") and/or Issuance of Subpoenas; and

NOW THEREFORE, no party requesting an oral argument and upon consideration of the papers filed herein, the following Order shall be entered in the above captioned action.

DISCUSSION

First, under the rules of discovery, a motion to compel is appropriate if "a party fails to answer an interrogatory[.]" See SDCL § 15-6-37(a)(2). To the extent DRA's interrogatories could be construed as a request for documents, the Interrogatories, and subsequent motion to compel, are improper under the Prehearing Chairman's Order regarding discovery which is dated May 10, 2019. Within that Order, it states as follows:

5. The Hearing Officer may issue any subpoena necessary for the conduct of any prehearing discovery or the hearing for witnesses to appear and give testimony and to produce records, books, papers and documents relating to any matters in these contested cases and likewise issue subpoenas for such purposes for persons interested therein as provided by § 15-6-45. Any party or intervenor wishing to obtain a subpoena from the Hearing

Officer shall submit a written request and a proposed subpoena to the Hearing Officer.

6. Pursuant to the Board's authority to order additional discovery as set forth in SDCL § 1-26-19.2, any party or intervenor any serve upon any party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, in accordance with the requirements of SDCL § 15-6-33(a). Any interrogatory served must also be served on the Hearing Officer. All interrogatories which are going to be served must be served within 30 days of the date of this Order.

7. Except as expressly stated herein, no other discovery devices are available to the parties.

Order dated May 10, 2019, p. 5 (emphases added). Thus, under the Order allowing discovery, DRA was permitted to submit only interrogatories to Wink or any other party and not requests for production of documents. A motion to compel contemplates the existence of an obligation to comply with a requested action. Here, due to the May 10, 2019 Order, there was no obligation for Wink to produce documents as the DRA did not comply with the terms of the Order for document production.

Further, DRA's Motion fails to comply with the requirements of the law. DRA is making this motion pursuant to SDCL §15-6-37(a) under the Rules of Civil Procedure. This rule provides in pertinent part, as follows:

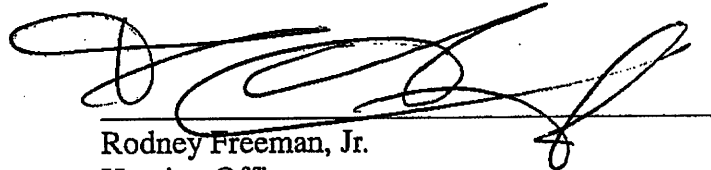
If . . . a party fails to answer an interrogatory submitted under § 15-6-33 . . . the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action.

SDCL § 15-6-37(a)(2) (emphasis added). The South Dakota Supreme Court has held that "such a certification requires the moving party to convey to the court 'essential

facts sufficient to enable the court to make a preliminary judgment on the adequacy and sincerity of the conferment.” *Krueger v. Grinnell Mutual Reinsurance Co.*, 2018 S.D. 87, ¶ 24, 921 N.W.2d 689, 696 (citations omitted). The conferment must be more than just a demand for compliance but rather a “two-way communication”. *See id.* ¶¶ 16-19, 921 N.W.2d at 695. DRA’s Motion to Compel fails to include a certification that it conferred or attempted to confer with counsel for Wink in good faith to resolve the discovery issues. “A failure to fulfill the meet and confer requirement in good faith often serves as a basis for denying the motion to compel.” *See id.* ¶ 20 (citations omitted).

For the reasons set forth herein, DRA’s Motion to Compel Discovery from Wink is hereby **DENIED** in its entirety. The request for issuance of subpoenas by the DRA is likewise **DENIED** as the DRA failed to comply with the requirements set forth in the Order of the Prehearing Chairman dated May 10, 2019 regarding document production.

Dated this 30 ^{gh} day of September, 2019.



Rodney Freeman, Jr.
Hearing Officer
South Dakota Water Management Board

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

IN THE MATTER OF WATER)	
APPLICATIONS NOS. 1986-1,)	
2792-2, and 2793-2, TRANSCANADA	)	CHIEF ENGINEER'S
KEYSTONE PIPELINE, LP	)	MOTION IN LIMINE

Comes now, the Chief Engineer and the Water Rights Program and hereby requests the preclusion of those documents, witnesses, and proffered experts which were not properly disclosed pursuant to the Prehearing Chairman's Order dated March 15, 2019, and the Board's oral order issued at the July 17, 2019 meeting. This motion is based upon procedural grounds only. The Chief Engineer reserves the right to assert other objections to proffered experts, witnesses, and exhibits.

BACKGROUND

These applications were publicly noticed at the end of January/beginning of February of 2019 and initially set for hearing on March 6, 2019, before the Water Management Board. Parties wishing to intervene in the matter were required to do so by February 25, 2019. After submitting petitions for intervention, a number of the intervenors requested the automatic delay of the hearing. The matter was then rescheduled for the May 2019 meeting. Given the number of intervenors, many of whom are unfamiliar with proceedings before the Board, counsel for the Chief Engineer moved for a procedural and scheduling order. On March 15, 2019, the

Prehearing Chairman entered such an order. It provides, in pertinent part, as follows:

2. The following pre-hearing schedule and obligations apply to Applicant, DENR, and all other parties:

a) Each party shall disclose in writing the names of any expert that party intends to call as a witness at the hearing of this matter on or before April 8, 2019. This disclosure must include copies of any curricula vitae, along with copies of any expert report the party intends to offer. If an expert report has not been prepared, the parties shall disclose a summary statement of the anticipated testimony the expert will provide and the methodology used by the expert to reach his/her conclusions.

...

c) Each party shall disclose in writing the name and contact information for any and all witnesses that the party expects to call during the hearing of this matter on or before April 29, 2019. This disclosure must include a brief one or two sentence summary of each witness' expected testimony.

d) Each party shall provide in writing a list identifying all exhibits that party intends to offer into evidence in its case in chief at the hearing and copies of said exhibits on or before April 29, 2019. Copies of the exhibits, with the exception of the administrative file, shall be provided to the parties. The copies may be provided by electronic means.

Prior to the May hearing, motions for an enlargement of time were filed by several of the intervenors and those motions were granted. However, the expert disclosure deadline was not extended. In the April 25, 2019 Order, the remaining deadlines were suspended and to be rescheduled by the entire Board at the May meeting. At the May meeting, it was determined that the parties should be allowed to engage in limited discovery. As a result, the Board chose to wait to set the final hearing dates until the July 2019 meeting.

At the July meeting, the Board set the final hearing dates: October 3-4, and 29-31, 2019. The Board also set the dates for disclosure of witnesses and exchange of exhibits as August 30, 2019. See <https://boardsandcommissions.sd.gov/Meetings.aspx?BoardID=106> , July 17, 2019 meeting at approximately 1:13:00. Again, the Board specifically ordered names and contact information for witnesses be disclosed as well as copies of the exhibits be provided. The Board also acknowledged at this hearing that the expert deadline had not been extended.

DISCUSSION

A. Experts

As noted above, the parties were ordered to disclose experts and their accompanying curricula vitae/resumes and reports. If a report was not available, the parties were to provide a description, including methodology, of the expert's opinion. Mniwakan Nakicijinpi has designated the following individuals as experts that it intends to rely upon: Steve Vance, Carlyle Ducheneaux, Leo Fischer, Jr., and Cheryl Chapman. Though a brief sentence is provided describing the anticipated testimony from each, Mniwakan Nakicijinpi's disclosure failed to meet the requirements set forth in the order. The disclosure did not provide the curricula vitae or resumes for these designated individuals. Rather, the disclosure states "Resume'/CV to follow." Yet as of the date of this motion, this information has yet to be provided.¹

¹ Furthermore, all parties were on notice as the failure to provide full expert disclosure was mentioned at the July meeting.

Additionally, there is no disclosure regarding the anticipated substance of their testimony nor the methodology or sources upon which these proffered experts will rely. The purpose of disclosing experts in advance is to allow a proper review of the qualifications of these designated individuals and allow challenges, if necessary, to their qualifications. The failure to properly disclose experts warrants their preclusion from testifying.

It also appears that other individuals listed as lay witnesses by other parties may be testifying based upon scientific, technical, or other specialized knowledge. The Chief Engineer reserves the right to object to individuals being called as lay witnesses who should have been disclosed as expert witnesses. See SDCL §§ 19-19-701, 19-19-702, and 19-19-703. See also *Weber v. Rains, et al.*, 2019 S.D. 53, ¶ 33, ___ N.W.2d ___.

B. Exhibits

As noted above, both the Order dated March 15, 2019, and the Board's oral order issued at the July 2019 meeting required that copies of exhibits be exchanged. The March 15 Order indicated that the exchange of copies could be electronic. In accordance with these orders, several of the parties chose to provide hard copies while TransCanada elected to share its exhibits electronically. The Yankton Sioux Tribe also opted to share a number of its exhibits electronically. However, the parties were merely given internet links for the remaining exhibits proposed by the Yankton Sioux Tribe. Internet links for exhibits were also provided by Dakota Rural Action. Likewise, Ms. Myers provided an internet link for one of her sixteen exhibits and provided no hard

copies, electronic copies, or internet links for the rest of her proposed exhibits. A number of the internet links provided were not functional and the exhibits could not be accessed.² Additionally, neither Ms. Lone Eagle nor Mniwakan Nakicijinpi provided any hard copies, electronic copies, or internet links for any of their proposed exhibits. Instead, they only provided a listing of their proposed exhibits. To aid the Board, a chart of those exhibits not properly produced is attached to this motion as Exhibit A with indications as to whether the internet links were functional.

The Board's orders were very clear – there was to be an exchange of exhibits. Exhibits that were not exchanged should not be allowed to be admitted during the hearing. Clearly, those exhibits not produced in any form (hard copy, electronic copy, or by the provision of an internet link) should be excluded from the hearing. Additionally, those exhibits that were disclosed only by internet link should also be precluded as many links were problematic or not functional at all. Providing internet links as opposed to hard copies or electronic copies defeats the purpose of the disclosure. Importantly, websites are capable of being edited at any moment and therefore, an internet link may not provide the parties with the actual exhibit to be introduced at the hearing. In addition, parties should not have to hunt for the exhibits proposed for

² The undersigned counsel did reach out to counsel for Dakota Rural Action and counsel for the Yankton Sioux Tribe to request hard copies for links which were not functioning. Counsel for those parties provided hard copies for those exhibits for which the links were not functioning. Those instances are designated on Exhibit A. The Chief Engineer is not requesting preclusion of those exhibits with this motion as copies were subsequently provided.

admission. Compliance with the Board's orders is important to ensure a meaningful review, an efficient hearing, and fairness to all parties.

C. Witnesses

Ms. Lone Eagle and Mniwakan Nakicijinpi both provided witness lists indicating the following individuals would be called to testify: Naca (Chief) Joseph Brings Plenty, Sr., Cheyenne River Sioux Tribe; Senator Troy Heinert, Rosebud Sioux Tribe; Percy White Plume, Oglala Sioux Tribe; and LaVae Red Horse, Cheyenne River Sioux Tribe. There is no indication as to what these individuals will testify. Furthermore, no contact information was provided for any of these witnesses. Testimony by these witnesses should be precluded because the remaining parties are unfairly disadvantaged by this lack of information.

