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MINUTES OF THE 221th MEETING OF THE
WATER MANAGEMENT BOARD
CAPITAL LAKE VISTOR CENTER
650 EAST CAPITOL AVENUE
PIERRE, SOUTH DAKOTA
January 13-14, 2020

CALL TO ORDER:

Chairman Hutmacher called the meeting to order at 8:28AM central daylight time. Julie Smith conducted a roll call vote of board members.

WATER MANAGEMENT BOARD MEMBERS PRESENT:

Peggy Dixon, Everett Hoyt, Tim Bjork, Leo Holzbauer, Rodney Freeman and Jim Hutmacher. Chad Comes was unable to attend. A quorum was present.

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

The following attended the meeting.

DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES (DENR):

Jeanne Goodman, Ron Duvall, Vickie Maberry, Karen Schlaak, Whitney Kilts, John Farmer, Eric Gronlund, Nakaila Steen, Blaise Hansen with the Water Rights Program; Julie Smith with the Drinking Water Program.

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

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
Tatanka Lone Eagle, petitioner
Jennifer Baker, counsel for Yankton Sioux Tribe
Cindy Myers, petitioner
Mahmud Fitol, petitioner
Jason Shald, petitioner

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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
Matt Naasz, Counsel for Tom & Lori Wilson and Wink Cattle Company
Bob Mercer, reporter
Peter Capossela, Counsel for Great Plains Tribal Water Alliance and Rosebud Sioux Tribe
Rebecca Terk
Jim Aamot
Matt Maher, Counsel for TransCanada Keystone Pipeline
Faith Spotted Eagle
Mike Novotny, Counsel for Cheyenne River Sioux Tribe
Julie Santella, petitioner
Steve Vance
Syed Huq
Pat Handlin, Counsel for Dakota Rural Action
James Ehler
Reinhard Zarata
Paula Antonie
Kent Moeckly
Pam Wilson
Lloyd Guy
Tonia Stands, petitioner
Holly T Bird
Leoyla Cowboy
Stu Adams
Phil Two Eagle
Joseph Robertson
Nick Elk Looks Back
Claude R Code
Manape LaMere
Ely Water
John Harter
MniWakan Nakicijinpi
Chalmer Combellick
Oscar High Elk
Rodney A Grass
Mario Gonzalez
Mona Renoveh
Phyllis Young
Isiah GrenBeal

ADOPT FINAL AGENDA FOR January 13-14, 2020:

Water Management Board
January 13-14, 2020

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

CONFLICTS DISCLOSURES AND REQUEST FOR STATE BOARD WAIVERS: None

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

Public Commenter: Phil Two Eagle, Rosebud, SD

CONTINUE WITH WITNESS 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

Chairman Hutmacher called upon Jennifer Baker, Counsel for Yankton Sioux Tribe to call a witness.

Mr. Peter Caposella, counsel for Great Plains Tribal Water Council and the Rosebud Sioux Tribe requested the Board take up the joint motion filed by a number of parties to deny all applications as a matter of law based on TransCanada not meeting its burden of proof regarding public interest.

Dakota Rural Action and Yankton Sioux Tribe joined Mr. Caposella's request for resolution of their motion to deny all applications as a matter of law. Chairman Hutmacher stated the motion will be taken up later as the Board received the motion late Friday afternoon and has not had an opportunity to review the motion.

Ms. Baker, counsel for Yankton Sioux Tribe, called Dr. Joseph Robertson

The court reporter administered the oath to Dr. Joseph Robertson.

Dr. Robertson is an enrolled member of Sisseton Wahpeton Oyate. Dr. Robertson recited his educational background. He has served as a statistical analyst. He specializes in statistical analysis to model real life situations. He reviewed law enforcement capacity in the area of the pipeline project.

Dr. Robertson gathered data as part of a risk assessment about harm from workforce camps. It pertains to the influx of workers and law enforcement's ability to address the risks. The data was gathered between May 2019 and December 2019. Consultations occurred with Yankton Sioux Tribe and Rosebud Sioux Tribe law enforcement officials and a Rapid City law enforcement analyst.

The Yankton Sioux Tribe has ten officers which equates to one officer per 500 tribal members. Also, the area they patrol is 685 square miles. There could be less than one officer per 171 square miles since all ten officers are not on duty at the same time. The drive from the Winner

workforce camp to Ft. Randall casino is 82 miles while the drive from the Winner workforce camp to the Rosebud casino is a little over 70 miles.

In comparison, Rapid City has 130 officers, which equates to one officer per 577 residents. One officer's coverage area is 0.42 square miles. A Yankton Sioux Tribal officer must cover a significantly greater area.

Dr. Robertson indicated as a citizen who has listened to the testimony presented in this case, he believes it is important to provide input. He is deeply concerned with the harm to citizens as a result of the TransCanada project, especially to the women and children that can be impacted and law enforcement's ability to address the issues associated with the workforce camps. These water permit applications should be considered contrary to the public interest.

Peter Capossela, counsel for Great Plains Tribal Water Alliance and/or Rosebud Sioux Tribe, cross examined Dr. Robertson.

Dr. Robertson stated law enforcement capacity is not adequate to address the issues that will arise during pipeline construction. Mr. Taylor objected, which was overruled by Chairman Hutmacher. Dr. Robertson stated he is trying to understand the unforeseen consequences of the project. There is clearly the potential for issues to result from up to 1,000 workers showing up in the area. He is trying to provide information to the Board. It is Dr. Robertson's knowledge that the Yankton Sioux Tribe and Rosebud Sioux Tribe do not have cross deputation authority or agreements with the state regarding joint law enforcement efforts.

Mr. Ellison, counsel for Dakota Rural Action, cross examined Dr. Robertson

Dr. Robertson stated that law enforcement issues could also apply to the city of Winner, which is approximately ten miles from the Colome workforce camp. The work force camps will nearly double the population of the area. Similar issues will result to both white and red communities including the towns of White River and Mission.

Dr. Robertson indicated that there are similar concerns in the Harding County area where the workforce camp could double the population of the area.

Mike Novotny, counsel for Cheyenne River Sioux Tribe, cross examined Dr. Robertson

Dr. Robertson testified regarding the potential consequences to the eastern portion of the Rosebud Sioux Tribe due to lack of officers. Law enforcement response time could be hours instead of minutes. Mr. Taylor objected, and Chairman Hutmacher sustained the objection.

Dr. Robertson said the focus of his analysis was the Colome workforce camp and not the other man camps.

Tonia Stands, pro se intervenor, cross examined Mr. Robertson

Dr. Robertson stated that missing indigenous women is beyond the scope of his review today. He is testifying regarding law enforcement capacity to address issues regarding this pipeline project.

Mr. Taylor, counsel for TransCanada, cross examined Mr. Robertson

Dr. Robertson testified he has not talked with TransCanada regarding the measures that will be in place to address law enforcement during construction. Dr. Robertson further stated there are jurisdictional and sovereignty issues where the tribes are reluctant to enter into agreements with the state regarding joint law enforcement.

Matt Naasz, counsel for Wink Cattle Company and Tom and Lori Wilson, cross examined, Dr. Robertson

Dr. Robertson stated he is aware that neither the Wink or Wilson application requests additional appropriation of water.

Ms. Baker, counsel for behalf of Yankton Sioux Tribe, called Faith Spotted Eagle.

The court reporter administered the oath to Faith Spotted Eagle.

Ms. Spotted Eagle stated she is an enrolled member of the Yankton Sioux Tribe, an elder and a member of an "old time" society and is the chair of the Yankton Sioux Tribe's treaty commission. She has a master's degree in guidance and counseling. She has been a school principal, basketball coach, and a consultant in peace making and cross-cultural training.

Ms. Spotted Eagle has concerns since she has mentored young girls and boys. Babies are born in water in the womb and there is a need to keep water safe. Near Yankton during summer camps those individuals that bathe in the water have gotten rashes, which is an indication there is something wrong with the water.

She is also concerned with infringement of their Tribal Winter Rights and is active in protecting the rights afforded the tribe in the 1851 treaty. Ms. Baker handed Ms. Spotted Eagle Exhibit No. 101. It is the 1851 Treaty of Ft. Laramie.

Ms. Baker handed Ms. Spotted Eagle Exhibit No. 102, which is the 1858 treaty with Yankton Sioux Tribe. Ms. Spotted Eagle said it was a treaty their people were coerced into signing since the tribal members were starving. Ms. Spotted Eagle stated the proposed pipeline travels through the treaty area. The Yankton Sioux Tribe has not consented to the pipeline route through the tribal area, and this is a violation of the treaty. They have also not consented to TransCanada's use of water provided the tribe by the treaty.

Ms. Spotted Eagle stated she is concerned with missing, abducted, and murdered indigenous women. She has personal experience involving a victim, who was relative, that was murdered. Both racial and sexual insults continue to occur. When she was younger, she was assaulted resulting in her getting kicked and having a broken leg. These types of occurrences are ongoing

today. Native American girls are targets for sexual predators. There is currently no protection in place with the result being great danger for indigenous women.

