

Sarah Vogel Law Firm, P.C.

222 North 4th Street ♦ Bismarck ND 58501-4004

Phone: (701) 221-2911 ♦ Fax: (701) 221-5842

May 6, 2008

VIA HAND DELIVERY

Debra Simenson, Clerk of Court
Burleigh County Courthouse
514 East Thayer Avenue
PO Box 1055
Bismarck, ND 58502

**RE: Dakota Resource Council vs. Public Service Commission
Civil No. 08-08-C-0814**

Dear Ms. Simenson:

Enclosed for filing in the above referenced case:

1. Supplemental Memorandum In Support of Motion to Stay Order Pending Appeal
2. Certificate of Service

Please contact me if you have any questions.

Sincerely,



Trina Gilhooly
Legal Assistant

Encs

c: Jana M. Linderman
William Binek
Thomas Kelsch
Gail Hagerty

Sarah Vogel
sarah@svogellaw.com
Licensed in ND

Beth A. Baumstark
beth@svogellaw.com
Licensed in ND, KY

Rudra Tamm
rudra@svogellaw.com
Licensed in ND, CT, NY

Derrick Braaten
derrick@svogellaw.com
Licensed in ND, MN

Dakota Resource Council,)	
Janie and John Capp,)	Case No. 08-08-C-00814
Ramona Klein,)	
Linette and Merle Kratochvil, and)	Agency Case No. PU-06-421
Mark Novak,)	
)	
Appellants)	SUPPLEMENTAL MEMORANDUM
)	IN SUPPORT OF
vs.)	MOTION TO STAY ORDER
)	PENDING APPEAL
Public Service Commission, and)	
TransCanada Keystone Pipeline, LP,)	
)	
Appellees)	
)	

The Appellants Dakota Resource Council, Janie and John Capp, Ramona Klein, Linette and Merle Kratochvil, and Mark Novak (Appellants) hereby submit this Supplemental Memorandum in Support of Motion to Stay Order Pending Appeal, as a response to the Return to Motion to Stay Pending Appeal and Memorandum in Support of Return filed by Appellee TransCanada Keystone Pipeline, LP (TransCanada Keystone) on April 21, 2008 and as a summary of the oral argument that Appellants will present at hearing on May 8, 2008.

I. The Court has broad discretion to grant a motion to stay a final agency order pending appeal, pursuant to N.D.C.C. § 28-32-48.

The right to appeal from a final agency determination arises from the provisions of the Administrative Agencies Practice Act (N.D.C.C. § 28-32-01 *et seq.*). N.D.C.C. § 28-32-48, which permits Appellants to request a stay of the final agency order pending appeal, does not establish a formal standard for granting a stay or for imposing terms and conditions on the stay. The broad language of this statute gives the Court substantial discretion to determine whether a stay should be granted and whether to impose appropriate terms and conditions. The Appellants' initial motion and supporting memorandum sets out a four-part test to guide the Court's determination of whether to grant a stay pending the outcome of this appeal:

- (1) Whether the Appellants are likely to succeed on appeal;
- (2) Whether the Appellants will suffer irreparable injury if the stay is not granted;
- (3) Whether substantial harm will come to another party if the stay is granted; and
- (4) Whether granting the stay will harm the public interest.

This test is derived, not from an interpretation of the Administrative Agencies Practice Act that governs this case, but rather from an interpretation of the Rules of Civil Procedure that govern appeals from civil proceedings originating in district court. The Appellants have acknowledged that this four-part test may provide relevant guidance to this Court in determining the appropriateness of a stay pending appeal. However, it should not be interpreted to supersede the Court's discretion under N.D.C.C. § 28-32-48, or to impose substantive rules beyond the terms of the statutory provisions that expressly govern appeals from administrative agency orders.

II. The Appellants have set forth four distinct grounds for appeal, any one of which would sustain a successful appeal.

In response to Appellants' request for a temporary stay, TransCanada Keystone quotes from Brusegaard v. Schroeder, which states in part:

There is, of course, a considerable reluctance in granting an injunction pending appeal where to do so is, in effect, to give the appellant the ultimate relief he is seeking. The appellant will be required to show a great likelihood, approaching near certainty, that he will prevail when his case finally comes to be heard on the merits, and he must show irreparable injury from denial of the relief. But when these requirements are met, the power exists to grant such relief and it has been exercised.