Likewise, Dakota Rural Action, Great Plains Tribal Water Alliance, Rosebud Sioux Tribe, and TransCanada did not provide contact information for their listed witnesses. However, they did provide a synopsis describing the anticipated testimony from each of their listed witnesses. Thus, these parties have failed to comply with the Board's orders.

CONCLUSION

The Board's orders set a very clear expectation as to the disclosure of exhibits and witnesses. The Chief Engineer, and presumably other parties, relied upon the Board's orders regarding the disclosure of witness information in particular. The failure to disclose pursuant to these orders is sanctionable. The proper sanction is to preclude those expert witnesses, witnesses, and

exhibits which were not properly disclosed. See SDCL § 15-6-37(a). See also *Thompson v. Avera Queen of Peace Hosp.*, 2013 S.D. 8, ¶¶ 12-13, 827 N.W.2d 570 (discussing the propriety of excluding expert witnesses); and *Isaac v. State Farm Mut. Auto. Ins. Co.*, 522 N.W. 2d 752, 762 (1994) (upholding the trial court's preclusion of evidence and witnesses due to failure to properly disclose pursuant to the trial court's pretrial order). Accordingly, the Chief Engineer requests the preclusion of those exhibits and witnesses which were not properly disclosed pursuant to the Board's orders.

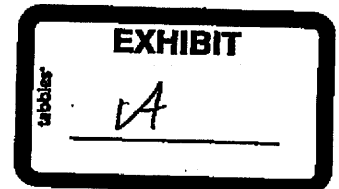
Dated this 1st day of October 2019.

Stacy B. Hlegse, Asst. Attorney General, for
Ann F. Mines Bailey
Assistant Attorney General
Mickelson Criminal Justice Center
1302 East Highway 14, Suite 1
Pierre, SD 57501
Telephone: (605) 773-3215

Counsel for Water Rights Program, DENR

1986-1, 2792-2, and 2793-2 Exhibits - Copies Not Provided

Party	Exhibit No.	Title of Exhibit	Link Provided?	Link Worked?
Cindy Myers	1	Testimony of Arden Davis	No.	---
	2	FSEIS	No	---
	3	FSEIS	No	---
	4	FSEIS	No	---
	5	FSEIS	No	---
	6	Testimony of Cindy Myers	No	---
	7	Post Hearing Brief of Cindy Myers	No	---
	8	Public Health Statement, Benzene	No	---
	9	Breach in Pipeline article Billings Gazette	No	---
	10	Extreme Power, flow improver	No	---
	11	John Stansbury, Analysis of Frequency, Magnitude and Consequences of Worst-case Spills	No	---
	12	Monday DEQ website excerpt	No	---
	13	Power Point presentation	No	---
	14	Rural Water Systems of SD	No.	---
	15	USGS streamer	Yes	No
	16	Keystone 1 spill site photos	No	---
	17	Affidavit of Cindy Myers, In the matter of PUC Docket HP 14-001, Petition of TransCanada Keystone Pipeline, LP (July 2016)	No	---
	18	Pre-filed Testimony of Cindy Myers, In the Matter of the Application of TransCanada Keystone Pipeline, LP,	No	---



Nebraska Public Services Commission (June 5, 2017)				
Lone Eagle	1	Satellite photos	No	---
	2	Water usage statistics for Cheyenne River Valley in Bridger area	No	---
	3	Water usage statistics for White River Valley	No	---
	4	Water usage statistics for Philip	No	---
	5	SDCL 1-54-5	No	---
	6	DENR budgets for last 12 years	No	---
	7	Testimony of Sec. Roberts to Senate Cmte on January 17, 2019	No	---
	8	DENR employee statistics for last 12 years	No	---
Mniwakan Nakicijinipi	1	Satellite photos	No	---
	2	Water usage statistics for Cheyenne River Valley in Bridger area	No	---
	3	Water usage statistics for White River Valley	No	---
	4	The Winter's Doctrine	No	---
Mahmud Fatil	None	No list of exhibits disclosed	No	---
Jason Shald	None	No list of exhibits disclosed	No	---
Paul Seamans	None	No list of exhibits disclosed	No	---

Terry and Cheri Frisch	None	No list of exhibits disclosed	No	---
Dakota Rural Action	1	2014 US State Department SEIS	Yes	Yes
	2	Pipeline Hazardous Materials Safety Administration environmental and safety records		
	2a	PHMSA Accident Report - Hazardous Liquid Pipeline Systems, Report No. 20100119-17791 (6/21/10 Carpenter Spill)	Yes	Yes
	2b	PHMSA Accident Report - Hazardous Liquid Pipeline Systems, Report No. 20100166-17790 (8/5/10 Roswell Spill)	Yes	Yes
	2c	PHMSA Accident Report - Hazardous Liquid Pipeline Systems, Report No. 20100166-17790 (9/16/10 Hartington Spill)	Yes	Yes
	2d	PHMSA Accident Report - Hazardous Liquid Pipeline Systems, Report No. 20110062-17788 (3/1/11 Turney Spill)	Yes	Yes
	2e	PHMSA Accident Report - Hazardous Liquid Pipeline Systems, Report No. 20110081-19268 (3/7/11 Cushing Spill)	Yes	Yes
	2f	PHMSA Accident Report - Hazardous Liquid Pipeline Systems, Report No. 20110129-17793 (4/28/11 Seneca Spill)	Yes	Yes

	2g	PHMSA Accident Report - Hazardous Liquid Pipeline Systems, Report No. 20110181-19269 (6/10/11 Rock Spill)	Yes	Yes
	2h	PHMSA Accident Report - Hazardous Liquid Pipeline Systems, Report No. 20110171-16159 (6/8/11 Ludden Spill)	Yes	Yes
	2i	PHMSA Accident Report - Hazardous Liquid Pipeline Systems, Report No. 20110208-16160 (6/28/11 Severance Spill)	Yes	Yes
	2j	PHMSA Accident Report - Hazardous Liquid Pipeline Systems, Report No. 20140298-19675 (8/21/14 Nederland Spill)	Yes	Yes
	2k	3/21/11 PHMSA Warning Letter, CPF 3-2011-1002W	Yes	Yes
	2l	9/10/13 PHMSA Warning Letter, CPF 4-2013-5017W	Yes	Yes
	2m	9/26/13 PHMSA Warning Letter, CPF 4-2013-5021W	Yes	Yes
	2n	4/26/16 PHMSA Notice of Amendment, CPF 4-2016-5013M	Yes	Yes
	2o	11/28/17 PHMSA Corrective Action Order, CPF 3-2017-5008H	Yes	Yes
	2p	2017 PHMSA Final Order, CPF 3-2015-5010	Yes	Yes
	2q	4/9/26 PHMSA Corrective Action Order	Yes	No – the link provides a document dated 11/20/15
	3	Court Record of <i>TransCanada Keystone Pipeline v. Kelly Rees, Charles</i>	No.	---

		<i>Thompson, Jr., Marilyn Mueller, Alton Smith, Sheldon Smith 31 CIV 19-006 and TransCanada Keystone Pipeline v. Thomas Dougherty, James Driscoll and Laurie Driscoll, Patricia Evans, Kathleen Haley, Quinn Scott, John Scott, Robert Haig, David Hagen, Sara Hagen, MaryJo Carson 31 CIV19-008</i>		
	4	<i>Court Record of Yankton County, et al. v. TransCanada Keystone Pipeline and SD Dep't of Revenue, 32 CIV 15-0263</i>	No	---
	5	Amended Final Decision and Order of PUC in HP 09-001	Yes	Yes
	6	Keystone's Responses to DRA's First Interrogatories in HP14-001	Yes	No. Hard copies were provided upon notification that the link was not functioning.
	7	Sibson Video	Yes	Yes
	8	Moeckley photos	Yes	No. Mr. Ellison provided a flash drive upon notification that the links did not work.
	9	CRS White Paper on Oil Sands and Oil Spill Liability Fund	Yes	Yes
	10	Failed Legislative Bills – a number of subparts	Yes	No. Mr. Ellison provided hard copies when informed links did not work.

	108	Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Vol. 1a	Yes	Yes
	109	Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Vol. 1b	Yes	Yes
	110	Responsible Resource Development and Prevention of Sex Trafficking: Safeguarding Native Women and Children on the Fort Berthold Reservation	Yes	No but upon notification a PDF was emailed.
	111	Responsible Resource Development: A strategic Plain to Consider Social and Cultural Impacts of Tribal Extractive Industry Development	Yes	Yes
	112	Social Cost and Material Loss: The Dakota Access Pipeline	Yes	Yes
	113	Violent Victimization Known to Law Enforcement in the Bakken Oil-Producing Region of Montana and North Dakota, 2006-2012	Yes	Yes
	116	FOSC Desk Report for the Enbridge Line 6b Oil Spill Marshall, Michigan	Yes	Yes
	117	Spills of Diluted Bitumen from Pipelines, A comparative Study of Environmental Fate, Effects, and Response	Yes	Yes
	118	Map of Kalamazoo River Closures and Dredging	Yes	Yes

	119	Draft Damage Assessment and Restoration Plain/Environmental Assessment for the July 25-26, 2010 Enbridge Line 6B Oil Discharges near Marshall, MI	Yes	Yes
	120	Letter from Jeffrey D. Wiese, Associate Administrator for Pipeline Safety, US DOT Pipeline and Hazardous Materials Safety Admin., to Gary Pruessing, President, Exxon Mobil Pipeline Company (April 2, 2013)	Yes	Yes
	122	Tribal Consultation Additional Federal Actions Needed for Infrastructure Projects	Yes	Yes
	123	Final Supplemental Environmental Impact Statement for the Keystone XL pipeline	Yes	Yes
	124	2009 Application of TransCanada to South Dakota Public Utility Commission	Yes	Yes
	125	2010 South Dakota Public Utility Commission Final Decision and Order, HP09-001	Yes	Yes
	126	2014 Petition of TransCanada to the South Dakota Public Utility Commission, HP14-001	Yes	Yes
	127	2016 South Dakota Public Utility Commission Final Decision and Order, HP14-001.	Yes	Yes.

TransCanada provided a file share link for all copies of their proposed exhibits. Yankton Sioux Tribe provided a file share link for the majority of their exhibits. Those exhibits which were not included in the file share are listed on the chart. Ms. Lone Eagle also utilized a file share link to disclose copies of her proposed Exhibits 10-17. Copies of her proposed Exhibits 1-9, however, were not provided and are listed on the chart. Great Plains Tribal Water Alliance provided one set to be used in all three of the TransCanada applications and the Wink application of hard copies of all their proposed exhibits. Likewise, Rosebud Sioux Tribe provided a single set of hard copies to be used in all three of the TransCanada applications as well as the Wink application.

Engineer moved for a procedural and scheduling order. On March 15, 2019, the Prehearing Chairman entered such an order.

Prior to the May hearing, motions for an enlargement of time were filed by several of the intervenors and those motions were granted. However, the expert disclosure deadline was not extended. In the April 25, 2019 Order, the remaining deadlines were suspended and to be rescheduled by the entire Board at the May meeting. At the May meeting, it was determined that the parties should be allowed to engage in limited discovery. As a result, the Board chose to wait to set the final hearing dates until the July 2019 meeting.