Ms. Baker handed Ms. Spotted Eagle Exhibit Nos. 105 and 106. Ms. Spotted Eagle stated they are the Yankton Sioux Tribe Resolution No. 2019-51 and Rosebud Sioux Tribe Exhibit No. 2019-38. They are resolutions regarding plans to protect tribes so that no workforce camps or pipeline are on tribal ground. The resolutions are important to create a database and sharing baseline data to implement an approach to protecting young girls and boys. They intend to protect cultural sites, which are commonly near water. Tribal women are always near the water as that is where they cook and take care of children. The resolutions are to protect the public interest.

Mr. Capossela, counsel for the Great Plains Tribe Water Alliance and/or the Rosebud Sioux Tribe, cross examined Ms. Spotted Eagle.

Ms. Spotted Eagle indicated that Canada is ahead of the United States regarding addressing issues to protect tribes. The treaty council's work on the Missouri River benefits not only the tribes but the state of South Dakota.

Ms. Handlin, counsel for Dakota Rule Action, cross examined Ms. Spotted Eagle

Ms. Spotted Eagle stated the treaty territory boundaries go into Nebraska, Wyoming, North Dakota, and South Dakota. The Cheyenne River, Bad River, and White River are within treaty boundaries.

Mike Novotny, counsel for the Cheyenne River Sioux Tribe, cross examined Spotted Eagle.

Ms. Spotted Eagle testified that many of the women's cultural sites along the river are fasting sites. There are 'thank you sites', fasting sites, and children sites all along the rivers. Contaminated water affects a woman's reproductive ability and increases the potential for birth defects.

Last summer, within a 50 mile stretch of a river there were 72 medicines found that can be used in numerous ways. Contaminated water can affect the ability of medicines to work. Contaminated water is bad medicine.

Mr. Fitol, pro se intervenor, cross examined Ms. Spotted Eagle.

Ms. Spotted Eagle stated where the pipelines cross the rivers are very near downstream intakes on tribal lands. There were shortages of water a few years back at the Standing Rock and Cheyenne River Sioux Tribe. This project will affect tribal rights and the ecosystems impacted by the withdrawal of water. Ms. Spotted Eagle testified the Yankton Sioux Tribe could be in a worse position because they are downstream of where contamination may occur.

Ms. Spotted Eagle is aware of sacred religious sites on the Cheyenne, Bad, and White Rivers.

Ms. Spotted Eagle stated under Tribal Winter Rights the tribes have senior rights to the use of water.

Ms. Spotted Eagle stated that drought, spills, and impacts to cultural sites are all concerns regarding the effects to the water supply.

Mr. Jason Shald, pro se intervenor, cross examined Ms. Spotted Eagle.

Ms. Spotted Eagle stated that when doing cultural competence training of managers, she saw an arrogance and incompetence. She can only think what the level of disregard is at the worker level.

Ms. Spotted Eagle testified there is an ongoing problem with derogatory comments being directed at those that oppose the pipeline. Ms. Spotted Eagle thinks it is foolish to continue the project without further study.

Ms. Spotted Eagle is aware of ceremonies that take place along the pipeline route, and these can be impacted by the workforce camps.

Ms. Spotted Eagle thinks common sense is important when considering this pipeline. There seems to be a disregard for the land and water. Ms. Spotted Eagle stated it is good to listen to mother earth and take the time to ensure to protect our earth. We need to think of the generations down the road.

Tonia Stands, pro se intervenor, cross examined Ms. Spotted Eagle.

Ms. Spotted Eagle said that headwaters are genesis sites. They are where the water begins, and we need to respect that. We need to be a leader in protecting the earth. This includes the water that is under the ground. The tribes have rights to the Inyan Kara aquifer (American's interpretation of the name) in that it is a creation site. The indigenous people have the foundational right to make the decision on the use of the water.

The Bozeman Trail was not allowed under the treaties; but it was not uncommon for conditions of a treaty not to be enforced.

Ms. Julie Santella, pro se intervenor, cross examined Ms. Spotted Eagle.

Ms. Spotted Eagle testified regarding Senate Bill 164 regarding missing and murdered indigenous people. The bill directs the state of South Dakota to document and train regarding missing and murdered indigenous people, but to Ms. Spotted Eagle's knowledge, that has not occurred yet. Consultation with those that have experienced those issues is needed.

Ms. Baker offered Exhibit Nos. 101, 105 and 106. These exhibits are included for all five cases. There were no objections. Chairman Hutmacher accepted the exhibits into the record.

Ms. Handlin on behalf of Dakota Rural Action offered the sealed certified copies regarding the DRA exhibits 302A – 302M, 313, 314, 318 through 333. Chairman Hutmacher stated acceptance is being deferred until later after counsel can sit down and properly label the exhibits.

Mr. Taylor stated that on December 20, 2019, the final supplemental EIS was published in the Federal Register. Mr. Taylor offered exhibit No. Z. Chairman Hutmacher accepted the exhibit into evidence.

Mr. Taylor stated there are findings of fact, conclusions of law and final decision (Hughes County 32-Civ15-000623) regarding the case brought by nine counties on the methodology for taxation. Chairman Hutmacher accepted Exhibit No. AA. The final decision was accepted but not the findings of fact and conclusions of law. Ms. Mines Bailey objected in that it was not properly disclosed.

Mr. Caposella brought up the motion for judgement on TransCanada not bearing its burden on public interest. Mr. Caposella stated now TransCanada wants to supplement its case. Chairman Hutmacher and Mr. Freeman stated they had not had time to review the motion.

Mr. Taylor requested to adopt the testimony of Mark Rath and Jeanne Goodman.

Mr. Taylor also requested the Board adopt HP09-001, which is the initial document and HP14-001, the certification proceeding before the Public Utilities Commission. Ms. Baker and Mr. Caposella objected in that TransCanada rested their case and now they are trying to circumvent the process. Mr. Ellison stated he was cut off on his testimony on Mr. Tencer based on these documents not being in the record.

Ms. Handlin offered DRA Exhibit Nos. 302A-302P, 313, 333, 318 through 333.

Mr. Taylor objected as to relevancy. Mr. Taylor stated there needs to be foundation. Relating to the exhibit regarding a gas pipeline, there is no showing between a gas issue and this application. Ms. Mines Bailey objected to 318 – 332 based on failure to disclose. Attorneys for TransCanada, Wink and Wilson joined the objection. Chairman Hutmacher overruled the objection and accepted the exhibits.

Mr. Caposella spoke to the motion for judgement that TransCanada did not meet its burden of proof on public interest. The lack of public interest testimony also relates to the Wink and Wilson applications. Mr. Tencer's testimony was about a pipeline from Alberta to Oklahoma without details. There needs to be a showing of public interest, which was not shown by Mr. Tencer's testimony. In his testimony, Mr. Tencer stated he had not looked at the public interest issues related to the project. On the other side of the ledger, intervenors have shown that it is not in the public interest. Testimony also indicated that President Bordeaux stated that the tribe was not consulted.

Mr. Taylor stated it is a technical motion. Their burden is embodied in SDCL 46-2A-9. The Chief Engineer testified that the use of water for dust suppression, construction, and human

consumption is in the public interest. The final supplemental EIS states the project is in the public interest. TransCanada has supplied numerous documents with a showing of public interest.

Mr. Naasz stated the water is to be used for domestic use – human consumption and sanitary purposes. Mr. Naasz stated Wink and Wilson opposed the motion.

Rodney Freeman moved to deny the motion to dismiss the application, second by Everett Hoyt. Board secretary conducted a roll call vote. Motion carried unanimously to dismiss the motion for judgement.

Mr. Capossela, counsel for Rosebud Sioux and/or Great Plains Tribal Water Alliance, called Paula Antoine.

Court Reporter administered the oath to Ms. Antoine.

Ms. Antoine is the director for the Rosebud Sioux Tribe land office, which handles permitting, mapping, land management, and leasing of lands owned by the Rosebud Sioux Tribe. Ms. Antoine manages the office, land management plans, permits for grazing and right of ways and handles drought issues. Ms. Antoine is familiar with tribal lands located in Tripp County. She is also familiar with the proposed pipeline route and the diversion point from the White River. The project is very close to a number of tribal tracts of land. It will have adverse effects to tribal tracts because of the decreased flow of water. The pipeline will affect future land management of that area. The pipeline can also affect migratory paths of deer and other wildlife.

Ms. Antoine stated she went to the area with Jason Shald who is a drone pilot to document the area. They were chased by a white security truck that tried to run into them and yelled at them to leave the area. She was scared and offended by the incident.

Ms. Antoine stated the proposed pipeline runs very close to tribal lands. In some areas, it is an arm's length away. From her home, the pipeline will be a quarter mile away.

Ms. Antoine is concerned about the workforce camp. She is also concerned that with the proximity to Interstate 90, it will be used for crime or sex trafficking.

Mr. Caposella provided Exhibit 302A to Ms. Antoine. The exhibit is the report for the Freeman oil spill. Ms. Antoine stated she has a charge to protect all lands and water. With the spill in Freeman, they organized going there for a prayer service to make sure the spill would not affect the Ogallala aquifer. At the time, the landowner asked that they pray for him. When she was at the site there was water in the ditch that had a film and an aroma to it.

Mr. Ellison, counsel for behalf of Dakota Rural Action, cross examined Ms. Paula Antoine.