199 N.W.2d 921, 925 (ND 1972). In seeking this stay, the Appellants are not asking the Court to grant the relief ultimately sought, which is reversal and reconsideration of the pipeline route that was approved by the Public Service Commission. Rather, Appellants are seeking a stay to temporarily maintain the status quo until the factual and legal issues involved in the appeal can be finally resolved by the Court.

TransCanada Keystone has expressed its intent in filings in this case to commence construction of the North Dakota portion of the pipeline within the next several weeks. If a stay is not granted to Appellants, and the appeal is ultimately successful, there will be 218 miles of pipeline buried beneath eastern North Dakota before the matter can return to the Public Service Commission for further review. If either the Appellants or TransCanada Keystone pursue an appeal to the Supreme Court, the pipeline may be in operation before all legal issues are finally resolved by the courts and the agency. In Brusegaard, the Court granted the requested stay without even being able to review the record of the trial, stating, "The court should place no obstacle in the way of one appealing if such obstacle would virtually dispose of the appeal and destroy any possibility of its efficacy to the appellant." *Id.* at 926-27. Granting a stay in this matter would only temporarily suspend TransCanada Keystone's construction activities in North Dakota and would not preclude continuing construction largely as planned in other states, completing pre-construction activities in North Dakota, and commencing actual construction in North Dakota at a later date. Not granting a stay in this matter would destroy the efficacy of the appeal for the Appellants and render any possible relief meaningless.

A. The Appellants' specifications of error are within the scope of N.D.C.C. § 28-32-46, which sets forth the grounds of appeal from a final agency order.

As noted by TransCanada Keystone, the Court must affirm the final order of the agency, unless it finds that any one of the eight statutorily specified grounds for appeal is present, pursuant to N.D.C.C. § 28-32-46. Appellants have limited their specifications of error in this matter to the grounds for appeal enumerated in N.D.C.C. § 28-32-46, and have set forth four such grounds for appeal, any one of which would sustain a reversal of the agency's final order. Furthermore, Appellants' Notice of Appeal and Specifications of Error enumerates the specific portions of the agency's final order that contribute to each ground for appeal. The Appellants have properly limited their claims in this matter to the scope of the governing statute.

B. The Court's limited deference to the agency's findings of fact does not preclude Appellants' success on appeal.

TransCanada Keystone correctly asserts that, in considering whether an agency's findings of fact are supported by a preponderance of the evidence, the reviewing court should exercise restraint and not make independent findings of fact or substitute the court's judgment for that of the agency.¹ See *Jacobs v. North Dakota State Pers. Bd.*, 551 N.W.2d 779, 781 (ND 1996). The standard to be applied by the Court is "whether a reasoning mind could have determined the findings were proven by the weight of the evidence from the entire record." *Id.* The Appellants are not asking this Court to engage in independent fact finding. The Appellants are asking the Court to review the record that has already been made by the agency and the parties to this case, and to determine whether the findings of fact are supported by a preponderance of the evidence, and whether those findings sufficiently address the evidence presented to the agency by the Appellants. This is nothing more than what the Court is permitted and required to do by the governing statute, N.D.C.C. § 28-32-46.

C. The agency's subject matter expertise does not require greater deference than what is normally afforded to any agency's findings of fact and does not preclude Appellants' success in this appeal.

The Appellants acknowledge that an agency's findings of fact are subject to the limited deference set forth above. However, the subject matter of the proceedings before the agency does not entitle the agency's findings to a separate and higher standard deference, as has been urged by TransCanada Keystone. Any final agency order is by nature technical and premised on the institutional expertise of the agency issuing the order. Nevertheless, N.D.C.C. § 28-32-46 charges the reviewing court to determine whether the agency's findings of fact – technical or not – are supported by a preponderance of the evidence. The statute already limits the grounds for appeal, and case law sets forth a standard of reasonableness for the Court to review the agency's findings of fact in light of the record. Nothing about the subject matter of this particular agency

¹ In comparison, an agency's decisions on questions of law are fully reviewable by a court on appeal. *State Bd. of Med. Exam.-Invest. v. Hsu*, 726 N.W.2d 216 (ND 2007).

order renders it more technical than any other agency order or subject to a more deferential standard of review than would be given to the findings of fact of any agency.