At the July meeting, the Board set the final hearing dates: October 3-4, and 29-31, 2019. The Board also set the dates for disclosure of witnesses and exchange of exhibits as August 30, 2019. Again, the Board specifically ordered names and contact information for witnesses be disclosed as well as copies of the exhibits be provided. The Board also acknowledged at this hearing that the expert deadline had not been extended.

DISCUSSION

A. EXPERTS

The March 15, 2019 Order states:

“2. The following pre-hearing schedule and obligations apply to Applicant, DENR, and all other parties:

- a) Each party shall disclose in writing the names of any expert that party intends to call as a witness at the hearing of this matter on or before April 8, 2019. This disclosure must include copies of any curricula vitae, along with copies of any expert report the party intends to

offer. If an expert report has not been prepared, the parties shall disclose a summary statement of the anticipated testimony the expert will provide and the methodology used by the expert to reach his/her conclusions.”

The parties were ordered to disclose experts and their accompanying curricula vitae/resumes and reports. If a report was not available, the parties were to provide a description, including methodology, of the expert’s opinion. Mniwakan Nakicijinpi has designated the following individuals as experts that it intends to rely upon: Steve Vance, Carlyle Ducheneaux, Leo Fischer, Jr., and Cheryl Chapman. Though a brief sentence is provided describing the anticipated testimony from each, Mniwakan Nakicijinpi’s disclosure failed to meet the requirements set forth in the order. The disclosure did not provide the curricula vitae or resumes for these designated individuals. Rather, the disclosure states “Resume’/CV to follow.” Upon information and belief, this information has yet to be provided.

Further, there is no disclosure regarding the anticipated substance of their testimony nor the methodology or sources upon which these proffered experts will rely. The purpose of disclosing experts in advance is to allow a proper review of the qualifications of these designated individuals and allow challenges, if necessary, to their qualifications.

B. EXHIBITS

The March 15, 2019 Order states:

“d) Each party shall provide in writing a list identifying all exhibits that party intends to offer into evidence in its case in chief at the hearing and copies of said exhibits on or before April 29, 2019. Copies of the exhibits, with the exception

of the administrative file, shall be provided to the parties. The copies may be provided by electronic means.”

In accordance with the March 15 Order, several of the parties chose to provide hard copies while TransCanada elected to share its exhibits electronically. The Yankton Sioux Tribe also opted to share a number of its exhibits electronically. Internet links for exhibits were also provided by Dakota Rural Action. Likewise, Ms. Myers provided an internet link for one of her sixteen exhibits and provided no hard copies, electronic copies, or internet links for the rest of her proposed exhibits. Additionally, neither Ms. Lone Eagle nor Mniwakan Nakicijinpi provided any hard copies, electronic copies, or internet links for any of their proposed exhibits. Instead, they only provided a listing of their proposed exhibits. Additionally, there have been a variety of amended and supplemental exhibit lists filed. In other words, there was varying levels of compliance with the March 15, 2019 Order which prevents the Board from rendering a blanket Order for this portion of the application.

C. WITNESSES

The March 15, 2019 Order states:

“c) Each party shall disclose in writing the name and contact information for any and all witnesses that the party expects to call during the hearing of this matter on or before April 29, 2019. This disclosure must include a brief one or two sentence summary of each witness’ expected testimony.”

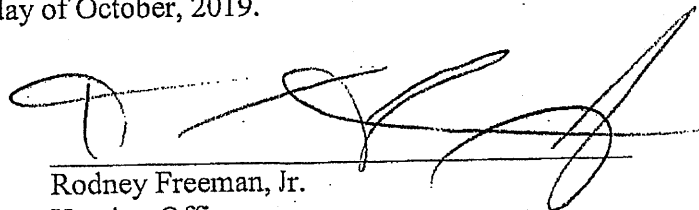
Ms. Lone Eagle and Mniwakan Nakicijinpi both provided witness lists indicating the following individuals would be called to testify: Naca (Chief) Joseph Brings Plenty, Sr., Cheyenne River Sioux Tribe; Senator Troy Heinert, Rosebud Sioux Tribe; Percy White Plume, Oglala Sioux Tribe; and LaVae Red

Horse, Cheyenne River Sioux Tribe, however there is no indication as to what these individuals will testify. Furthermore, no contact information was provided for any of these witnesses. Likewise, Dakota Rural Action, Great Plains Tribal Water Alliance, Rosebud Sioux Tribe, and TransCanada did not provide contact information for their listed witnesses. However, they did provide a synopsis describing the anticipated testimony from each of their listed witnesses. In other words, there was varying levels of compliance with the March 15, 2019 Order which prevents the Board from rendering a blanket Order for this portion of the application.

CONCLUSION

For the reasons set forth herein, the Chief Engineer's Motion *In Limine* is **GRANTED** as to the experts proffered by the Mniwakan Nakicijinpi, as they failed to properly disclose their experts in compliance with the March 15, 2019. The Chief Engineer's Motion *In Limine* is **DENIED** as to her request to preclude exhibits and lay witnesses as discussed herein. Nevertheless, the Chief Engineer, Parties, or intervenors may object during the hearing to any particular exhibit or witness for any objectionable basis, including those that are set forth in the Chief Engineer's Motion.

Dated this 11th day of October, 2019.



Rodney Freeman, Jr.
Hearing Officer
South Dakota Water Management Board

RECEIVED

OCT 03 2019

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES WATER RIGHTS PROGRAM

WATER MANAGEMENT BOARD

IN THE MATTER OF WATER)	
APPLICATION NO. 1963A-1, TOM &	)	CHIEF ENGINEER'S
LORI WILSON	)	MOTION IN LIMINE
)	

Comes now, the Chief Engineer and the Water Rights Program and hereby requests the preclusion of those documents and expert witnesses which were not properly disclosed pursuant to the Prehearing Chairman's Order dated May 10, 2019, and the Board's oral order issued at the July 17, 2019 meeting. This Motion is based upon procedural grounds only. The Chief Engineer reserves the right to assert other objections to expert witnesses and exhibits.

BACKGROUND

This application was publicly noticed in late January of 2019. Parties wishing to intervene in the matter were required to do so by February 4, 2019. Several petitions for intervention were received. Accordingly, the matter was scheduled for hearing during the March 2019 meeting of the Water Management Board. Dakota Rural Action exercised its statutory right to an automatic delay of the hearing and the matter was rescheduled for the May 2019 meeting. Given the number of intervenors, and the matter's connection to the proposed TransCanada pipeline, counsel for the Chief Engineer moved for a procedural and scheduling

order. On March 15, 2019, the Prehearing Chairman entered such an order. It provides, in pertinent part, as follows:

2. The following pre-hearing schedule and obligations apply to Applicant, DENR, and all other parties:

a) Each party shall disclose in writing the names of any expert that party intends to call as a witness at the hearing of this matter on or before April 8, 2019. This disclosure must include copies of any curricula vitae, along with copies of any expert report the party intends to offer. If an expert report has not been prepared, the parties shall disclose a summary statement of the anticipated testimony the expert will provide and the methodology used by the expert to reach his/her conclusions.

...

c) Each party shall disclose in writing the name and contact information for any and all witnesses that the party expects to call during the hearing of this matter on or before April 29, 2019. This disclosure must include a brief one or two sentence summary of each witness' expected testimony.

d) Each party shall provide in writing a list identifying all exhibits that party intends to offer into evidence in its case in chief at the hearing and copies of said exhibits on or before April 29, 2019. Copies of the exhibits, with the exception of the administrative file, shall be provided to the parties. The copies may be provided by electronic means.

Prior to the May hearing, Dakota Rural Action moved for an enlargement of time. By Order dated April 25, 2019, the Prehearing Chairman granted the motion and suspended the remaining deadlines to be rescheduled by the entire Board at the May meeting. The expert deadline, however, was not extended. At the May meeting, it was determined that the parties should be allowed to engage in limited discovery. As a result, the Board chose to wait to set the final hearing dates until the July 2019 meeting.

At the July meeting, the Board set the final hearing dates: October 3-4, and 29-31. The Board also set the dates for disclosure of witnesses and exchange of exhibits as August 30, 2019.

See <https://boardsandcommissions.sd.gov/Meetings.aspx?BoardID=106>, July 17, 2019 meeting at approximately 1:13:00. Again, the Board specifically ordered names and contact information for witnesses be disclosed as well as copies of the exhibits be provided. The Board also acknowledged at this hearing that the expert deadline had not been extended.

DISCUSSION

A. Experts

As noted above, the parties were ordered to disclose experts and their accompanying curricula vitae/resumes and reports. If a report was not available, the parties were to provide a description, including methodology, of the expert's opinion. The Cheyenne River Sioux Tribe has designated the following individuals as experts that it intends to rely upon: Steve Vance, Carlyle Ducheneaux, Leo Fischer, Jr., and Cheryl Chapman. The Cheyenne River Sioux Tribe's disclosure, however, failed to meet the requirements set forth in the Order. The disclosure did not provide the curricula vitae or resumes for these designated individuals, with the exception of Mr. Vance whose "Biographical Profile" was submitted with the expert disclosure. For the individuals other than Mr. Vance, the disclosure states "Resume'/CV to follow." As of the date of this motion, this information has yet to be provided.¹ Additionally, only a brief sentence is provided describing the general nature of the testimony. There is no disclosure regarding the anticipated opinions or

¹ Furthermore, all parties were on notice as the failure to provide full expert disclosure was mentioned at the July meeting.

substance of their testimony nor is there a disclosure as to the methodology or sources upon which these proffered experts will rely. The purpose of disclosing experts in advance is to allow a proper review of the qualifications of these designated individuals and allow challenges, if necessary, to their qualifications. The failure to properly disclose experts warrants their preclusion from testifying.

It also appears that other individuals listed as lay witnesses by the parties may be testifying based upon scientific, technical, or other specialized knowledge. The Chief Engineer reserves the right to object to individuals being called as lay witnesses who should have been disclosed as expert witnesses. *See* SDCL §§ 19-19-701, 19-19-702, and 19-19-703. *See also Weber v. Rains, et al.*, 2019 S.D. 53, ¶ 33, ___ N.W.2d ___.

B. Exhibits

As noted above, both the Order dated March 15, 2019, and the Board's oral order issued at the July 2019 meeting, required that copies of exhibits be exchanged. The March 15 Order indicated that the exchange of copies could be electronic. In accordance with these orders, several of the parties chose to provide hard copies while TransCanada elected to share its exhibits electronically. The Yankton Sioux Tribe also opted to share a number of its exhibits electronically. However, the parties were merely given internet links for the remaining exhibits proposed by the Yankton Sioux Tribe. Internet links for exhibits were also provided by Dakota Rural Action. Likewise, Ms. Santella provided internet links for her proposed exhibits. A number of the internet

links provided were not functional and the exhibits could not be accessed.² For example, one of the links required subscribing to a website or the purchase of materials in order to access the proposed exhibit. To aid the Board, a chart of those exhibits not properly produced is attached to this Motion as Exhibit A with indications as to whether the internet links were functional.