Ms. Antoine stated that on the Standing Rock reservation, the trucks used by TransCanada were white in color. If construction occurs, Ms. Antoine believes there will be detrimental effects everywhere for the people in the area. She fears for the safety of the people in her hometown.

Mr. Fitol, pro se intervenor, cross examined Ms. Antoine.

Ms. Antoine stated that as part of her duties she does compliance checks on tribal land leases with the tribe.

Mr. Shald, pro se intervenor, cross examined Ms. Antoine.

Mr. Shald first clarified he is a noncommercial journalist when doing his drone piloting.

Ms. Antoine stated she believes there is additional militarization due to these type of construction projects. She believes her rights as a citizen have been hampered by these activities as she has the right to voice her opinion without being targeted and scrutinized. She indicated she can no longer drive around and enjoy the countryside. Ms. Antoine anticipates that after her testimony today she'll receive messages about being hurt or even get death threats. This project is not in the best interest of the state.

Ms. Antoine stated that cultural events and ceremonial services will be disrupted by pipeline activities. The ceremonies generally take place outside.

Ms. Tonia Stands, pro se intervenor, cross examined Ms. Antoine.

Ms. Antoine stated that water used for ceremonies could be contaminated if the project moves forward. Many of their ceremonies are conducted on a daily, weekly, or annual basis. All ceremonies involve the use of water and medicines and they must be protected.

Mr. Capossela, counsel for Rosebud Sioux Tribe and/or Great Plains Tribal Water Alliance, cross examined Elizabeth Wake Man.

The court reporter administered the oath to Elizabeth Wake Man.

Ms. Wake Man stated she works for the National Resources Department for the Flandreau Santee Sioux Tribe. Her duties include being the brownfields coordinator who does surveys for hazardous waste on tribal lands. She also the director of the Water Alliance for the tribe.

Ms. Wake Man stated that if there is a spill, she would be called to help with the cleanup. There are concerns with the spills and how and when they will happen. The spills cause harm to the land and tribal resources. Flandreau is located 12 miles from the Minnesota border.

Mr. Ellison, counsel for Dakota Rural Action, called Kent Moeckly.

First, the Board granted DRA's motion in limine regarding a prior felony conviction for Mr. Moeckly.

The court reporter administered the oath to Kent Moeckly.

Mr. Moeckly is a retired farmer from Britton and testified regarding construction of the pipeline and the pipeline spill that occurred near Amherst in Marshall County. He now leases his property to another individual. Mr. Moeckly took pictures after the oil spill near Amherst. Mr. Ellison showed Mr. Moeckly Exhibit 308, which is a series of pictures taken by Mr. Moeckly. Using the projector, those pictures were shown to the Board with Mr. Moeckly describing each picture.

Mr. Moeckly stated that the year the spill occurred was very wet. When the spill occurred, he traveled to the site and was in close proximity to where the spill occurred. There was significant traffic. He noticed a putrid smell in the area. He was not allowed to get any closer to the site. Once TransCanada personnel were on site everything became very secretive.

Mr. Moeckly went on to describe pictures from Exhibit No. 308 regarding reclamation after pipeline construction.

Mr. Moeckly stated he told personnel on-site that under the wet conditions filling in the trench with saturated soil was not proper. They initially stopped their work. However, upon coming back to the site he found that they had restarted their work, finished that day, and left the site. Mr. Moeckly continued through a series of pictures showing various site conditions when reclamation was taking place.

Mr. Moeckly finished his direct testimony stating that the pipeline rupture was only forty yards from the Crow Creek drain which conveys drainage water from the basin into the James River.

Mr. Capossela, counsel for Rosebud Sioux Tribe and/or Great Plains Tribal Water Alliance, cross examined Mr. Moeckly.

In general, Mr. Moeckly testified that TransCanada is not to be trusted. During remediation efforts, outside firms were brought in for the work. There was an increased crime rate in the area during the remediation.

Mr. Shald, pro se intervenor, cross examined Mr. Moeckly.

Mr. Moeckly stated the increased traffic did cause a lot of damage on the county roads. The County Commission tried to get money for the damage that occurred to roads.

Ms. Julie Santella, pro se intervenor, cross examined Mr. Moeckly.

Mr. Moeckly stated there were other individuals that had problems with TransCanada during the reclamation.

Mr. James Moore, counsel for TransCanada, cross examined Mr. Moeckly.

Mr. Moeckly stated the reclamation from the original pipeline construction took place in 2009. He does not have pictures since TransCanada came back and did further reclamation. He met with TransCanada personnel in 2012 to review reclamation work on his property. He did not

recall saying he was happy with the reclamation work. He was paid for the easement on his property after the threat of eminent domain. He indicated that no one was paid for the crop loss on the property.

Dakota Rural Action objected to the line of questioning based on beyond the scope of direct testimony. Chairman Hutmacher overruled the objection.

Mr. Moeckly stated he has not worked on construction of a pipeline. He is not familiar with West River soils. He assumes west river soils are similar to his land in Marshall County.

Mr. Moeckly stated he is not familiar with the bonds posted regarding potential damage to roads that are conditions of the PUC permit. Mr. Moeckly stated he is not familiar with whether the county released those bonds. Mr. Moeckly stated the Amherst spill did not affect his land.

Mr. Bruce Ellison, counsel for Dakota Rural Action, called John Harter.

The court reporter administered the oath to John Harter.

Mr. Harter stated he runs a cow/calf operation in Tripp County and teaches martial arts. The proposed pipeline will cut across a portion of his property in the sandhills that sits above the Ogallala aquifer. The soils are high erodible blow sands. Under wet conditions from last year, water levels were at or above the surface.

Between use by Tripp County Rural Water and the city of Winner, the water level will drop six feet and impacts his water levels. Within a six-mile area, there is a heavy draw of water. TransCanada plans to purchase water from Tripp Rural Water. That will draw the water table further down. He questioned whether Tripp Rural Water can legally sell water to TransCanada as the rural water use is to be for domestic and agricultural use.

Mr. Harter stated the pipeline will go through a wetland on his property. There was no discussion of horizontal drilling, instead trenching of the pipeline will occur across this property. Mr. Harter believes having this pipeline across his property is going to cost him money. He indicated the landowners are supposed to watch over the pipeline. He lives 16 miles from this property. Based on his time and mileage, he figures it will cost him about \$900 a day in time wasted when he could be moving bales of hay. He believes it will also reduce his property values. His easement payment is \$13,000. Over 50 years that equates to \$1.37 per day. Mr. Harter stated that TransCanada has changed the proposed location of the pipeline on his property three times without consulting with him. Mr. Harter questions TransCanada's honesty.

Mr. Harter stated he has two wells just off the pipeline route. The old well is not capped off. The new well is just beyond 175 feet from the proposed pipeline. The pipeline heat can have an adverse effect on the soil health and lessen the vegetation's production capability.

Mr. Capossela, counsel for Rosebud Sioux Tribe and/or Great Plains Tribal Water Alliance cross examined Mr. Harter.

Mr. Harter stated that he is concerned about the threat of anthrax due to ground disturbance. There is a higher risk with the pipeline because of the amount of disturbance. He was advised by his veterinarian to vaccinate his cattle, which is an additional expense. Additionally, the overall value of the property will decrease by turning it into a Superfund site.

Mr. Harter stated his land is located four miles west of Colome. He has property that adjoins land held by the Rosebud Sioux Tribe.

Ms. Baker, counsel for Yankton Sioux Tribe, cross examined Mr. Harter.

Mr. Harter stated he is familiar with the PUC permit and conditions. Condition No. 35 is to be treated as a high consequence area. To Mr. Harter's knowledge he is unaware of any consultation with the county regarding Condition No. 35.

Mr. Harter stated he has sage and other medicinal plants that grow on his property.

Mr. Novotny, counsel for Cheyenne River Sioux Tribe, cross examined Mr. Harter.

Mr. Harter testified that there is a turtle effigy on his property. He indicated that he is unaware if TransCanada did any cultural surveys on the property as TransCanada would not provide them to him. The Rosebud Sioux Tribe did a cultural survey independent of the TransCanada survey that found the turtle effigy.

Mr. Harter stated he is concerned with the concrete saddles used to hold the pipeline from becoming buoyant due to friction and / or corrosion that could over time damage the pipeline.

Mr. Harter stated there are endangered species such as the burying beetle and possibly an endangered salamander on his property.

Mr. Mahmud Fitol, pro se intervenor, cross examined Mr. Harter.

Mr. Harter stated he uses wells to water his livestock. The water source is the Ogallala High Plains aquifer. He is concerned about the pipeline contaminating the aquifer. He also said there is no plan for removing the pipeline at the end of its projected life.

Mr. Harter stated that after construction of the pipeline he estimates it will take three to five years to reclaim the land back to its normal state.

Mr. Shald, pro se intervenor, cross examined Mr. Harter.

Mr. Harter stated the biggest threat is being able to run his operation each day. During the calving season he was continually having meetings or court to attend. There is also monetary stress that is already associated with ranching.

Mr. Harter indicated that he would not sign an easement if it was not in his best interest. Therefore, he has been deemed uncooperative. Mr. Harter stated that during the negotiation

process, he was asked for his banking records. Companies such as TransCanada have the right to eminent domain. If he says no to a deal, they can assert eminent domain, and he is deemed uncooperative.