D. Agency determinations are not entitled to a presumption of validity beyond the specific grounds for appeal enumerated in N.D.C.C. § 28-32-46.

N.D.C.C. § 28-32-46 states, “A judge of the district court must review an appeal from the determination of any administrative agency based only on the record filed with the court ... the court must affirm the order of the agency unless it finds that any of the following are present ...” The statute then sets forth eight enumerated grounds for appeal of an administrative agency order. Appellants’ specifications of error in this matter are limited to the grounds for appeal enumerated in the statute. There is no additional basis for granting a “presumption of validity” to agency determinations, beyond what is already embodied in N.D.C.C. § 28-32-46.

E. Agency findings of fact must be supported by a preponderance of evidence in order to be upheld on appeal, not the lesser standard of “substantial evidence.”

TransCanada Keystone urges that the Court may not substitute its judgment for that of the agency, where there is “substantial evidence” to support the agency’s findings. In support of this proposition, TransCanada Keystone cites a court case from 1956. This standard of review contradicts the express statutory language of N.D.C.C. §28-32-46, which specifically states that the Court must review the agency’s findings of fact to determine whether they are supported by a “preponderance of the evidence.” It is not permissible to substitute a lesser “substantial evidence” standard of review for the “preponderance of the evidence” standard specified in the governing statute.

F. The Appellants’ appeal is based on four major specifications of error, any one of which would justify the relief requested by Appellants.

1. **The agency order is not in accordance with the law.** In particular, the agency order fails to properly interpret and apply the statutory provisions set forth in Appellants’ Notice of Appeal and Specifications of Error, including:
 - a. The agency order does not comply with the legislative policy expressed in N.D.C.C. § 49-22-02. This statement of legislative policy forms the cornerstone of the agency’s selection of a pipeline route pursuant to the specific criteria enumerated in the siting statute. N.D.C.C. § 49-22-02 requires that the agency select a pipeline route that produces minimal adverse effects to the environment and the welfare of the citizens of North Dakota, that is compatible with environmental preservation and the efficient use of resources, and that minimizes adverse human and environmental impact. Identification and analysis of adverse impacts, identification and comparison of alternative routes, and identification and avoidance of environmentally sensitive areas all need to be examined in light of what will minimize adverse impacts to the environment and the public welfare. While the agency successfully copied the language of N.D.C.C. § 49-22-02 into its final order, it did not successfully apply the standards of this code provision to the facts of this

case. In particular, where alternative routes were reasonably available – co-locating the pipeline in an existing pipeline corridor, re-locating the pipeline away from surface waters and shallow aquifers, identifying and re-locating the route away from private wells and other potable water sources, or re-locating the route away from statutory avoidance areas – the agency did not exercise its discretion to fully examine the impacts of each alternative and perform a substantive comparison to identify the safest route that would minimize adverse impacts. The agency failed in its statutory obligation to avoid risk to the greatest extent possible and to minimize adverse impacts by selecting the safest route. Instead, the agency ignored some categories of risk and improperly proposed mitigation of others in order to justify selection of the route proposed by the applicant TransCanada Keystone. This failure is set forth in more detail below.

- b. The agency order does not adequately consider adverse direct and indirect environmental effects as required by N.D.C.C. § 49-22-09(4). The largest category of impacts that were not considered at all by the agency were impacts to private wells along the pipeline. Neither TransCanada Keystone nor the agency identified private wells along the pipeline or attempted to identify and analyze potential impacts to those wells from the pipeline. The North Dakota pipeline route passes almost exclusively through rural areas where residents obtain water for human consumption, irrigation and livestock from private wells located on their property. In a number of cases, the pipeline route passes so near rural residences, that TransCanada Keystone was required to obtain a written waiver from the landowner. Information regarding private wells is available from the State, from the counties where the route would be located, and from landowners, but was not sought or analyzed by either the applicant or the agency.