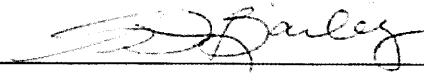
The Board's orders were very clear – there was to be an exchange of exhibits. Exhibits that were not exchanged should not be allowed to be admitted during the hearing. Those exhibits that were disclosed only by internet link should be precluded, as many links were problematic or not functional at all. Providing internet links, as opposed to hard copies or electronic copies, defeats the purpose of the disclosure. Importantly, websites are capable of being edited at any moment and therefore, an internet link may not provide the parties with the actual exhibit to be introduced at the hearing. In addition, parties should not have to hunt for the exhibits proposed for admission. Nor should parties be required to subscribe to a website/webservice or purchase materials in order to receive a copy of an exhibit. Compliance with the Board's orders is important to ensure a meaningful review, an efficient hearing, and fairness to all parties.

² The undersigned counsel did reach out to counsel for Dakota Rural Action and counsel for the Yankton Sioux Tribe to request hard copies for links which were not functioning. Counsel for those parties provided hard copies for those exhibits for which the links were not functioning. Those instances are designated on Exhibit A. The Chief Engineer is not requesting preclusion of those exhibits with this motion as copies were subsequently provided.

CONCLUSION

The Board's orders set a very clear expectation as to the disclosure of exhibits and witnesses. The Chief Engineer, and presumably other parties, relied upon the Board's orders regarding the disclosure of witness information in particular. The failure to disclose pursuant to these orders is sanctionable. The proper sanction is to preclude those expert witnesses and exhibits which were not properly disclosed. See SDCL § 15-6-37(a). See also *Thompson v. Avera Queen of Peace Hosp.*, 2013 S.D. 8, ¶¶ 12-13, 827 N.W.2d 570 (discussing the propriety of excluding expert witnesses); and *Isaac v. State Farm Mut. Auto. Ins. Co.*, 522 N.W. 2d 752, 762 (1994) (upholding the trial court's preclusion of evidence and witnesses due to failure to properly disclose pursuant to the trial court's pretrial order). Accordingly, the Chief Engineer requests the preclusion of those exhibits and expert witnesses which were not properly disclosed pursuant to the Board's orders.

Dated this 2nd day of October, 2019.



Ann F. Mines Bailey
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STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

IN THE MATTER OF WATER)
APPLICATION NO. 1963A-1, TOM &) CERTIFICATE OF SERVICE
LORI WILSON)
)

The undersigned hereby certifies that a true and correct copy of the Chief Engineer's Motion in Limine in the above matter were served by U.S. mail, first class, postage prepaid, upon the following on this 2nd day of October 2019:

Matthew E. Naasz
Counsel for Tom and Lori Wilson
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And on the same date, the original Chief Engineer's Motion in Limine was filed with:

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Counsel for Water Rights Program, DENR

1963A-1 (Wilson) Exhibits - Copies Not Provided

Party	Exhibit No.	Title of Exhibit	Link Provided?	Link Worked?
Julie Santella	1	Article "Violence on the Land, Violence on our Bodies"	Yes	Yes
	2	FSEIS	Yes	
	3	Winters v. United States	Yes	Yes
	4	Maps	Yes	Yes
	5	Article "Uranium Activities' Impacts on Lakota Territory" by Liliias Jarding	Yes	Yes
	6	CV of James Stone	Yes	Yes
	7	CV of Hannan LaGarry	Yes	No
	8	Book "Environmental Impacts from the North Cave Hills Abandoned Uranium Mines"	Yes	No. The link provides access only to the abstract. Can purchase book for \$389 or subscribe to website
	9	Article "Assessment of Aquifer Contamination Near Abandoned Uranium Mines"	Yes	Yes
	10	Article "Final Report: North Cave Hills Abandoned Uranium Mines Impact"	Yes	Yes
	11	Thesis of Emmanuel Tuombe. 2009	No	No
	12	Paper by James Sanovia, "analysis of Regional Aeolian Transport of Heavy Metals in Harding County"	Yes	Provides only notice of the presentation of the paper and not the paper

EXHIBIT

tabbles

LA

	13	2016 Community Health Assessment for Stark County, ND	Yes	Yes
	14	Article "\$3M federal grant aimed at Bakken oilfield crimes against women."	Yes	Yes
	15	Article "Drilling Down"	Yes	Yes
	16	Article "Family Crisis Shelter"	Yes	Yes
	17	Article - ND Sex trafficking victim says police failed me	Yes	Yes
	18	Article "pipeline expansion means increased violence against tribal women"	Yes	Yes
Dakota Rural Action	1	2014 US State Department SEIS	Yes	Yes
	2	Pipeline Hazardous Materials Safety Administration environmental and safety records		
	2a	PHMSA Accident Report - Hazardous Liquid Pipeline Systems, Report No. 20100119-17791 (6/21/10 Carpenter Spill)	Yes	Yes
	2b	PHMSA Accident Report - Hazardous Liquid Pipeline Systems, Report No. 20100166-17790 (8/5/10 Roswell Spill)	Yes	Yes
	2c	PHMSA Accident Report - Hazardous Liquid Pipeline Systems, Report No. 20100166-17790 (9/16/10 Hartington Spill)	Yes	Yes
	2d	PHMSA Accident Report - Hazardous Liquid Pipeline Systems, Report No. 20110062-17788 (3/1/11 Turney Spill)	Yes	Yes

	2e	PHMSA Accident Report - Hazardous Liquid Pipeline Systems, Report No. 20110081-19268 (3/7/11 Cushing Spill)	Yes	Yes
	2f	PHMSA Accident Report - Hazardous Liquid Pipeline Systems, Report No. 20110129-17793 (4/28/11 Seneca Spill)	Yes	Yes
	2g	PHMSA Accident Report - Hazardous Liquid Pipeline Systems, Report No. 20110181-19269 (6/10/11 Rock Spill)	Yes	Yes
	2h	PHMSA Accident Report - Hazardous Liquid Pipeline Systems, Report No. 20110171-16159 (6/8/11 Ludden Spill)	Yes	Yes
	2i	PHMSA Accident Report - Hazardous Liquid Pipeline Systems, Report No. 20110208-16160 (6/28/11 Severance Spill)	Yes	Yes
	2j	PHMSA Accident Report - Hazardous Liquid Pipeline Systems, Report No. 20140298-19675 (8/21/14 Nederland Spill)	Yes	Yes
	2k	3/21/11 PHMSA Warning Letter, CPF 3-2011-1002W	Yes	Yes
	2l	9/10/13 PHMSA Warning Letter, CPF 4-2013-5017W	Yes	Yes
	2m	9/26/13 PHMSA Warning Letter, CPF 4-2013-5021W	Yes	Yes
	2n	4/26/16 PHMSA Notice of Amendment, CPF 4-2016-5013M	Yes	Yes
	2o	11/28/17 PHMSA Corrective Action Order, CPF 3-2017-5008H	Yes	Yes

	2p	2017 PHMSA Final Order, CPF 3-2015-5010	Yes	Yes
	2q	4/9/26 PHMSA Corrective Action Order	Yes	No – the link provides a document dated 11/20/15
	3	<i>Court Record of TransCanada Keystone Pipeline v. Kelly Rees, Charles Thompson, Jr., Marilyn Mueller, Alton Smith, Sheldon Smith 31 CIV 19-006 and TransCanada Keystone Pipeline v. Thomas Dougherty, James Driscoll and Laurie Driscoll, Patricia Evans, Kathleen Haley, Quinn Scott, John Scott, Robert Haig, David Hagen, Sara Hagen, MaryJo Carson 31 CIV19-008</i>	No.	---
	4	<i>Court Record of Yankton County, et al. v. TransCanada Keystone Pipeline and SD Dep't of Revenue, 32 CIV 15-0263</i>	No	---
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	113	Violent Victimization Known to Law Enforcement in the Bakken Oil-Producing Region of Montana and North Dakota, 2006-2012	Yes	Yes
	116	FOSC Desk Report for the Enbridge Line 6b Oil Spill Marshall, Michigan	Yes	Yes

	117	Spills of Diluted Bitumen from Pipelines, A comparative Study of Environmental Fate, Effects, and Response	Yes	Yes
	118	Map of Kalamazoo River Closures and Dredging	Yes	Yes
	119	Draft Damage Assessment and Restoration Plain/Environmental Assessment for the July 25-26, 2010 Enbridge Line 6B Oil Discharges near Marshall, MI	Yes	Yes
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	122	Tribal Consultation Additional Federal Actions Needed for Infrastructure Projects	Yes	Yes
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	124	2009 Application of TransCanada to South Dakota Public Utility Commission	Yes	Yes
	125	2010 South Dakota Public Utility Commission Final Decision and Order, HP09-001	Yes	Yes
	126	2014 Petition of TransCanada to the South Dakota Public Utility Commission, HP14-001	Yes	Yes
	127	2016 South Dakota Public Utility Commission Final Decision and Order, HP14-001.	Yes	Yes.

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OCT 11 2019

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
WATER RIGHTS PROGRAM

WATER MANAGEMENT BOARD

IN THE MATTER WATER APPLICATION) NO. 1963A-1, TOM AND LORI WILSON))))))))	ORDER ON CHIEF ENGINEER'S MOTION <i>IN LIMINE</i>
--	--

WHEREAS, on October 2, 2019, filed a Motion *In Limine* requesting the preclusion of exhibits and witnesses not properly disclosed pursuant to the Board's Procedural and Scheduling Order dated March 15, 2019.

NOW THEREFORE, the issue being briefed by the Parties and intervenors and upon consideration of the papers and Orders herein, the following Order shall be entered in the above captioned action.

BACKGROUND

This application was publicly noticed in late January of 2019. Parties wishing to intervene in the matter were required to do so by February 4, 2019. Several petitions for intervention were received. Accordingly, the matter was scheduled for hearing during the March 2019 meeting of the Water Management Board. Dakota Rural Action exercised its statutory right to an automatic delay of the hearing and the matter was rescheduled for the May 2019 meeting. Given the number of intervenors, and the matter's connection to the proposed TransCanada pipeline, counsel for the Chief Engineer moved for a procedural and scheduling order. On March 15, 2019, the Prehearing Chairman entered such an order.

Prior to the May hearing, Dakota Rural Action moved for an enlargement of time. By Order dated April 25, 2019, the Prehearing Chairman granted the motion and suspended the remaining deadlines to be rescheduled by the entire Board at the May meeting. The expert deadline, however, was not extended. At the May meeting, it was determined that the parties should be allowed to engage in limited discovery. As a result, the Board chose to wait to set the final hearing dates until the July 2019 meeting.

At the July meeting, the Board set the final hearing dates: October 3-4, and 29-31, 2019. The Board also set the dates for disclosure of witnesses and exchange of exhibits as August 30, 2019. Again, the Board specifically ordered names and contact information for witnesses be disclosed as well as copies of the exhibits be provided. The Board also acknowledged at this hearing that the expert deadline had not been extended.

DISCUSSION

A. EXPERTS

The March 15, 2019 Order states:

“2. The following pre-hearing schedule and obligations apply to Applicant, DENR, and all other parties:

- a) Each party shall disclose in writing the names of any expert that party intends to call as a witness at the hearing of this matter on or before April 8, 2019. This disclosure must include copies of any curricula vitae, along with copies of any expert report the party intends to offer. If an expert report has not been prepared, the parties shall disclose a summary statement of the anticipated testimony the expert will provide and the methodology used by the expert to reach his/her conclusions.”