Ms. Santella, pro se intervenor, cross examined Mr. Harter.

Mr. Harter stated he believes his negotiation with TransCanada is uneven. He stated he did not have the ability to say “no”, and they had the ability to devalue his property.

Mr. Harter stated that the team from Rosebud Sioux Tribe provided an unbiased survey since the tribe does not have any monetary issue on his land. Mr. Harter stated he is concerned that other cultural surveys conducted by TransCanada have not followed federal guidelines and treaties.

Ms. Meyers, pro se intervenor, cross examined Mr. Harter.

Mr. Harter stated that it is challenging to put in fence posts when the water is close to the land surface. Based on that, constructing a pipeline in these areas with high water levels will be difficult. Mr. Harter stated the water level in a dugout on his land is representative of the static water level of the aquifer.

Regarding Condition No. 40 of the PUC permitting, TransCanada was to agree to replace poly vinyl pipelines within 500 feet of the pipeline. He does not have a pipeline but does have a well with polyvinyl casing within 200 feet of the pipeline route.

Mr. Taylor, counsel for TransCanada, cross examined Mr. Harter.

Mr. Harter stated that he has attended just about every hearing or legal proceeding regarding this project. Mr. Harter stated that the easement he entered is void because TransCanada violated the terms. Mr. Harter stated that Judge Brown validated the easement, but he does not recognize that decision.

Mr. Harter stated he is not an expert on PVC pipe use for well casings. He is also not an expert on heat from the pipeline and effect heat has on the soil health. Mr. Harter stated it is just common sense.

Mr. Taylor asked Mr. Harter if he wanted his well replaced by TransCanada. Mr. Harter stated he did not know. Mr. Taylor stated all Mr. Harter has to do is call him, and the well will be replaced.

Mr. Naasz, counsel for Wink and Wilson, cross examined Mr. Harter.

Mr. Harter stated that Harding County is likely 300 miles from Colome. He did not know the location of Howes Corner. Mr. Harter does not draw water from the Hell Creek or Inyan Kara aquifer.

Mr. Ellison on behalf of Dakota Rural Action stated that Governor Noem was contacted about testifying. Both times he contacted the Governor's office, the Governor has unable to attend due to scheduling conflicts.

Also, Mr. Ellison stated that Dakota Rural Action's witness, Mr. Bear Runner, is unable to attend due to a crisis on the reservation. If he is able to attend tomorrow, Mr. Ellison requests leave to call him as a witness.

The court reporter administered the oath to pro se intervenor Cindy Myers.

Ms. Myers stated she is a pro se intervenor from Holt County, Nebraska. She wants to protect the water, especially ground water. The water from the well at their home is from the Ogallala aquifer, and it is so pure and does not need filtration. Her well is 52 feet deep.

As a nurse, Ms. Myers spoke about being worried about the spikes in cancer and respiratory issues occurring in Canada. The Keystone XL pipeline is a threat to residents in South Dakota, Nebraska, and to others throughout the United States.

Specifically, her research has zeroed in on benzene, which can contaminate water. She learned that 17 drops of benzene in a 50,000-gallon water tower would result in the water being too contaminated to drink. Ms. Myers stated she believes the only acceptable level of benzene is zero in our drinking water.

Ms. Myers stated contamination from tar sands oil will sink into water compounding clean-up. Benzene causes cancer, most notably leukemia. Benzene is soluble in water and can get through human skin. High concentrations of benzene can kill a human in 10 – 15 minutes so first responders need to be trained to deal with such cases. The safety data sheets need to be provided to the hospitals prior to a spill.

Ms. Myers presented her exhibits:

- Exhibit 214 was accepted into the record. It shows tributary water courses that will be crossed by the pipeline that are vital to drinking water systems (Cheyenne, Bad, Grand, Moreau and White Rivers).
- Exhibit 213 was accepted into the record. This exhibit shows the coverage in South Dakota by rural water systems. Eighteen rural water systems draw water from the Missouri River.
- Exhibit 201 was accepted into the record which is a section from the final supplemental environmental impact statement.
- Exhibit 204 was accepted into the record which is a separate section from the final supplemental environmental impact statement.
- Exhibit 216 was accepted into the record. The picture represents how large the piles of soil are at a spill site.
- Exhibit 215 was accepted into the record. The picture is of the spill from April 2016. This was a spill of 17,000 gallons.

Ms. Myers concluded that SDCL 49-91B-22 provides that a facility can not impair the welfare of its citizens. This project will impair our welfare.

Mr. Moore, counsel for TransCanada, cross examined Ms. Myers

Regarding her testimony on the Final Supplemental EIS, Ms. Myers stated her exhibits were only excerpts of the EIS.

Mr. Shald indicated that Ms. Lone Eagle asked him to remind Board members that non-expert rebuttal experts could be called on January 13 – 14. Mr. Ellison stated Ms. Lone Eagle may have one or two rebuttal witnesses.

Mr. McVey stated that intervenors are having their ability to put on their case. The applicant has the ability to rebut but TransCanada may not have any rebuttal witnesses. If TransCanada does not call rebuttal witness, it will limit other parties ability to call their rebuttal witnesses.

Chairman Hutmacher stated he planned to conduct closing arguments the following morning beginning at 8:30 AM. Each party would be afforded 10 minutes for closing. The TransCanada issue will conclude by 10:30 AM.

Mr. Taylor stated TransCanada does not have any rebuttal witnesses but plans to have rebuttal exhibits that he is ready to offer. In general, the exhibits planned for introduction are: TransCanada asks judicial notice of the PUC dockets HP09-001 and HP14-001. In both dockets there is extensive discussion about reclamation plans. Chairman Hutmacher will take judicial notice of these two exhibits.

Regarding judicial notice of a Supreme Court ruling, Mr. Taylor said it is the law of the state, so the Board does not need to take judicial notice. Mr. Taylor withdrew offering this exhibit.

Mr. Taylor asked the Board to take judicial notice of the findings of fact, conclusions of law of Hughes County docket 32CIV15 – 00-263. This is the tax case that was brought by the nine counties. The findings set forth why the case was brought. Chairman Hutmacher denied admission of the exhibit (Exhibit CC).

Mr. Taylor offered Pages 91 – 108 of Appendix D to the FSEIS – BOR criteria for Mni Wiconi river crossings as Exhibit BB. Chairman Hutmacher denied admission of the exhibit.

Mr. Taylor offered Exhibits DD and EE which are certified copies from the Register of Deeds for Jones and Haakon County regarding BLM easement for Mni Wiconi easements and the same easements for TransCanada. Mr. Taylor stated that Reno Red Cloud testified that there was not consultation or easements regarding the pipeline for the Mni Wiconi / Ogallala Sioux water system. Mr. Caposella stated TransCanada is trying to bolster their case in chief. Chairman Hutmacher denied admission of the certified copies. Mr. Taylor stated that he intends to mark the exhibits.

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Mr. Ellison objected in that TransCanada did not justify why these are rebuttals exhibits. They are trying to fill in their case that they did not do during their case in chief. Mr. Taylor supplemented with the justification for exhibits (see above).

Chairman Hutmacher stated ten minutes will be afforded for each party to address all three applications.

Board recessed at 6:37 PM on January 13, 2020.

Board reconvened at 8:32 AM on January 14, 2020.

Chairman Hutmacher stated the first item on the agenda is closing arguments for the TransCanada applications, then the Board will move on to the Wink and Wilson applications.

Mr. Taylor, counsel for TransCanada, stated the Board operates under SDCL 46-1-4. This case is governed by SDCL 46-2A-9, which sets forth the four factors that must be met. The case shows that water is available, and the diversions will not impair existing rights. This was testified to by Mark Rath and confirmed by TransCanada's witness Mr. Hopgood. The first two factors are met. TransCanada believes it can meet the conditions set forth in the recommendations. Regarding beneficial use and public interest, the Chief Engineer testified that based on past practice, the intended uses are a beneficial use and in the public interest. TransCanada introduced into the record all the environmental impact statement's prepared on this project. The source of the oil is tar sands in Canada, which is the third largest deposit. Concerns were presented regarding the man camps, but there was not testimony regarding issues that occurred when construction took place for the Dakota Access pipeline or Keystone pipeline in eastern South Dakota. There were also issues regarding damage to roads, but there was no testimony from the counties. TransCanada has proven that the project is in the public interest. TransCanada will agree with conditions to be placed on the permits. TransCanada agrees that if the tribes quantify their Winter Rights that those rights will be senior to TransCanada's use of the water. Mr. Taylor urged granting of the permits.

Ms. Mines Bailey, counsel to the Chief Engineer, stated the applications were properly public notice pursuant to SDCL 46-2A-4. There are four factors that must be met to issue the permits. Mark Rath testified that unappropriated water is available, and the diversion will not unlawfully impair existing rights with conditions put in place. Arguments regarding water quality are not under the review of SDCL 46. As far as beneficial use, there is a statutory definition. Mr. Tencer testified about the needed water, so there is no doubt that the use is beneficial to the applicant. As for being for the public benefit, the state must determine how to develop the water. The legislature directs that water is to be put to beneficial use to its fullest extent. The Chief Engineer testified the use is consistent with past board decisions and past uses of water. Intervenor's have argued this is a special case that should be handled differently, but the statutes do not afford for a different analysis. Much of the intervenor's case is outside the bounds of Title 46 for what is to be reviewed. We are narrowly focused on Title 46 and not on areas that are under other jurisdictions. The Chief Engineer proposed qualifications, but the Board can alter those conditions. The evidence weighs in favor of issuing the permits.