In addition, with regard to other categories of impacts, the agency did not consider the company's own risk analysis regarding the frequency and volume of leaks along the pipeline (Joint Intervenor's Exhibit 1). This risk analysis demonstrated that small-rate leaks were the most common, that such leaks could go undetected for days, weeks or months despite the detection measures put in place, and that even very small-rate leaks from a 591,000 barrel per day pipeline would result in a large total volume of spill over a relatively short time period (thousands of barrels per day from a 0.5 percent leak). This analysis was prepared for the company, filed with the agency as an exhibit, and analyzed and argued in Appellants' post-hearing submissions. Nevertheless, the agency does not mention the document in its final order, and does not consider the range and extent of adverse impacts suggested by the analysis.

- c. The agency order does not adequately consider alternatives as required by N.D.C.C. § 49-22-09(5). The agency order dismisses the alternative of co-locating the pipeline in an existing pipeline corridor, because that route would be longer (Finding of Fact 8). An existing pipeline corridor would already have been subjected to the impacts of pipeline construction, including excavation of soil, clear-cutting of trees, and construction of water body crossings. Native habitat in the existing corridor would already have been disturbed, and cultural resources already surveyed and avoided or mitigated. Pipeline construction and operation activities generally would have lesser impact in an existing corridor than in a new corridor previously undisturbed by a pipeline. This is recognized

in North Dakota Administrative Code § 69-06-08-02(4), which gives preference to utilization of existing pipeline corridors. Relative length of the existing corridor is not relevant to considering the relative adverse impacts of the routes, unless the conditions along the two routes are perfectly identical in all respects except for distance. The agency never undertakes a proper analysis and comparison, but simply dismisses the existing corridor as “longer.”

The agency order also dismisses routing the pipeline through an alternative area of the North Dakota, on the grounds that the pipeline route connects with existing TransCanada pipeline infrastructure in Manitoba, and the company prefers to cross the Missouri River at Yankton, South Dakota (Finding of Fact No. 6). These decisions by TransCanada Keystone are allowed to control the overall location of the route in North Dakota. While this may have economic benefits for TransCanada Keystone, and potential if unsubstantiated benefits for Canada and South Dakota, it is not relevant to the impacts on the environment and citizens of North Dakota that the agency is charged with minimizing. An alternative route farther east or farther west through North Dakota, if it lessens adverse impacts for the state, is an appropriate consideration for the agency. However, the agency never undertakes this analysis, and instead defers to the applicant’s preference for where the pipeline is to enter and exit the state.

Other minor route alternatives – in the vicinity of the Fordville Aquifer, or in the vicinity of the Lake Ashtabula reservoir and the Sheyenne River – were not adequately considered by the agency in light of the agency’s obligation to minimize adverse impacts from the pipeline. The agency did not fully address the nature and extent of impacts to ground and surface water, including the location of private wells and the potential impacts of the type of small-rate, large-volume leak discussed above. The agency instead relied on probability and risk mitigation measures – such as leak detection and thicker pipeline – to determine that the proposed route was safe enough. However, the agency is charged with identifying the safest possible route. Where specific alternatives to the proposed route are available to be analyzed and compared, the agency has an obligation to do so. Stating that an alternative is longer, crosses more parcels of private property, or crosses more wetlands, as the agency does when ruling out these route alternatives, does not constitute the detailed analysis and comparison required by a siting statute that favors minimizing the adverse impacts to the environment and the public welfare. Even small risks to drinking water may on balance outweigh risks to wetlands. Impacts to wetlands may be mitigated more effectively than impacts to drinking water. Land along the alternative route may entail greater length but less overall adverse impact to water resources and plant and animal life. The agency did not undertake this analysis and comparison in any detail, but instead accepted the proposed route as safe enough, in spite of evidence that a safer route may be available.

- d. The agency order does not adequately consider the irreversible and irretrievable commitments of natural resources as required by N.D.C.C. § 49-22-09(6). Resources that will be irreversibly and irretrievably sacrificed to this route, include but are not limited to: forested areas that will be clear cut, water bodies that will be trenched, native soil that will be excavated, species that will be disturbed, shallow aquifers and surface waters that will be exposed to risk from the pipeline, and environmentally sensitive avoidance areas

that will be crossed by and exposed to risk from the pipeline. As detailed under other statutory criteria, the agency has not adequately considered alternatives to the selected route that may have a lesser impact on these resources, has not identified the full range of impacts to these resources (in particular risks from future pipeline leaks outlined in Joint Intervenors' Exhibit 1), has not properly identified avoidance areas along the route, and has not adequately considered alternatives to utilizing avoidance areas. These valuable natural resources should not be irretrievably sacrificed to a pipeline route in the absence of a showing that the selected route is the safest route and the necessary choice.