The parties were ordered to disclose experts and their accompanying curricula vitae/resumes and reports. If a report was not available, the parties were to provide a description, including methodology, of the expert’s opinion. The Cheyenne River Sioux Tribe has

designated the following individuals as experts that it intends to rely upon: Steve Vance, Carlyle Ducheneaux, Leo Fischer, Jr., and Cheryl Chapman. The Cheyenne River Sioux Tribe's disclosure, however, failed to meet the requirements set forth in the Order. The disclosure did not provide the curricula vitae or resumes for these designated individuals, with the exception of Mr. Vance whose "Biographical Profile" was submitted with the expert disclosure. For the individuals other than Mr. Vance, the disclosure states "Resume'/CV to follow." Upon information and belief, this information has yet to be provided.

Further, there is no disclosure regarding the anticipated substance of their testimony nor the methodology or sources upon which these proffered experts will rely. The purpose of disclosing experts in advance is to allow a proper review of the qualifications of these designated individuals and allow challenges, if necessary, to their qualifications.

B. EXHIBITS

The March 15, 2019 Order states:

"d) Each party shall provide in writing a list identifying all exhibits that party intends to offer into evidence in its case in chief at the hearing and copies of said exhibits on or before April 29, 2019. Copies of the exhibits, with the exception of the administrative file, shall be provided to the parties. The copies may be provided by electronic means."

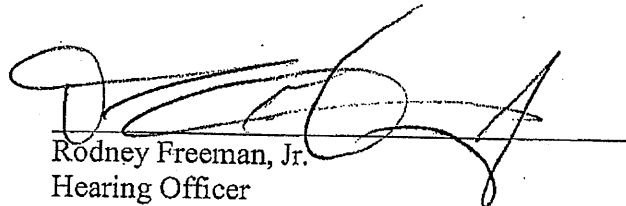
In accordance with the March 15 Order, several of the parties chose to provide hard copies while TransCanada elected to share its exhibits electronically. The Yankton Sioux Tribe also opted to share a number of its exhibits electronically. However, the parties were merely given internet links for the remaining exhibits proposed by the Yankton Sioux Tribe. Internet links for exhibits were also provided by Dakota Rural Action. Likewise, Ms. Santella provided internet links for her proposed exhibits. A number of the internet links provided were not functional and the exhibits could not be accessed. For example, one of the links required subscribing to a website or the purchase of materials in order to access the proposed exhibit.

Additionally, there have been a variety of amended and supplemental exhibit lists filed. In other words, there was varying levels of compliance with the March 15, 2019 Order which prevents the Board from rendering a blanket Order for this portion of the application.

CONCLUSION

For the reasons set forth herein, the Chief Engineer's Motion *In Limine* is **GRANTED** as to the experts proffered by the Cheyenne River Sioux Tribe, as they failed to properly disclose their experts in compliance with the March 15, 2019. The Chief Engineer's Motion *In Limine* is **DENIED** as to her request to preclude exhibits. Nevertheless, the Chief Engineer, Parties, or intervenors may object during the hearing to any particular exhibit for any objectionable basis, including those that are set forth in the Chief Engineer's Motion.

Dated this 11th day of October, 2019.


Rodney Freeman, Jr.
Hearing Officer
South Dakota Water Management Board

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OCT 03 2019

WATER RIGHTS PROGRAM

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

IN THE MATTER OF WATER)
APPLICATION NO. 1975A-1, WINK)
CATTLE COMPANY)

CHIEF ENGINEER'S)
MOTION IN LIMINE)

Comes now, the Chief Engineer and the Water Rights Program and hereby requests the preclusion of those exhibits which were not properly disclosed pursuant to the Prehearing Chairman's Order dated May 10, 2019, and the Board's oral order issued at the July 17, 2019 meeting. This Motion is based upon procedural grounds only. The Chief Engineer reserves the right to assert other objections to expert witnesses and exhibits.

BACKGROUND

This application was publicly noticed in late January of 2019. Parties wishing to intervene in the matter were required to do so by February 11, 2019. Several petitions for intervention were received. Accordingly, the matter was scheduled for hearing during the March 2019 meeting of the Water Management Board. Dakota Rural Action exercised its statutory right to an automatic delay of the hearing and the matter was rescheduled for the May 2019 meeting. Given the number of intervenors, and the matter's connection to the proposed TransCanada pipeline, counsel for the Chief Engineer moved for a procedural and scheduling order. On March 15, 2019, the Prehearing Chairman entered such an order. It provides, in pertinent part, as follows:

2. The following pre-hearing schedule and obligations apply to Applicant, DENR, and all other parties:

a) Each party shall disclose in writing the names of any expert that party intends to call as a witness at the hearing of this matter on or before April 8, 2019. This disclosure must include copies of any curricula vitae, along with copies of any expert report the party intends to offer. If an expert report has not been prepared, the parties shall disclose a summary statement of the anticipated testimony the expert will provide, and the methodology used by the expert to reach his/her conclusions....

b) Each party shall disclose in writing the name and contact information for any and all witnesses that the party expects to call during the hearing of this matter on or before April 29, 2019. This disclosure must include a brief one or two sentence summary of each witness' expected testimony.

c) Each party shall provide in writing a list identifying all exhibits that party intends to offer into evidence in its case in chief at the hearing and copies of said exhibits on or before April 29, 2019. Copies of the exhibits, with the exception of the administrative file, shall be provided to the parties. The copies may be provided by electronic means.

Prior to the May hearing, Dakota Rural Action moved for an enlargement of time. By Order dated April 25, 2019, the Prehearing Chairman granted the motion and suspended the remaining deadlines to be rescheduled by the entire Board at the May meeting. The expert deadline, however, was not extended. At the May meeting, it was determined that the parties should be allowed to engage in limited discovery. As a result, the Board chose to wait to set the final hearing dates until the July 2019 meeting.

At the July meeting, the Board set the final hearing dates: October 3-4, and 29-31. The Board also set the dates for disclosure of witnesses and exchange of exhibits as August 30, 2019. See <https://boardsandcommissions.sd.gov/Meetings.aspx?BoardID=106> , July 17, 2019 meeting at approximately 1:13:00. Again, the Board specifically ordered

names and contact information for witnesses be disclosed as well as copies of the exhibits be provided. The Board also acknowledged at this hearing that the expert deadline had not been extended.

DISCUSSION

As noted above, both the Order dated March 15, 2019, and the Board's oral order issued at the July 2019 meeting required that copies of exhibits be exchanged. The March 15 Order indicated that the exchange of copies could be electronic. In accordance with these orders, several of the parties chose to provide hard copies while TransCanada elected to share its exhibits electronically. The Yankton Sioux Tribe also opted to share a number of its exhibits electronically. However, the parties were merely given internet links for the remaining exhibits proposed by the Yankton Sioux Tribe. Internet links for exhibits were also provided by Dakota Rural Action. A number of the internet links provided were not functional and the exhibits could not be accessed.¹ To aid the Board, a chart of those exhibits not properly produced is attached to this Motion as Exhibit A with indications as to whether the internet links were functional.

The Board's orders were very clear – there was to be an exchange of exhibits. Exhibits that were not exchanged should not be allowed to be

¹ The undersigned counsel did reach out to counsel for Dakota Rural Action and counsel for the Yankton Sioux Tribe to request hard copies for links which were not functioning. Counsel for those parties provided hard copies for those exhibits for which the links were not functioning. Those instances are designated on Exhibit A. The Chief Engineer is not requesting preclusion of those exhibits with this motion as copies were subsequently provided.

admitted during the hearing. Those exhibits that were disclosed only by internet link should be precluded as many links were problematic or not functional at all. Providing internet links as opposed to hard copies or electronic copies defeats the purpose of the disclosure. Importantly, websites are capable of being edited at any moment and therefore, an internet link may not provide the parties with the actual exhibit to be introduced at the hearing. In addition, parties should not have to hunt for the exhibits proposed for admission. Compliance with the Board's orders is important to ensure a meaningful review, an efficient hearing, and fairness to all parties.

CONCLUSION

The Board's orders set a very clear expectation as to the disclosure of exhibits. The Chief Engineer, and presumably other parties, relied upon the Board's orders regarding the required disclosures. The failure to disclose pursuant to these orders is sanctionable. The proper sanction is to preclude those exhibits which were not properly disclosed. *See* SDCL § 15-6-37(a). *See also Isaac v. State Farm Mut. Auto. Ins. Co.*, 522 N.W. 2d 752, 762 (1994) (upholding the trial court's preclusion of evidence and witnesses due to failure to properly disclose pursuant to the trial court's pretrial order).

Accordingly, the Chief Engineer requests the preclusion of those exhibits and witnesses which were not properly disclosed pursuant to the Board's orders.

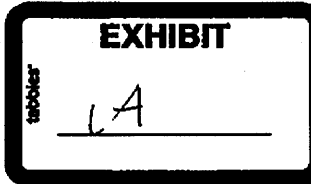
Dated this 2nd day of October, 2019.



Ann F. Mines Bailey
Assistant Attorney General
Mickelson Criminal Justice Center
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501
Telephone: (605) 773-3215

1975A-1 (Wink Cattle) Exhibits - Copies Not Provided

Party	Exhibit No.	Title of Exhibit	Link Provided?	Link Worked?
Dakota Rural Action	1	2014 US State Department SEIS	Yes	Yes
	2	Pipeline Hazardous Materials Safety Administration environmental and safety records		
	2a	PHMSA Accident Report - Hazardous Liquid Pipeline Systems, Report No. 20100119-17791 (6/21/10 Carpenter Spill)	Yes	Yes
	2b	PHMSA Accident Report - Hazardous Liquid Pipeline Systems, Report No. 20100166-17790 (8/5/10 Roswell Spill)	Yes	Yes
	2c	PHMSA Accident Report - Hazardous Liquid Pipeline Systems, Report No. 20100166-17790 (9/16/10 Hartington Spill)	Yes	Yes
	2d	PHMSA Accident Report - Hazardous Liquid Pipeline Systems, Report No. 20110062-17788 (3/1/11 Turney Spill)	Yes	Yes
	2e	PHMSA Accident Report - Hazardous Liquid Pipeline Systems, Report No. 20110081-19268 (3/7/11 Cushing Spill)	Yes	Yes
	2f	PHMSA Accident Report - Hazardous Liquid Pipeline Systems, Report No. 20110129-17793 (4/28/11 Seneca Spill)	Yes	Yes



	2g	PHMSA Accident Report - Hazardous Liquid Pipeline Systems, Report No. 20110181-19269 (6/10/11 Rock Spill)	Yes	Yes
	2h	PHMSA Accident Report - Hazardous Liquid Pipeline Systems, Report No. 20110171-16159 (6/8/11 Ludden Spill)	Yes	Yes
	2i	PHMSA Accident Report - Hazardous Liquid Pipeline Systems, Report No. 20110208-16160 (6/28/11 Severance Spill)	Yes	Yes
	2j	PHMSA Accident Report - Hazardous Liquid Pipeline Systems, Report No. 20140298-19675 (8/21/14 Nederland Spill)	Yes	Yes
	2k	3/21/11 PHMSA Warning Letter, CPF 3-2011-1002W	Yes	Yes
	2l	9/10/13 PHMSA Warning Letter, CPF 4-2013-5017W	Yes	Yes
	2m	9/26/13 PHMSA Warning Letter, CPF 4-2013-5021W	Yes	Yes
	2n	4/26/16 PHMSA Notice of Amendment, CPF 4-2016-5013M	Yes	Yes
	2o	11/28/17 PHMSA Corrective Action Order, CPF 3-2017-5008H	Yes	Yes
	2p	2017 PHMSA Final Order, CPF 3-2015-5010	Yes	Yes
	2q	4/9/26 PHMSA Corrective Action Order	Yes	No - the link provides a document dated 11/20/15