Mr. Caposella, counsel for Great Plains Tribal Water Alliance and Rosebud Sioux Tribe, stated the one thing learned is that the tribal people want to protect the water, especially for the future generations. There was testimony regarding the White River and the interaction between surface water and groundwater that cannot be quantified. The upstream gage on the White River is not always operational. The Board needs to look at the risk to the water. This is under the public interest criteria. The reason there are so many studies on this project is that the studies by the state department were messed up. Risk factors include that leak detection is only 23 % effective in recognizing a leak. The project manager did not know the regulations on construction of a pipeline in a floodplain. The pipeline poses a significant risk to the waters of this state. Mr. Caposella believes the capacity to put water to beneficial use involves more than SDCL Chapter 46. The Board should deny or defer the applications until TransCanada secures all its federal permits. TransCanada lacks the ability to construct the project because they do not have approval from the tribes.

Ms. Baker, counsel for Yankton Sioux Tribe, stated SDCL 46-1-4 states that water is to be put to beneficial use and there is not to be a waste of water. TransCanada's use is blatantly not in the public interest. The burden of proof is on the applicant. Regarding availability and impairment of existing rights, the tribes have Winter Rights. The fact that Winter Rights have not been quantified does not mean they are not valid. SDCL 46-1-5 states that the use for domestic use take precedence, and the tribes uses are largely domestic. In other states such as Montana, state agencies cannot issue permits until the tribal rights are quantified. With respect to beneficial use, it has to be reasonable, in the interest of the state, and best utilization of the waters of the state. TransCanada did not show their use is reasonable. Public interest is not defined, but other statutes provide direction that public health and protection of resources must be considered. Testimony presented by Yankton Sioux Tribe showed that the influx of men at workforce camps increase crimes and violence against women. TransCanada did not put on a public interest case while intervenors showed it was not in the public interest.

Ms. Handlin, counsel for Dakota Rural Action, stated Keystone has leaked more oil than they have reported. Keystone has shown poor quality assurance in construction and maintenance. Leaks at valves are a common occurrence, so TransCanada has a problem they have not corrected. They also have not shown proper cathodic protection. In the case of the oil spill near Freeman, a leak of 16,900 gallons occurred due to an improper weld.

Mr. Ellison, counsel for Dakota Rural Action, stated the Water Management Board is the only agency to protect our water. They have broad authority under public interest. They need to decide whether to give free water to a hazardous pipeline. The project will be disastrous in the long term and possibly in the short term. This Board should not look for ways to make this work but instead should look to the issues before them. Studies on the project have been inadequate. Three permits in 11 days of testimony is a very short time to make a decision. The burden is on TransCanada, not the intervenors. There may be enough water in the rivers at times, but there are times there is not enough water and there are downstream users that must be taken into consideration. Beneficial use is defined in 46-1-6 and must be consistent with the public and best use. Conservation of the water is to be considered. The use does not extend to waste or unreasonable use or method of use. This company has a bad track record, and it will threaten all

downstream uses. South Dakota gets nothing from this project. The pipeline will cross 350 waterbodies. Mr. Ellison implored the Board to deny these applications.

Mr. Shald, pro se intervenor, stated that this pipeline will be around longer than the people in this room. He recognizes that there is a lot of conflict that weigh upon the Board. He cautioned the board to be wary of those that tell the Board to turn away from what is right. If the Board feels it needs more time, please take the time needed.

Mr. Fital, pro se intervenor, stated he strongly opposes the TransCanada pipeline. He noted gratitude to the Board to allow Nebraska residents to participate as all share the same environment. He stated action is needed on the climate. The winters are mild and there are marked increases in precipitation. Extracting tar sand oils is not in the public interest and will lead to human extinction. It has not been shown there is water available or that there will be no impairment of existing rights. This project cannot be in the public interest. All have the right to be free, and the government is attempting to limit freedoms. Tribal water rights are not being taken into consideration. This is about shared homes and shared waters; leave it in the ground. Spills will taint precious drinking water and soils. This is unacceptable. Extraction is expensive and not needed. There is much to lose due to this project. This is all risk with no reward. Fossil fuels will eventually run out so better renewable resources is needed. This pipeline threatens the water of South Dakota and Nebraska for decades to come. This is not in the interest of the American people.

Ms. Lone Eagle, pro se intervenor, stated that she has problems giving a closing argument due to the egregious act against her children, and that the state has been working with TransCanada. The state has contradicted itself because water is not available, rights will be impaired and is not a beneficial use. No one wants to hear that testimony. Ms. Lone Eagle stated that her rights have been violated. She is grateful to be able to be here today. Her children will submit in writing their closing argument. She read a statement of her son regarding a big white truck that tried to T-bone their vehicle. She wants to know why a foreign company has the right to terrorize citizens and steal our water. Ms. Lone Eagle stated they begin and end proceedings with prayer. She sang a prayer into the record in Lakota.

Mr. Taylor, counsel for TransCanada, on rebuttal closing, stated the rule of law governs but the rule of public opinion does not. TransCanada has requested water that equates to enough water to irrigate about one section of ground. These issues have been addressed by the Public Utilities Commission that determined after long hearings, the project is in the public interest. TransCanada agrees these permits are subject to the tribe's Winter Rights. The measure of public interest as described by the Chief Engineer is based on past decisions. The Department of State, PUC, Circuit Court and Supreme Court have all determined the project is in the public interest. Mr. Taylor urged issuing the permits with qualifications.

Chairman Hutmacher closed the hearing on TransCanada's three water permit applications.

Recessed at 10:13 AM.

Reconvened at 10:25 AM.

Chairman Hutmacher stated the Board will not go into deliberation on the TransCanada applications at this time.

Mr. McVey, Board Counsel, stated there are certified copies that Dakota Rural Action needs to place exhibit numbers on. Ms. Handlin indicated she would do so.

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

Ms. Mines Bailey offered the administrative record for Application No. 1975A-1 as Exhibit No. 1, administrative record for Application No. 1975-1 as Exhibit No. 5, and administrative record for Application No. 1855-1 as Exhibit No. 6. Chairman Hutmacher admitted the exhibits into the record.

Ms. Mines Bailey, counsel for the Water Rights Program, called John Farmer.

The court reporter administered the oath to Mr. Farmer.

Mr. Farmer stated he has been with the Water Rights Program for three years. He is working to become a professional engineer. He gave a history of his work experience prior to his employment with the Water Rights Program. His job duties for the Water Rights Program include technical reports on water permit applications and dam inspections. He prepared the technical report on Application No. 1975A-1. He corrected his report that on page two, the reference to eight water wells should be ten water wells on record. Ms. Mines Bailey offered Exhibit 2, the curriculum vitae for Mr. Farmer. Chairman Hutmacher accepted Exhibit 2.

Mr. Farmer stated that Application No. 1975A-1 seeks to use the water in different areas than authorized by No. 1975-1. It does not request additional water. Water Permit No. 1855-1 appropriated the use of 0.133 cfs for domestic and rural use for livestock water. Also, there was a commercial component to the water use. The water source is the Inyan Kara aquifer. The permit was licensed in 2017 for 39 gallon per minute (0.087 cfs).

Water Permit No. 1975-1 sought to increase the diversion rate from the well and to allow use of water in a temporary man camp. Currently, No. 1975-1 appropriates an addition of 31 gpm for a combined total of 71 gallons per minute from the well.

Mr. Farmer stated his review was limited to whether there would be an unlawful impairment of existing rights since this is an amendment. His review did not look at whether there is unappropriated water available. He reviewed whether there would be an adverse impact to adequate wells. An adverse impact would be if an adequate well could no longer provide sufficient water.

Ms. Mines Bailey offered Exhibit No. 7 which is a map of the area that Mr. Farmer prepared. Chairman Hutmacher accepted Exhibit No. 7 into the record. Mr. Farmer stated the green

triangles are water rights completed into the Inyan Kara aquifer. The blue circles are well completion reports on file for wells greater than 2,000 feet deep.

Mr. Farmer stated there are 186 water rights completed in the Inyan Kara aquifer in South Dakota. Forty-six water rights are in Meade County. Besides the applicant there is one water right in a ten-mile radius using this aquifer. He did not look for rights within the Cheyenne River Sioux reservation. He looked for that information on the tribe's website but was unable to find any information.

Mr. Farmer stated there are ten well completion reports within a ten-mile radius that are greater than 2,000 feet deep. The nearest domestic well is 2 ½ miles away. The Cheyenne River Sioux reservation boundaries are about three miles away.

Mr. Farmer stated he does not believe there will be unlawful impairment of existing rights based on the artesian head pressure and the distance between wells. He based this on the Theis Equation. There is over 2,700 feet of head pressure in the Wink well. The Inyan Kara is a large aquifer with a significant amount of water in storage. The Water Rights Program has not received any report of complaints regarding this well.