- e. The agency order does not adequately consider the effects on existing scenic areas, historic sites and structures, and paleontological or archaeological sites pursuant to N.D.C.C. § 49-22-09(9). In particular, as discussed above, the agency order fails to consider data from TransCanada Keystone's risk analysis regarding the frequency and volume of leaks along the proposed pipeline. This analysis points to the probability of a small-rate, large-volume leak that leak detection systems do not pick up. Scenic areas and historic sites can be drilled under to preserve the visual integrity of a resource and mitigate the impacts of construction, but adverse impacts may result during the operation of the pipeline as well, particularly in the event of a leak. Difficulty in early detection of small-rate leaks could actually pose a greater problem where the pipeline has been drilled under a scenic area or historic property, than where the pipeline is buried at normal depth in open territory. Appellants raised this concern in post-hearing filings, but it was not addressed in the final agency order. Scenic areas and cultural sites represent irreplaceable resources that make a full consideration of the range of adverse impacts especially critical. The agency's failure to adequately consider effects to existing scenic areas that qualify as avoidance areas is discussed further below.
- f. The agency order does not properly identify avoidance areas pursuant to North Dakota Administrative Code § 69-06-08-02(2). The agency order fails to identify the Sheyenne River Valley as a statutory avoidance area. The portion of the Sheyenne Valley that the pipeline route crosses is a federal and state designated scenic byway that qualifies as an avoidance area under the plain language of North Dakota Administrative Code § 69-06-08-02(2). Appellants made this argument on the record, including in post-hearing submissions. The agency order does not address this argument, and does not explain why the Sheyenne Valley would not qualify as a statutory avoidance area. Avoidance areas receive special treatment in the siting of pipelines, and may be used for a pipeline route only if the applicant demonstrates that no reasonable alternatives are available.
- g. The agency order does not adequately consider alternative routes around avoidance areas as required North Dakota Administrative Code § 69-06-08-02(2). TransCanada Keystone suggests that boring under a statutory avoidance area constitutes "avoidance." The agency order does not concur with this assertion, and on the contrary states, "The proposed Keystone Pipeline will cross avoidance areas as defined by the Commission." (Finding of Fact No. 29). Either approach is a misapplication of the North Dakota Administrative Code. In the case of the argument made by TransCanada Keystone, horizontal directional drilling under a sensitive site is mitigation, not avoidance. Other

adverse impacts to the avoidance area may result, including impacts from future leaks and disturbance of the river bed, subsurface hydrology, or the root systems of overlying trees. The North Dakota Administrative Code requires the applicant to demonstrate that no reasonable alternatives exist before a statutory avoidance area may be used for a pipeline route. The agency makes no finding that the applicant could not reasonably avoid the avoidance areas identified in the agency order, including the Sheyenne River Valley avoidance area that was not properly identified in the order. This finding is necessary as a statutory prerequisite for considering avoidance areas for pipeline routes, regardless of any mitigation measure that are utilized.

h. The agency order does not adequately consider the selection criteria of North Dakota Administrative Code § 69-06-08-02(3). In particular, the agency failed to require the applicant to demonstrate that adverse impacts to the health and safety of human, plant and animal life will be kept to an acceptable minimum. As set forth above, this includes, but is not limited to, failure to identify and analyze major categories of impacts (e.g., private wells) and failure to consider data from TransCanada Keystone's risk analysis regarding the frequency and volume of leaks along the proposed pipeline (e.g., undetected small-rate leaks). The agency cannot objectively determine that adverse impacts will be kept to an acceptable minimum while ignoring the nature and extent of the impacts involved.

i. The agency order does not adequately consider the policy criteria of North Dakota Administrative Code § 69-06-08-02(4). In particular, as discussed above, the agency failed to give proper consideration to the utilization of existing pipeline corridors. This criterion gives specific preference to existing rights-of-way and corridors, further calling into question the agency's failure to give detailed consideration to existing pipeline corridors as a preferable alternative to the selected route.