	3	Court Record of <i>TransCanada Keystone Pipeline v. Kelly Rees, Charles Thompson, Jr., Marilyn Mueller, Alton Smith, Sheldon Smith</i> 31 CIV 19-006 and <i>TransCanada Keystone Pipeline v. Thomas Dougherty, James Driscoll and Laurie Driscoll, Patricia Evans, Kathleen Haley, Quinn Scott, John Scott, Robert Haig, David Hagen, Sara Hagen, MaryJo Carson</i> 31 CIV19-008	No.	---
	4	Court Record of <i>Yankton County, et al. v. TransCanada Keystone Pipeline and SD Dep't of Revenue</i> , 32 CIV 15-0263	No	---
	5	Amended Final Decision and Order of PUC in HP 09-001	Yes	Yes
	6	Keystone's Responses to DRA's First Interrogatories in HP14-001	Yes	No. Hard copies were provided upon notification that the link was not functioning.
	7	Sibson Video	Yes	Yes
	8	Moeckley photos	Yes	No. Mr. Ellison provided a flash drive upon notification that the links did not work.
	9	CRS White Paper on Oil Sands and Oil Spill Liability Fund	Yes	Yes
	10	Failed Legislative Bills – a number of subparts	Yes	No. Mr. Ellison provided hard copies when

				informed links did not work.
	108	Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Vol. 1a	Yes	Yes
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OCT 11 2019

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER RIGHTS
PROGRAM

WATER MANAGEMENT BOARD

IN THE MATTER WATER)
APPLICATION NO. 1975A-1, WINK)
CATTLE COMPANY)
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ORDER ON CHIEF ENGINEER'S
MOTION *IN LIMINE*

WHEREAS, on October 2, 2019, filed a Motion *In Limine* requesting the preclusion of exhibits and witnesses not properly disclosed pursuant to the Board's Procedural and Scheduling Order dated March 15, 2019.

NOW THEREFORE, the issue being briefed by the Parties and intervenors and upon consideration of the papers and Orders herein, the following Order shall be entered in the above captioned action.

BACKGROUND

This application was publicly noticed in late January of 2019. Parties wishing to intervene in the matter were required to do so by February 4, 2019. Several petitions for intervention were received. Accordingly, the matter was scheduled for hearing during the March 2019 meeting of the Water Management Board. Dakota Rural Action exercised its statutory right to an automatic delay of the hearing and the matter was rescheduled for the May 2019 meeting. Given the number of intervenors, and the matter's connection to the proposed TransCanada pipeline, counsel for the Chief Engineer moved

for a procedural and scheduling order. On March 15, 2019, the Prehearing Chairman entered such an order.

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DISCUSSION

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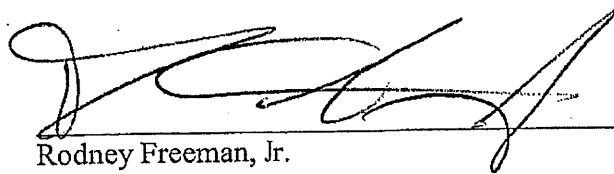
In accordance with the March 15 Order, several of the parties chose to provide hard copies while TransCanada elected to share its exhibits electronically. The Yankton Sioux Tribe also opted to share a number of its

exhibits electronically. However, the parties were merely given internet links for the remaining exhibits proposed by the Yankton Sioux Tribe. Internet links for exhibits were also provided by Dakota Rural Action. A number of the internet links provided were not functional and the exhibits could not be accessed. Additionally, there have been a variety of amended and supplemental exhibit lists filed. In other words, there was varying levels of compliance with the March 15, 2019 Order which prevents the Board from rendering a blanket Order for this portion of the application.

CONCLUSION

For the reasons set forth herein, the Chief Engineer's Motion *In Limine* is **DENIED** as to her request to preclude exhibits. Nevertheless, the Chief Engineer, Parties, or intervenors may object during the hearing to any particular exhibit for any objectionable basis, including those that are set forth in the Chief Engineer's Motion.

Dated this 11 day of October, 2019.



Rodney Freeman, Jr.
Hearing Officer
South Dakota Water Management Board

testify about his qualifications, general information about the Keystone XL Pipeline project and how a pipeline is constructed, and how Keystone proposes to use the water for construction-related purposes.

A large part of Hopgood and Tencer's testimony will apply to all three permit applications. The hearing would be greatly streamlined if each witness only testified once, simply explaining as testimony unfolds which aspects apply only to a given permit. For example: "Mr. Hopgood, tell the Board about your education and qualifications." Then: "Mr. Hopgood, with respect to your analysis of the Cheyenne River flows...." That approach is used every day in courts throughout South Dakota. With the Board's permission, general testimony applicable to all the applications can be heard once rather than having to be repeated three times. Testimony particular to a certain application can be clearly identified in the course of direct or cross examination.

Keystone's request is made in the interest of efficiency and concluding the hearing in a timely manner. In terms of the numbered paragraphs in the order, after the first two days of hearing, the Board heard evidence from a single witness, Mark Rath, progressing no further than paragraph 3(c) of the procedural order, out of ten subparts. Assuming that the State is not calling the Chief Engineer until the third and fourth statutory factors are addressed, that means it took two days to complete less than one-third of the first half of the evidence on Keystone's applications.

In addition to Hopgood, Tencer, and the Chief Engineer, there are 28 more listed witnesses with respect to Keystone's permit applications. If each of the remaining witnesses is called once, there will be 31 direct examinations and 31 rounds of cross-examination as opposed

to 93 direct examinations and 93 rounds of cross-examination if each witness testifies three times, plus the potential for redirect exam. So far, the Board has heard three direct examinations and three rounds of cross-examination – all from one witness, and without re-direct examination, which likely will change.

Based on the first two days, it will take weeks, not days, to complete the hearing if the Board does not streamline the proceedings. If Hopgood and Tencer take a half day each, which seems unrealistically short given the experience of the first two days, two days would be left for the remaining 29 witnesses. If only 24 of those listed witnesses testify and the examination of each witness takes one hour, there would be another three days of testimony. At two hours per witness, six days would be required to complete the hearing. At three hours per witness, it would require nine days. At a half day for each of the remaining listed witnesses, 15 additional days would be required to complete the evidence.

Allowing Keystone to present its witness testimony in the manner suggested and requiring other parties to follow suit would significantly reduce the amount of time needed to complete the hearing.

2. Due process does not require an unlimited hearing.

Procedural due process rights are not unlimited. The process due in any given case depends on "a determination of the precise nature of the government function involved as well as of the private interest that has been affected by government action." *In re State of South Dakota Water Management Board Approving Water Permit No. 1791-2*, 351 N.W.2d 119, 123 (S.D. 1984). With respect to a water appropriation permit, the question is "of concern to all South Dakotans equally, since 'all water within the state is the property of the people of the state.'

SDCL § 46-1-3." *Id.* Individual landowners have no greater interest in a permit to appropriate water than any other citizen of the State, which must be considered in determining to what process the Intervenor in this case are entitled. *Id.*

That aside, the Board has the discretion to regulate the ordering of witness testimony and the time for testimony. *See, e.g., State v. Selalla*, 2008 S.D. 3, ¶ 18, 744 N.W.2d 802, 807 ("We review the trial court's implementation of courtroom procedures under the abuse of discretion standard.") Moreover, due process does not require that a party be given unlimited time to be heard. *See, e.g., In re ARF*, 307 P.3d 852, 858 (Wyo. 2013) (limiting trial to one day and allowing each party half the trial time did not violate due process); *In re Lemus v. Martinez*, 441 P.3d 831 (Wyo. 2019) (no due process violation in limiting trial time and parties' presentations at trial; "a court may limit the length of the trial and the amount of time the litigations have to present their cases, so long as it complies with the dictates of due process"); *Dicker v. Dicker*, 207 A.3d 525, 536 (Conn. Ct. App. 2019) (holding that a court may reasonably limit the time allowed for an evidentiary hearing).

Many administrative agencies have discussed the propriety of time limits on hearings and cross-examination, as well as procedures to streamline hearings. *See, e.g., In re Application of Sourcegas Arkansas*, 2015 WL 4872344 (Ark. P.S.C.) (balancing interests in rate case and noting that "[d]ue process does not guarantee a party the right to unlimited process, but rather, guarantees that a party receives the 'rudimentary elements of fair play'"); *In re Consumers Power Co.*, 1973 WL 18106 (Atomic Energy Comm'n) ("While opportunity for reasonable cross-examination is provided by the Administrative Procedure Act and the Commission's Rules of Practice, there is no right to unlimited cross-examination. A party is only entitled to conduct

'such cross-examination as may be required for a full and true disclosure of the facts.'"). The most important aspect of considering due process is balancing the rights of the parties and considering the interests at stake in the particular proceeding. "The question, as we see it, is whether the opportunity thus afforded is reasonable and, in particular, whether the process as a whole strikes a fair balance between the competing interests." *In re Petition of Central Vermont Public Service Co.*, 1986 WL 13000986 (Vermont Public Service Board).

What is missing from this hearing based on the parties' witness and exhibit disclosures is balance and limits of any kind. Keystone and the State collectively intend to call four witnesses. The Intervenors intend to call 28 witnesses. For many of those witnesses, the relevance of their testimony to the matters in issue is not readily apparent. Keystone did not propose that the parties be required to submit prefiled testimony, did not object to five days being set for the hearing, did not propose defined limits on cross-examination, and has not moved to strike the testimony of any particular witness based on relevance. But Keystone objects to an unlimited hearing in which the Intervenors are allowed to call as many witnesses as they want and to cross-examine witnesses called by the State and Keystone for as long as they want, regardless of how long the hearing takes. The Board may lawfully and reasonably limit the time for hearing, and should enforce the procedural order that the hearing will be concluded on October 31.

Proof that such a modest limit is reasonable and practicable can be found next door in recent administrative proceedings before the Nebraska Public Service Commission involving the Keystone XL Pipeline. The Ponca Tribe of Nebraska and the Yankton Sioux Tribe intervened and challenged Keystone's application to approve a route through Nebraska. On appeal from the PSC's decision approving a route, the Ponca and the Yankton Sioux Tribe argued that the PSC

violated their due process rights by limiting the scope of their participation "to the issues of impacts on social and cultural resources." *In re Application No. OP-0003*, 932 N.W.2d 653, 689 (Neb. 2019). The PSC also limited the tribes to one witness each, and restricted their cross-examination time to one hour. *Id.* at 690. On appeal, the Nebraska Supreme Court held that the PSC's limitations did not violate due process, and referred approvingly to the PSC having "advised the parties in numerous orders of its obligation to bring the proceedings to a timely resolution." *Id.* at 689.