Mr. Farmer testified that there was not an annual volume cap on Permit No. 1975-1. Under Application No. 1975A-1, the Chief Engineer recommended a qualification on the recommendation to limit the amount of use by the workforce camps to 57.2 acre feet per year.

Mr. Matt Naasz, counsel for Wink Cattle Company, cross examined Mr. Farmer.

Mr. Farmer did not conduct a hydrologic budget as part of his review since this was an amendment. The review showed that the proposed withdrawal would not adversely impact the artesian head pressure. To adversely impact an adequate well, the head pressure would need to be reduced to the top of the aquifer.

Mr. Caposella, counsel for Rosebud Sioux Tribe and/or Great Plains Tribal Water Alliance, cross examined Mr. Farmer.

Mr. Farmer indicated that the Inyan Kara aquifer does not communicate with the Cheyenne River or alluvial deposits. He indicated that other wells may need to have lowered pumps if the artesian head pressure is reduced. The recommended 57.2-acre feet of water annually was arrived at based on an email from the applicant's consultant.

Ms. Handlin counsel for Dakota Rural Action, cross examined of Mr. Farmer.

Mr. Farmer indicated that No. 1975-1 and 1975A-1 were reviewed at different times. The different time periods could impact the number of existing rights since another permit could have been issued between the two reviews. He prepared a hydrologic budget when he reviewed Application No. 1975-1. A hydrologic budget was not conducted for No. 1975A-1.

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

Ms. Mines Bailey offered Exhibit No. 1, the administrative record for Application No. 1963A-1 and Exhibit No. 5, the administrative record for Water Permit No. 1963-1. Chairman Hutmacher admitted the exhibit into the record.

Ms. Mines Bailey, counsel for the Water Rights Program, called Whitney Kilts.

The court reporter administered the oath to Whitney Kilts.

Ms. Kilts stated she has been with the Water Rights Program for five years. Ms. Mines Bailey offered Exhibit No. 2 which is the curriculum vitae for Ms. Kilts. Chairman Hutmacher accepted Exhibit No. 2 into the record.

Ms. Kilts went through her educational background. She has a bachelor and master's degree in civil engineering from SDSU. She is working to obtain her professional engineering license. Ms. Kilts stated her duties include preparing technical reports, conducting dam inspections, reviewing of plans and specifications, licensing well drillers and co-directing four seasonal employees that measure water levels in observation wells.

Mr. Kilts made a correction on page 3 of her report; the "city" of Buffalo should be the "town" of Buffalo.

Mr. Kilts stated this application seeks to amend No. 1963-1 to add additional places of use of water to Permit No. 1963-1 to supply workforce camps. The application does not seek additional diversion or volume to what is authorized. Her review involved whether there would be unlawful impairment of existing rights.

In looking at unlawful impairment, Ms. Kilts stated she looks at whether there will be an adverse impact to an adequate well. Permit No. 1963-1 appropriated water from the Hell Creek aquifer at a rate of 0.53 cfs for irrigation, livestock water, and temporary use at a workforce camp. There is not a volume cap on the non-irrigation component of the permit.

Ms. Mines Bailey offered Exhibit No. 7, which was an area map compiled by Ms. Kilts. Chairman Hutmacher accepted Exhibit No. 7 into the record. Ms. Kilts stated the exhibit shows existing water rights, observation wells, domestic/stock well completion reports, and well locations authorized by Water Permit No. 1963-1.

Ms. Wilts stated there are eleven water rights on file appropriating water from the Hell Creek aquifer. The nearest Indian reservation boundary is 80 miles away. The nearest domestic well is in the name of Licking, which is about 0.9 miles away. Ms. Kilts believes there is a reasonable probability that there will not be an unlawful impairment of existing rights. This is based on the diversion and distance from the nearest wells.

There is an observation well in the area that documents the water levels in the Hell Creek aquifer. The observation well is about four miles from the town of Buffalo wells.

Ms. Mines Bailey showed Ms. Kilts Exhibit No. 6, which is the hydrograph for observation well HR-86F. Ms. Kilts indicated the period of record for the well is from the mid 1980's to 2019. The water level has been increasing, and there are no sharp downward trends. Chairman Hutmacher accepted Exhibit No. 6 into the record.

The town of Buffalo has multiple wells authorized by water rights. If there were significant issues with the aquifer and withdrawals by the town of Buffalo, the observation well would show downward points in the water level.

Ms. Kilts stated the volume cap proposed by the recommendation will limit the use for the temporary workforce camps.

Matt Naasz, counsel for Tom and Lori Wilson, cross examined Ms. Kilts.

Ms. Kilts stated she did not prepare a hydrologic budget as part of her review because with an amendment, the only criteria is whether there is unlawful impairment of existing rights. Ms. Kilts stated she is aware that Mr. Wilson testified that he rents the land where the Licking well is located. The application does not request additional water or an additional use.

Mr. Novotny, counsel for Cheyenne River Sioux Tribe, cross examined Ms. Kilts.

Ms. Kilts stated she looked at where existing users were located as part of her review. She looked at all domestic users as well. Ms. Kilts stated she is aware that the town of Buffalo has an application pending that is going through the public notice process. She did not review her report again on Application No. 1963A-1 when the town of Buffalo's application was received.

Ms. Kilts stated she is not familiar with the details of the Treaties of 1851 or 1858 but has heard of them. Ms. Kilts has heard of Winter Rights and that they deal with reserved water rights. She did not consider them as part of her review of this application because the rights are not quantified. She did not contact tribes regarding wells they may have in the area and relied on our well completion reports database.

Ms. Kilts did not contact the Cheyenne River Sioux Tribe regarding their water code.

Ms. Kilts stated the application was complete for the purpose of conducting her review. She did not look at wastewater disposal as part of her review. Ms. Kilts stated her review was quantity based. She did not look at water quality or Winter Rights.

Mr. Ellison, counsel for Dakota Rural Action, cross examined Ms. Kilts.

Ms. Kilts stated this application was to amend an existing permit to add the additional use of workforce camps that water may be supplied from the wells authorized by Water Permit No. 1963-1. The observation well indicates that the water levels are dominated by climatic changes. Ms. Kilts stated domestic use takes precedence over appropriative rights under the water rights

law. Ms. Kilts did not as part of her review look at potential contamination due to a spill from the pipeline.

Based on Exhibit No. 7, the entire area shown would have the Hell Creek aquifer under it. This is an aquifer not a lake. There is a gradient in the aquifer, so there is movement of water within the aquifer. Ms. Kilts cannot quantify the movement of water within the aquifer.

Mr. Ellison handed a copy Exhibit No. 7 and called it Exhibit No. 7A. He asked Ms. Kilts to draw an arrow of the aquifer gradient direction from Mr. Wilson's well. Ms. Kilts stated her assessment was the regional direction of flow but not the specific direction at this location. Therefore, she could not provide a gradient direction at this specific location. The direction of the gradient of the aquifer does not necessarily affect the levels in the observation well. Ms. Kilts stated she does not know the amount of flow across the aquifer annually at the Wilson site.

Ms. Baker, counsel for Yankton Sioux Tribe, cross examined Ms. Kilts.

Ms. Kilts testified that the permit holder is to report their annual water use. She is not aware if the water will be withdrawn by TransCanada or Mr. Wilson. The permit holder is responsible for reporting. Ms. Kilts is not aware of how the system will be operated.

Ms. Tonia Stands, pro se intervenor, cross examined Ms. Kilts.

Ms. Kilts stated she is not aware of how many tribes are in South Dakota. The Inyan Kara aquifer and Hell Creek aquifer are separate water bodies. The aquifers were named based on the location when the aquifer was documented. Ms. Kilts is not aware of how the Hell Creek aquifer was named without researching the topic. The Lakota and Hell Creek formations are separate.

Ms. Kilts stated she is not aware of tribal water codes.

Regarding adverse impact of a water right, Ms. Kilts stated that is the criteria that needs to be met in order to issue a water permit for an amendment. Ms. Stands indicated that the tribes have their own water codes. Ms. Kilts again stated she is not aware of tribal water codes. Based on Exhibit No. 7A, Ms. Kilts did not place a mark, because she did not know the details in the specific area of the Wilson well.

Ms. Santella, pro se intervenor, cross examined Ms. Kilts.

Ms. Kilts stated that if the location of the workforce camps changed, she did not necessarily know, but that may require them to file an amendment.

Mr. Naasz stated that Tom and Lori Wilson and Wink Cattle Company will not be calling Mr. Zapata in their case in chief but reserve the right to call him in rebuttal.

Ms. Handlin indicated that she wants to offer of proof regarding recharge from the Driscoll/ Putnam study. Ms. Handlin indicated that Mr. Farmer did not account for spring flow.

DRA Exhibit No. 1 as an offer of proof Table 16 from the Driscoll/Putnam study.

Closing arguments on Application No. 1975A-1, Wink Cattle Company

Mr. Matt Naasz, counsel for Wink Cattle Company, stated this application is for an amendment with no additional water, no additional diversion, or no additional use. They are asking for additional areas for the use of water. The Board needs to look at whether there is unlawful impairment of existing rights. There has been no testimony regarding impairment except for potential Winter Rights that have not been quantified. Mr. Wink has been providing water to area ranchers and intends to protect that use. The water for workforce camps will be used for domestic types of use like drinking and sanitation. The use is a beneficial use based on the definition of public interest. The last criteria is public interest. We are only looking at the use and not the user of the water. It is in the public interest for the men at the camps to be able to use water for uses such as brushing their teeth. Mr. Naasz stated Mr. Wink agrees to the conditions proposed by the Chief Engineer.