More specifically, the Nebraska court held that the PSC would be unable to manage all of the divergent interests involved in the proceeding "if it were required to afford unbounded participation to every intervenor. '[I]ntervention is a useful tool, but [one] which must be used carefully[,] lest the manageable lawsuit become an unmanageable cowlick.'" *Id.* at 689-90. Having referred to the hearing officer's concerns that the tribes "asked the same questions of virtually every witness" and "failed to form questions that were not redundant," the Nebraska Supreme Court found that limitations far exceeding anything Keystone requests here did not violate due process. *Id.* at 690. Notably, the hearing lasted four days even though Keystone submitted prefiled testimony from 10 witnesses, each of whom was presented for cross-examination, and rebuttal testimony from six witnesses, while the intervenors submitted prefiled testimony from 61 witnesses and offered live testimony from 10 landowners and one expert witness. *Id.* at 667.

Limitations on the proceedings in Keystone's previous permitting process in South Dakota are also illustrative. The hearing on Keystone's permit application before the Public Utilities Commission in HP09-001 took three days. The hearing on Keystone's certification

under SDCL § 49-41B-27 in HP04-001 took nine days, after which the South Dakota Supreme Court held that no hearing was even required. *In re PUC Docket HP 14-0001*, 2018 S.D. 44, ¶ 23, 914 N.W.2d 550, 559 ("the Appellants here were not entitled to procedural due process in the Commission's acceptance of the certification"). There is no legal or factual reason that a hearing on permits to appropriate water for uses limited to construction of the pipeline should exceed the five days provided in the Board's scheduling order.

3. Keystone has a due-process interest in a timely decision on its permit applications.

Keystone filed its permit applications on October 4, 2018, anticipating construction in 2019 and 2020. One year has passed without a decision on the applications. Keystone intends to begin construction in 2020, so the permits will need to cover calendar years 2020 and 2021. Given the conditions proposed for two of the permits, Keystone may not be able to withdraw any water from the Bad River or the White River after June 1, meaning that for Keystone to be able to use all of its requested permits for 2020 construction, the Board must enter a final order granting the permits by February 2020 at the latest.

The Board's current procedural order contemplates that the hearing will be concluded at the end of October, findings of fact and conclusions of law will be presented in November, and the applications will be decided at the Board's regularly-scheduled meeting on December 4, 2019. Chairman Hutmacher mentioned on October 2 that if the hearing were not concluded on October 31, the hearing room would not be available during the legislative session, suggesting that additional hearing dates would not be set until January or February. If that happened, findings and conclusions could not be completed earlier than the Board's regularly scheduled March 2020 meeting. Thus, it appears that if the hearing is not concluded in time for decision at

the meeting on December 4, 2019, Keystone's permit applications will not be decided in time for Keystone to use water during the 2020 construction season – despite the permit applications having been filed in October 2018.

Keystone has a due process interest in a timely and orderly process for deciding its permit applications. The statutory and regulatory framework for water appropriation is not consistent with a process that takes more than one year, as has already happened here. The permit applications were filed on October 4, 2018. The Chief Engineer had 60 days to act on the permit applications, Rath's report was dated December 6, 2018, and the Chief Engineer's recommendation was dated January 14, 2019. A hearing was initially set for March 6, 2019. The Intervenor, some of whom were given advance personal notice of the permit applications even though only published notice is required, requested a statutory extension of the hearing date. The statute requires that the hearing be reset not less than 20 days after the initial hearing date. SDCL § 46-2A-23. The Board's process is to enter findings of fact and conclusions of law after the hearing, usually at the next regular board meeting. This process is commensurate with SDCL § 49-41B-24, which requires that a permit application to construct and operate a crude oil pipeline be decided within one year of filing. Thus, both the procedures in SDCL Ch. 46-2A and the Board's administrative rules contemplate a reasonably expeditious proceeding.

The United States Supreme Court has held that due process requires a hearing at a meaningful time. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 547 (1985). In *Cavarretta v. Department of Children and Family Services*, 660 N.E.2d 250 (Ill. Ct. App. 1996), the court held that a teacher's due process rights were violated when his name was listed in a state register of suspected child abusers and he was not given a hearing until more than one year

after his request. Administrative rules contemplated a hearing within 30 days of a request. The court held that a gross deviation from the 30-day time frame would violate due process, and that not holding a hearing until 299 days after the request, and not issuing a decision until 598 days after the request violated due process. *Id.* at 256-57.

Here, South Dakota law provides that the policy of the State is to put the water resources of the State to beneficial use to the fullest extent of which they are capable. SDCL § 46-1-4. Keystone previously received temporary water permits for construction of the Keystone Pipeline in April 2008 within months after submitting applications. Keystone reasonably expected, based on its experience in South Dakota and other states with similar permitting processes, that its proposed use of water for pipeline construction was consistent with both SDCL § 46-1-4 and SDCL § 46-2A-9. Given the statutory and administrative procedures in place, Keystone reasonably expected that by submitting permit applications in October 2018, it would have a decision on its permits in time for construction in 2019. Yet in October 2019, after two days of hearing, it appears that Intervenors have succeeded in delaying the permitting process to the point that Keystone may not have a decision on its permit applications in time for construction in 2020. A further delay in concluding the hearing and deciding Keystone's permit applications would violate its due process right to a hearing held and concluded at a meaningful time. Therefore, the Board should confirm that this hearing will conclude on October 31, 2019 as previously ordered.

4. Conclusion

Keystone objects to any further delay in concluding the hearing and resolving its permit applications and respectfully requests that the Board adopt its streamlining proposals for the balance of the hearing.

Dated this 14th day of October, 2019.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ James E. Moore

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Attorneys for TransCanada Keystone Pipeline, LP

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
WATER MANAGEMENT BOARD

IN THE MATTER WATER	)	ORDER ON APPLICANT'S MOTION TO
APPLICATIONS NO. 1986-1, 2792-2, and	)	STREAMLINE WITNESS TESTIMONY
2793-2, TRANSCANADA	)	AND CONFIRM DEADLINE TO
	)	COMPLETE EVIDENTIARY HEARING
)	
)	
)	
)	

WHEREAS, on October 14, 2019, the TransCanada Keystone Pipeline, LP (Applicant hereinafter) filed a Motion to Streamline Witness Testimony and Confirm Deadline to Complete Evidentiary Hearing;

WHEREAS, in its Motion, the Applicant made three requests:

- (1) allow it to present its witness testimony on all three permit applications in a single examination; and
- (2) require that the State and Intervenors present their witness testimony in single examinations; and
- (3) confirm that the hearing will be concluded on October 31, 2019, as previously ordered.

NOW THEREFORE, no party requesting an oral argument and upon consideration of the papers filed herein, the following Order shall be entered regarding each of the three requests set forth above.

On August 27, 2019, the Board entered an Order on Hearing Procedure which was amended by the Board at the Hearing on October 4, 2019. That Order was intended to move the hearing along as fast as possible, while at the same time protecting the due process rights of the parties and intervenors, and protecting the record on appeal, as there are three separate applications pending before the Board.

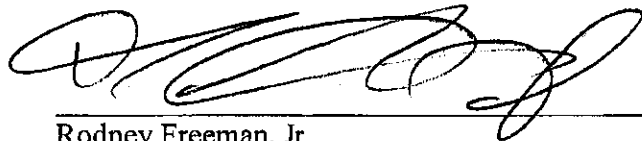
In their Motion, the Applicant makes no allegation which demonstrates a different intention than the existing Procedural Order, as Amended, nor does the proposed solution protect the due process rights of the parties and intervenors, or the record on appeal as effectively as the existing Order.

This Pre-Hearing Chair recently granted certain Motions *In Limine* which should naturally have the effect of expediting the proceeding, nevertheless, all parties and intervenors should have the opportunity to fully present their case, and the opportunity to cross examine on each of the individual applications as they are all separate. Likewise, the parties and intervenors will have the ability to object to witnesses and evidence as appropriate which may also have the effect of streamlining the hearing.

In the event the evidentiary hearings relating to the three pending applications are not resolved by the end of the day on October 31, 2019, the Board will schedule additional hearing days as necessary.

ACCORDINGLY, the Applicant's Motion to Streamline Witness Testimony and to Confirm Deadline to Complete Evidentiary Hearing is **DENIED**.

Dated this 19th day of October 2019.



Rodney Freeman, Jr.
Hearing Officer
South Dakota Water Management Board

**BEFORE THE WATER MANAGEMENT BOARD
OF THE DEPARTMENT OF ENVIRONMENT AND NATURAL
RESOURCES**

**IN RE APPLICATIONS 1986-1, 2792-2, 2793-2 BY
TRANSCANADA FOR APPROPRIATION OF CHEYENNE,
WHITE, AND BAD RIVER WATERS, FOR USE
TO CONSTRUCT THE KEYSTONE XL
HAZARDOUS MATERIALS PIPELINE**

**DAKOTA RURAL ACTION'S MOTION FOR FOR SUBPOENAS DUCES
TECUM TO THE CHIEF ENGINEER OF WATER MANAGEMENT
BOARD OF DEPARTMENT OF ENVIRONMENT AND NATURAL
RESOURCES**

Pursuant to SDCL §15-6-45, Dakota Rural Action (hereinafter, "DRA"), by and through the below-signed Attorney, hereby moves the Water Management Board (hereinafter, "WMB" or "Board") for an Order authorizing a subpoena duces tecum (hereinafter, "SDT") to be issued by DRA to the Chief Engineer for the following documents (e-mails) identified during the Interrogatory discovery process as related to the above-entitled matter involving communications between and involving the DENR, the Offices of Governors Daugaard and Noem, and/or TransCanada, and involving numerous witnesses noticed by DENR to testify before the Board, beginning 10/3/19. DRA requests the SDT be a forthwith subpoena to the Custodian

of Records for the Chief Engineer of the Water Management Board of the Department of Environment and Natural Resources. A copy of the requested subpoena is attached hereto.

DRA seeks an SDT for the documents contained in the Chief Engineer's Privilege Log identified as:

- Priv.Log: WR 0002-0016
 WR 0021-0024
 WR 0025-0027
 WR 0030-0031
 WR 0032-0034
 WR 0045-0046
 WR 0047-0056
 WR 0062-0080
 WR 0081-0085
 WR 0088-0090
 WR 0092-0120
 WR 0238-0265
 WR 0267-0277
 WR 0296

DRA respectfully submits that should the Hearing Officer or the WMB have any question about the propriety of this SDT request, that a hearing be held on the matter.

Dated this 2nd day of October, 2019.

/s/ Bruce Ellison
BRUCE ELLISON
Attorney for Dakota Rural Action
P.O. Box 2508
Rapid City, SD 57709
belli4law@aol.com

**BEFORE THE WATER MANAGEMENT BOARD
OF THE DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES**

**IN RE APPLICATIONS 1986-1, 2792-2, 2793-2 BY
TRANSCANADA FOR APPROPRIATION OF CHEYENNE,
WHITE, AND BAD RIVER WATERS, FOR USE
TO CONSTRUCT THE KEYSTONE XL
HAZARDOUS MATERIALS PIPELINE**

TO: CUSTODIAN OF RECORDS, CHIEF ENGINEER, WATER MANAGEMENT BOARD OF
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

YOU ARE HEREBY COMMANDED to forthwith bring the following documents identified with the following WR numbers on the Chief Engineers "Privilege Log" to the Hearing Room for proceeding beginning on October 3, 2019 at 10:30 a.m. and continuing on October 4, 2019 at 9 a.m., the Hearing being held at the Capitol Building, 500 E. Capitol Ave, Pierre, SD 57701:

- Priv.Log: WR 0002-0016
 WR 0021-0024
 WR 0025-0027
 WR 0030-0031
 WR 0032-0034
 WR 0045-0046
 WR 0047-0056
 WR 0062-0080
 WR 0081-0085
 WR 0088-0090
 WR 0092-0120
 WR 0238-0265
 WR 0267-0277
 WR 0296

Dated this __ day of October, 2019

Bruce Ellison
Attorney for Dakota Rural Action

RETURN: I, _____ do hereby certify that on October __,
2019, I served this Subpoena Duces Tecum on the Chief Engineer or her staff at
_____, Pierre, SD.