Ms. Mines Bailey, counsel for the Water Rights Program, stated that the notice was properly done in accordance with state law. This application was public noticed in Meade County and the other counties where water may be used. There is no increase in the diversion rate or volume of water. The workforce camp will use the water for domestic purposes. The public interest criteria must be reviewed under Chapter 46 of state law. There is no unlawful impairment and therefore the Chief Engineer has recommended approval with qualifications. The Chief Engineer has provided a volume limitation as part of the recommendation.

Mr. Caposella, counsel for the Rosebud Sioux Tribe and Great Plains Tribal Water Alliance, stated the scope of public interest as interpreted by the Chief Engineer reads the public interest out of the statutes by limiting it to Chapter 46. TransCanada wants an amendment to allow additional places of water use to build a controversial pipeline; that should be taken into consideration. The petitioner has good faith concerns with the workforce camps and the pipeline. Public interest is more than putting water to use, and the Board should interpret public interest in a broad sense.

Ms. Baker, counsel for Yankton Sioux Tribe, stated there is not a reasonable probability that the three criteria have been met. The Winter Rights have not been recognized. There is no assurance that Mr. Wink will know how much water will be withdrawn. There has been no evidence of beneficial use or public interest and the best utilization of the waters of the state. There is the threat of the activities that take place at these man camps. Yankton Sioux Tribe requests the application be denied.

Ms. Handlin, counsel for Dakota Rural Action, stated that beneficial use and public interest have been defined in DeKay vs. USFWS. The water use needs to be useful and beneficial to appropriator. But it also must be consistent with the public interest in the best utilization of the waters of the state. Mr. Wink is looking for another business opportunity to sell water. Ms. Handlin stated that calling this domestic use is a misnomer in that it is a commercial use of water. TransCanada plans to pay him for the water. The burden has not been met by the applicant. Therefore, Ms. Handlin requests the application be denied.

Continuation of Testimony on Water Permit Application No. 1963A-1, Tom and Lori Wilson

Mr. Novotny, counsel for Cheyenne River Sioux Tribe, called Chalmer Combellick.

The court reporter administered the oath to Mr. Combellick.

Mr. Combellick stated he is an enrolled member of the Cheyenne River Sioux Tribe and is an employee of the Tribe's Game, Fish and Parks. He previously worked for the SD Department of Game, Fish and Parks. Mr. Combellick stated he is a wildlife biologist with a passion for bio diversity and looks at the land as a source of life.

Mr. Combellick stated the treaties outline the boundaries for the Tribe's rights to hunt and fish. The Cheyenne people rely upon the meat and other foods gathered from the landscape. It is healthy and affordable for residents. He is aware of the location of the proposed pipeline and its proximity to the Reservation and that it crosses the Cheyenne River. He has a general knowledge of the location of the workforce camp in Meade County.

Mr. Combellick stated the introduction of contaminants in the river could impact the reintroduction of the river otter, which is an endangered species in South Dakota. Many plants in the area are used for medicine.

If there were several workers in area, Mr. Combellick stated they would expect them to possibly come on to the reservation illegally. The use of this water will enable climate change and environmental destruction.

Ms. Baker, counsel for Yankton Sioux Tribe, cross examined of Mr. Combellick.

Mr. Combellick stated the animals on the reservation are sacred to the indigenous people. Harm to the animals causes harm to the indigenous people. If the plants used for medicine are harmed, it could also cause harm the people.

Ms. Stands, pro se intervenor, cross examined Mr. Combellick.

Mr. Combellick stated the Moreau River, Cheyenne River, and Missouri Rivers flow along the borders of the Cheyenne River Sioux reservation. A decrease in the water flow could possibly have an effect on the Moreau River. The area ranchers also rely on the rivers. He is aware that other tribes have water codes.

Mr. Naasz, counsel for Tom and Lori Wilson, cross examined Mr. Combellick.

Mr. Combellick stated he is aware that the Wilson application enables the construction of the pipeline, which may impact the surface water. The reservation boundary is about 60 miles from the proposed application.

Mr. Novotny, counsel for Cheyenne River Sioux Tribe, called Steve Vance as a witness.

The court reporter administered the oath to Mr. Vance.

Mr. Vance stated he is an enrolled member of Cheyenne River Sioux Tribe. He is the historic preservation officer for the tribe. The reservation is about three million acres with land in Wyoming and land near Ft. Pierre. Mr. Vance stated he is aware of the workforce camp to be located in Meade County.

Mr. Vance stated he served in the military and then was a native artist, school bus driver, and operated heavy equipment. In 1976 he became a police officer for the Tribe, then a teacher prior to becoming the preservation officer. His current responsibilities are to preserve cultural sites on the reservation. He has been in that position for the past 10 or 11 years. Mr. Vance talked about the treaties and people coming on to the reservation without being announced. There are looters or grave robbers that come on to the reservation. He has seen an increase in traffic in the area since the proposal for the pipeline.

Section 106 consultation is supposed to be consultation, identification of effects to the Tribe, evaluation, and finally determine eligibility to National Registry. The Department of State met with the Cheyenne River Sioux Tribe prior to his position as preservation officer. He has seen many reports for the workforce camps, but they were not done with the involvement of the Cheyenne River Sioux Tribe.

Mr. Vance went through what he would look at in the field to see cultural sites that are more detailed than an archeologist will look for. Mr. Vance does not believe there was an offer to the Tribe to develop methodology or scoping for the project. The pipeline and workforce camps will affect the tribe's access to many things such as plants or finding solitude.

Mr. Vance stated that TransCanada contacted his office, but there was no discussion of methodology for the survey. He indicated that TransCanada cultural surveyors walk 30 meters apart while the tribe walk at seven meters. No mitigation measures were discussed. There was no discussion if problems occur with the cultural survey.

Mr. Vance stated the Cheyenne River Sioux Tribe says "no" to construction of the pipeline by denial of the Wilson application.

Ms. Stands, pro se intervenor, cross examined Mr. Vance.

Mr. Vance stated that every one of their ceremonies, except the Sun Dance, use water. During the Sun Dance they do not eat or drink water for four days out of respect for water.

His understanding is tribal land has not had boundaries from the beginning. Each reservation now sits on an area of land that is called tribal land. Mr. Vance stated he views tribal land to be coast to coast.

Mr. Naasz, counsel for Tom and Lori Wilson, cross examined Mr. Vance.

Mr. Vance testified he rejected a federal agency request for consultation that came from a consultant, Mr. Cushman. The application is not within the reservation boundaries.

Mr. Novotny conducted redirect of Mr. Vance.

Mr. Vance stated that consultation is to be government to government, not foundation to foundation or Mr. Cushman to Mr. Vance. Mr. Vance stated that Mr. Cushman was with a consulting firm, not a federal decision-making entity.

Ms. Santella, pro se intervenor, called Mario Gonzales.

The court reporter administered the oath to Mr. Gonzales.

Mr. Gonzales stated he is an attorney at law and has been since 1973. He is an enrolled member of the Ogallala Sioux Tribe and specializes in Indian tribal law. He understands the route of the pipeline that will cut across lands that were part of the Ft. Laramie treaty. That treaty recognized hunting and fishing rights on all these lands.

Mr. Gonzales discussed riparian rights and the prior appropriation doctrine. The prior appropriation doctrine is primarily in place in the states west of the Mississippi River. All water rights are unquantified to begin with and quantifying those rights would determine the amount of water a tribe possesses. These reserved water rights are held in trust for the tribes. He is the author of the Mni Wiconi Act that was passed through Congress, which authorized the rural water system.

Mr. Gonzales stated that Harding County would be included in the 1851 treaty land area. Mr. Gonzales stated that groundwaters are interconnected to surface waters. Therefore, groundwater issues are relevant to the treaty.

Mr. Novotny, counsel for Cheyenne River Sioux Tribe, cross examined Mr. Gonzales.

Mr. Gonzales has not been involved in the quantifications of Winter Rights in South Dakota.

The 1851 treaty recognized title to 60 million acres of land and included hunting and fishing rights on those lands. The hunting rights were purportedly extinguished by the Black Hills Act, but the fishing rights were not extinguished. A quantity and quality of water to sustain the fishery must be maintained. If there is an impact to the quality of the water, it could affect the the Tribes' subsistence fishing rights.

Mr. Gonzales stated a breach in the pipeline could contaminate the water source. An unquantified water right is a vested property right. The drawing of water from the groundwater affects the surface water, and it could impact the flows in the rivers resulting in diminishment of the flows.

Ms. Stands, pro se intervenor, cross examined Mr. Gonzales.

Mr. Gonzales believes the tribes have reserved water rights to the Hell Creek aquifer if they are within the treaty boundaries. He has no knowledge of the state contacting the tribes regarding the application.

Mr. Naasz, counsel for Tom and Lori Wilson, cross examined Mr. Gonzales.

Mr. Gonzales stated the tribes have not quantified any reserved water rights in South Dakota.

Chairman Hutmacher called for closing remarks allowing four minutes for each party.

Mr. Naasz, counsel for Tom and Lori Wilson, stated this is an application to amend a permit and does not request an increase in the diversion rate, volume or type of use. The Board needs to look if the change impairs existing rights, is a beneficial use and public interest. The discussion on Winter Rights involves unquantified reserved water rights. The water use will be used by construction workers for domestic use such as drinking and hygiene, which is a beneficial use. The scope of public interest should be relevant to the use of the water. The composition of the Board indicates it is clear the Board's inquiry should involve the use of water. It is not about the involvement of law enforcement in the project. The public interest should be about the use of the water.

Ms. Mines Bailey, counsel for the Water Rights Program, stated that the notice was proper pursuant to 46-2A-23 and 46-2A-4 and therefore is properly before the Board. The works are in Harding County and the other counties where water will be used. Ms. Mines Bailey reiterated the criteria that must be met to approve an amendment to a water permit. The review of the public interest must be within the confines of Chapter 46. The Chief Engineer recommends approval with qualifications.

Mr. Novotny, counsel for the Cheyenne River Sioux Tribe, stated that the applicant bears the burden of proof. The record of evidence is that Wilson fails to carry the burden since the Winter Rights were not considered. Even if not quantified, they are vested property rights that must be considered. DENR ignores the importance of beneficial use and public interest by lumping it under Chapter 46. The application did not include well information and wastewater disposal, so it is incomplete. The workforce camp will result in violence within the area. The tribes were not consulted. History of the construction of a pipeline shows that once operational leaks occur that contaminates the resources.

Ms. Handlin, counsel for Dakota Rural Action, stated the major points that the applicant has not shown are availability of water, nor have they shown there will not be unlawful impairment of existing rights. Mr. Wilson plans to sell this water and not make a domestic use of water. To be a beneficial use it must be in the interest of the public and be in the best use of the state's water. Water quality must be taken into consideration. This Board must consider public interest where the Public Utilities Commission did not have to look at public interest.

Water Management Board
January 13-14, 2020

Ms. Baker, counsel for the Yankton Sioux Tribe, requested the Board to adopt her closing statement made in the Wink application. Chairman Hutmacher stated the record will reflect Yankton Sioux Tribe's prior closing argument.

Ms. Stands, pro se intervenor, in closing stated that they are allowed to practice their religious activities without interference. The Board does not understand treaty or sovereignty rights. They have rights that are being violated. This project will have an adverse effect on the tribe. The tribes hold 100 percent of water rights. The relevant treaties include the tribal right to the use of groundwater.

Ms. Santella, pro se intervenor, stated she has been learning as the proceedings have progressed. She carries the concerns of many other people. She takes that responsibility very seriously. Ms. Santella said that Ms. Kilts had not accounted for Winter Rights or consulted with tribes during her review. Ms. Santella believes that the TransCanada applications and application for workforce camps are intertwined. Ms. Santella stated what is before the Board is whether five more workforce camps are in the public interest. The impact of gender violence must be taken into consideration. Ms. Santella urged to please think seriously about the matters before the Board.

Chairman Hutmacher stated the hearing on Water Permit Application No. 1963A-1, Tom and Lori Wilson is closed.

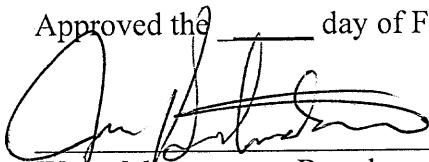
Chairman Hutmacher stated the next meeting will be Tuesday, January 21, 2020, at the Casey Tibbs Rodeo Center beginning at 11:00 AM. The Board will first go into executive session. The decision making will take place in public session. Testimony will not be allowed at that time.

Motion by Holzbauer, second by Bjork to adjourn the meeting. Motion for adjournment passed unanimously by roll call vote.

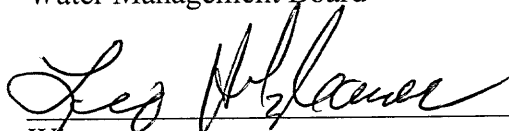
Chairman Hutmacher declared the meeting adjourned at approximately 5:00 PM.

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 February, 2020



Water Management Board



Witness

PUBLIC COMMENT
SIGN IN SHEET
WATER MANAGEMENT
BOARD MEETING
Date Jan. 13, 2020

Name

1. Phil Turo Egle

2. _____

3. _____

4. _____

5. _____

6. _____

7. _____

8. _____

9. _____

10. _____

11. _____

12. _____

City

Rosebud, SD

ATTENDANCE SHEET
WATER MANAGEMENT BOARD

Date Jan 13, 2020

<u>NAME (PLEASE PRINT)</u>	<u>MAILING ADDRESS</u>	<u>CITY, STATE & ZIP</u>	<u>Trans Canada</u> <u>ITEM OF</u> <u>INTEREST</u>
Jason Shald	13906 Poppleton Circle.	Omaha NE.	
Stu Adams	1008 N. Porter Ave	Pierre, SD	SD PR
Lloyd Guy	P.O. Box 500	Rosebud, SD	SD PR
MAHMUD FITIL		Omaha, NE	DENR #NOKXL
JOHN TAYLOR	Sioux Falls		Trans Canada
Matt Kossz	Rapid City	Rapid City	Link/Wilson
Matt Mahr	Itasca, 700 Louisiana	Itasca, TX	TransCanada
NAKAYIA STEEN	311 Center Ln, Ft. Pierre	Ft. Pierre, SD	
Blaise Hansen		Pierre	
Peter GROSSCH	PO Box 10643 Eugene OR		TC Energy
BOB MERCER	Pierre		
Phil Two Eagle	PO Box 1157, Roschard ⁵⁷⁵⁷⁰ SD	Roschard SD 57570	Sicangu Treaty Council
Pat Handlen	1180 N Milwaukee Chicago 60640		DRA
Jennifer Baker	1900 Plaza Dr	Louisville, CO 80027	water protection
Joseph Robertson	3803 State Park Dr 57105	Sioux Falls	

ATTENDANCE SHEET
WATER MANAGEMENT BOARD
Date Jan. 13, 2020

NAME (PLEASE PRINT)

MAILING ADDRESS

CITY, STATE & ZIP

ITEM OF INTEREST

MIKE NOVOTNY	1404 FT CROOK RD S. BELLEVUE, NE		
Jim Armo + Julie Smith	Brookings, SD	57006	Citizen
Tonia Strub	PC	SD	
John Grottel	RC Ogala		
Bruce	US	Lake Andes SD	KXL ^{no}
Nick Elk Looks Back	P.O. Box 2508 Rapid City	Rapid City, SD	DRA Aff
Curtis Dole	Box 436	Parmelee SD	hearing
Manape LaMere		Sioux Nation	personal
Holly T. Bird	P.O. Box 508 Mandan ND		BIZ
Rebecca Turk	910 4th St Suite A	Brookings	KXL
James Ehlers		Presho	Citizen
Paula Antoine	RST.	Rosebud SD	testimony
Steve Vance	CRST	Freeburn, SD	Water Permit
Elyse	Thurman Service	Thurman	Elk with
	Sam		act

ATTENDANCE SHEET
WATER MANAGEMENT BOARD
Date 1-13-2020

<u>NAME (PLEASE PRINT)</u>	<u>MAILING ADDRESS</u>	<u>CITY, STATE & ZIP</u>	<u>ITEM OF INTEREST</u>
Kent Wockly	Box 903	Britton, S.D.	
Wm Taylor	4820 E 57th	Sioux Falls	TLXL
Cindy Myers	PO Box 104	Strawn NE	KXL
John Harter	28125-309th Ave	Wenner SD	KXL
MRS Leola Cowboy	PO Box 578	Mandan ND 58554	KXL
Tracey Zphier	^{CRST} PO Box 590 Eagle Butte, SD	→	KXL
Mary Duvall		Pierre	legis Oversight
RENHARD ZAPATA	Jan. 14, 2020		
Elizabeth Lone Eagle	405 Maple Grove Rd, Cambridge, ON	Cambridge, Canada	KXL
Mr. Wakan Nakicijini	59.3Bj Fox Loop Rd Bridger, SD	→	KXL
Tatanka Ihancan	" " "		KXL
STEVENS VANCE	CRST		
Chalmer Combellek	CRST		
Oscar High Elk	O'ohennupa		

ATTENDANCE SHEET WATER MANAGEMENT BOARD

Date Jan. 14, 2020

NAME (PLEASE PRINT)

MAILING ADDRESS

CITY, STATE & ZIP

ITEM OF
INTEREST

Richard Bass

Mario Gonzalez

Phil Two 8/4

Tracey Zepher

Mona Remount

Phyllis Young

Isiah Grey Bear

Spud Hug

P.O. Box 152

522 Seventh Street

PO Box 1157

CRST

PO Box 590 EB, SD

COST

Box 335 F.T SD

Box 694

BOX 21

Box ~~404~~ 430

Refused 705776

Rapid City, 57701

Rosabel SD 52570

KXL Germany

KX4 hearing

822

KXL

Hearing

KXL

Fort Yates ND 58538

Fort Yates ND 58538

KXL

Rosbud, SD 57576

KXL