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
WATER MANAGEMENT BOARD

IN THE MATTER WATER	)	ORDER ON DAKOTA RURAL
APPLICATIONS NO. 1986-1, 2792-2, and	)	ACTION'S MOTION FOR SUBPOENAS
2793-2, TRANSCANADA	)	<i>DUCESTECUM</i> TO THE CHIEF
	)	ENGINEER
)	
)	
)	
)	
)	

WHEREAS, on October 2, 2019, Dakota Rural Action (DRA) filed a Motion for Subpoenas *Duces Tecum* to the Chief Engineer of the Department of Environment and Natural Resources (DENR) and included a Subpoena *Duces Tecum* for signature (as amended that same date to include a date and a signature line); and

WHEREAS, on October 16, 2019, the Chief Engineer filed her Objection to Dakota Rural Action's Motion for Subpoena *Duces Tecum*, by and through Ann F. Mines-Baily, Counsel for the Water Rights Program, DENR

NOW THEREFORE, the issue being briefed by the Parties and upon consideration of the papers filed herein, the following Order shall be entered on the above captioned Motion.

DRA's motion is untimely. Under the discovery order dated May 10, 2019, any permissible discovery request was to be served no later than June 10, 2019. DRA was served with the Chief Engineer's response which provided the two charts disclosing information about these communications on July 10, 2019, and a supplemental response on July 19, 2019.

Moreover, the May 10, 2019 Discovery Order clearly set forth the procedures to obtain documentary evidence from the Parties and Intervenors. Specifically, the Order Stated:

The Hearing Officer may issue any subpoena necessary for the conduct of any prehearing discovery or the hearing for witnesses to appear and give testimony and to produce records, books, papers and documents relating to any matters in these contested cases and likewise issue subpoenas for such purposes for persons interested therein as provided by § 15-6-45. Any party or intervenor wishing to obtain a subpoena from the Hearing Officer shall submit a written request and a proposed subpoena to the Hearing Officer. (See Order dated May 10, 2019 at ¶ 5.)

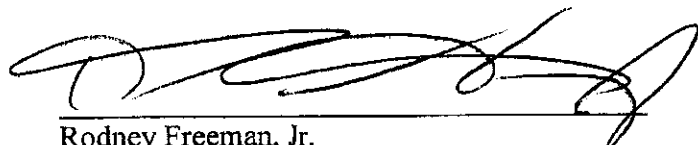
Nevertheless, the DRA chose to ignore this Order and attempted to secure documents through the interrogatory process. When rebuffed by the Chief Engineer, the DRA continued to attempt to circumvent the provisions of the Order by filing a Motion to Compel which was denied by the pre-hearing chair. The DRA's failure to comply with the Discovery Order resulted in extra burdens on the Chief Engineer in responding to an unnecessary Motion (the Motion to Compel) and an extra burden on the pre-hearing chair who had research the parties positions and draft an Order on the Motion, and on the Board as they approved the Order of the hearing officer.

The DRA filed this Motion the day before the hearings on the underlying matter were to begin (October 3, 2019.) Had the DRA followed the procedures clearly set forth in the May 10, 2019 Procedural Order they could have either obtained the requested documents or alternatively been entitled to enter into argument regarding the various privileges asserted by the Chief Engineer, an issue we do not need to reach to deny this Motion.

CONCLUSION

For the reasons set forth herein, the DRA's Motion for Subpoenas *Duces Tecum* to the Chief Engineer of the Department of Environment and Natural Resources **DENIED**.

Dated this 19th day of October, 2019.



Rodney Freeman, Jr.
Hearing Officer
South Dakota Water Management Board

/s/

Rebecca L. Kidder
Fredericks Peebles & Patterson LLP
1830 W. Fulton Street, Suite 201
Rapid City, SD 57702
Phone: (605) 791-1515
Fax: (605) 791-1915
Email: rkidder@ndnlaw.com

Attorneys for the Yankton Sioux Tribe

CERTIFICATE OF SERVICE

I certify that on this 1st day of October, 2019, the original of the **YANKTON SIOUX TRIBE'S MOTION FOR TIME CERTAIN FOR WITNESS TESTIMONY** was filed with the Chief Engineer for the Water Management Board by U.S. mail at:

Eric Gronlund
DENR Water Rights Program
Joe Foss Building
523 East Capitol Avenue
Pierre, SD 57501

Also on this day, a true and accurate copy was sent via U.S. mail to the following:

James Hutmacher, Chairman
Water Management Board
523 East Capitol Avenue
Pierre, SD 57501

Matthew E. Naasz
506 Sixth Street
P.O. Box 8045
Rapid City, SD 57709

Rodney Freeman Jr., Prehearing Chairman
Water Management Board
523 East Capitol Avenue
Pierre, SD 57501

Bruce Ellison
P.O. Box 2508
Rapid City, SD 57709

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Tonia Stands
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Rapid City, SD 57701

Nicole E. Ducheneaux
Big Fire Law & Policy Group LLP
1404 South Fort Crook Road
Bellevue, NE 68005



Legal Assistant

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

IN THE MATTER WATER	)	ORDER REGARDING YANKTON SIOUX
APPLICATION NO. 1963A-1, TOM	)	TRIBE'S MOTION FOR TIME CERTAIN
AND LORI WILSON	)	FOR WITNESS TESTIMONY
)	
)	
)	
)	
)	
)	
)	

WHEREAS, the Yankton Sioux Tribe (the "Tribe" hereinafter) filed a Motion for Time Certain for Witness Testimony; and

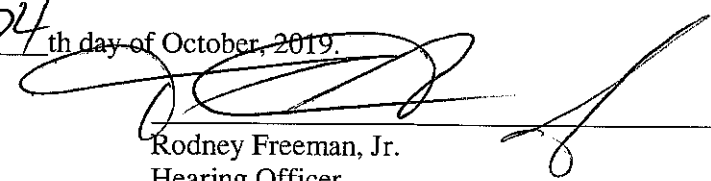
WHEREAS, the Tribe asserts that a witness, Kip Spotted Eagle, is unavailable to testify on October 30-31, 2019 due to a family medical appointment; and

WHEREAS, the Tribe requests that the testimony of Kip Spotted Eagle be heard during the October 29, 2019 hearing date (out of order in relation to the August 27, 2019 Order on Hearing Procedure).

NOW THEREFORE, upon information and belief, the Applicant does not oppose the Tribe's Motion, and the Board has no objection.

FOR THE REASONS set forth above, the Yankton Sioux Tribe's Motion for Time Certain for Expert Testimony is hereby **GRANTED**. The Board will hear the testimony of Kip Spotted at the Hearing on October 29, 2019; the timing of such witness will be determined by the Board.

Dated this 24th day of October, 2019.


Rodney Freeman, Jr.
Hearing Officer
South Dakota Water Management Board

STATE OF SOUTH DAKOTA

SOUTH DAKOTA WATER MANAGEMENT BOARD

IN THE MATTER OF WINK CATTLE)	
COMPANY'S APPLICATION TO AMEND)	
WATER RIGHT NO. 1855-1 AND WATER)	YANKTON SIOUX TRIBE'S
PERMIT NO. 1975-1 FOR ADDITIONAL)	MOTION FOR TIME CERTAIN FOR
AREAS OF USE, APPLICATION NO.)	WITNESS TESTIMONY
1975A-1)	
)	

The Yankton Sioux Tribe (the "Tribe"), by and through its attorneys Fredericks Peebles and Patterson LLP, hereby submits this Motion for Time Certain for Witness Testimony.

As previously disclosed, the Tribe intends to offer testimony of Kip Spotted Eagle at the hearing in this matter. Mr. Spotted Eagle is unavailable to appear on the hearing dates scheduled for October 30-31, 2019, because he has a family medical appointment. Mr. Spotted Eagle is willing and able to provide testimony in this matter on October 29, 2019. The Tribe's counsel was unable to reach opposing counsel for their positions on this motion.

WHEREFORE, the Tribe hereby requests that the testimony of the Tribe's witness, Kip Spotted Eagle, be set during the October 29, 2019 hearing date.

Respectfully submitted this 1st day of October, 2019.


Jennifer S. Baker, *Pro Hac Vice*
Thomasina Real Bird
Fredericks Peebles & Patterson LLP
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Louisville, CO 80027
Phone: (303) 673-9600
Facsimile: (303) 673-9155
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/s/ _____
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Rapid City, SD 57702
Phone: (605) 791-1515
Fax: (605) 791-1915
Email: rkidder@ndnlaw.com

Attorneys for the Yankton Sioux Tribe

CERTIFICATE OF SERVICE

I certify that on this 1st day of October, 2019, the original of the **YANKTON SIOUX TRIBE'S MOTION FOR TIME CERTAIN FOR WITNESS TESTIMONY** was filed with the Chief Engineer for the Water Management Board by U.S. mail at:

Eric Gronlund
DENR Water Rights Program
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Pierre, SD 57501

Also on this day, a true and accurate copy was sent via U.S. mail to the following:

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Legal Assistant

STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
WATER MANAGEMENT BOARD

IN THE MATTER WATER)
APPLICATION NO. 1975A-1, WINK)
CATTLE COMPANY)

ORDER REGARDING YANKTON
SIOUX TRIBE'S MOTION FOR TIME
CERTAIN FOR WITNESS TESTIMONY

WHEREAS, the Yankton Sioux Tribe (the "Tribe" hereinafter) filed a Motion for Time Certain for Witness Testimony; and

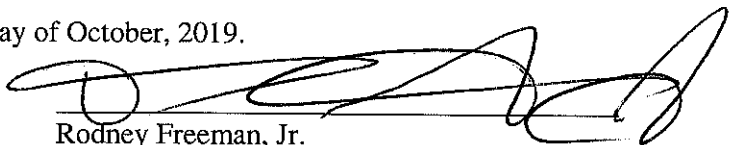
WHEREAS, the Tribe asserts that a witness, Kip Spotted Eagle, is unavailable to testify on October 30-31, 2019 due to a family medical appointment; and

WHEREAS, the Tribe requests that the testimony of Kip Spotted Eagle be heard during the October 29, 2019 hearing date (out of order in relation to the August 27, 2019 Order on Hearing Procedure).

NOW THEREFORE, upon information and belief, the Applicant does not oppose the Tribe's Motion, and the Board has no objection.

FOR THE REASONS set forth above, the Yankton Sioux Tribe's Motion for Time Certain for Expert Testimony is hereby **GRANTED**. The Board will hear the testimony of Kip Spotted at the Hearing on October 29, 2019; the timing of such witness will be determined by the Board.

Dated this 24th day of October, 2019.



Rodney Freeman, Jr.
Hearing Officer
South Dakota Water Management Board