2. The findings of fact in the agency order are not supported by a preponderance of the evidence. The findings of fact that form the basis of this appeal lack sufficient foundation in the evidentiary record and are not reasonably supported by the weight of the evidence offered:

a. There is not sufficient evidence to support a finding that alternatives to the selected route would not minimize adverse effects and would likely increase environmental impacts (Finding of Fact No. 9).

This finding of fact improperly implies that available alternatives to the selected route have been adequately analyzed and compared. As discussed above, the agency order dismisses the alternative of co-locating the pipeline in an existing pipeline corridor, merely because that route would be longer (Finding of Fact 8). Pipeline construction and operation activities generally would have lesser impact in an existing corridor than in a new corridor previously undisturbed by a pipeline. North Dakota Administrative Code § 69-06-08-02(4) gives a preference to existing pipeline corridors for siting new pipelines. Relative length of the existing corridor is not relevant to considering the relative adverse impacts of the route, unless the conditions along the two routes are perfectly identical in

all respects except for distance. The agency never undertakes this analysis, but simply dismisses the existing corridor as “longer.”

The agency order also dismisses routing the pipeline through an alternative area of the North Dakota, because the selected route connects with an existing pipeline infrastructure in Manitoba, and the company prefers to cross the Missouri River at Yankton, South Dakota (Finding of Fact No. 6). These decisions by TransCanada Keystone are not relevant to minimizing the impacts on the environment and citizens of North Dakota. The agency simply defers to the applicant’s preference as to where the pipeline enters and exits the state, without a fact-based impact analysis that compares the selected route to other available alternatives.

Other minor route alternatives – in the vicinity of the Fordville Aquifer, or in the vicinity of the Lake Ashtabula reservoir and the Sheyenne River – were not adequately considered by the agency in light of the agency’s obligation to minimize adverse impacts from the pipeline. The agency ignored potential direct and indirect impacts to ground and surface water, including the location of private wells and the impacts of a small-rate undetected leak, as detailed in TransCanada Keystone’s own risk analysis. Where specific alternatives to the proposed route are available to be analyzed and compared, the agency has an obligation to do so. The agency had specific route alternatives along each of these two pipeline segments that offered the potential to decrease adverse impacts and increase safety to the environment and public welfare. The agency did not undertake a detailed analysis and comparison of the alternatives, but instead opted to accept the proposed route as safe enough.

- b. There is not sufficient evidence to support a finding that the selected route and corridor has adequately considered avoidance areas (Finding of Fact No. 40):

As has already been discussed, the agency order fails to properly identify the Sheyenne River Valley as a statutory avoidance area. The portion of the Sheyenne Valley that the pipeline route crosses is a federal and state designated scenic byway that qualifies as an avoidance area under the plain language of North Dakota Administrative Code § 69-06-08-02(2). Appellants made this argument on the record, including in post-hearing briefs. The agency order does not address this argument, and does not explain why the Sheyenne Valley would not qualify as a statutory avoidance area. Avoidance areas receive special treatment in the siting of pipelines, and may be used for a pipeline route only if the applicant demonstrates that no reasonable alternatives are available.

Furthermore, the agency makes no finding that the applicant could not avoid the avoidances areas identified in the agency order, or the Sheyenne River Valley avoidance area that was not identified in the order. This finding is necessary as a statutory prerequisite for considering avoidance areas for pipeline routes, regardless of any mitigation measures that are utilized.

- c. There is not sufficient evidence to support a finding that the Fordville Aquifer will not be exposed to crude oil or BTEX contamination, or that the selected route represents the minimal environmental impact (Findings of Fact Nos. 54 and 68):

As discussed above, the company’s risk analysis demonstrates that small-rate leaks are the most common, that such leaks could go undetected for days, weeks or

months despite the detection measures put in place, and that even very small-rate leaks from a 591,000 barrel per day pipeline would result in a large volume spill over a relatively short time period (thousands of barrels per day from a 0.5 percent leak). Statements by witnesses for TransCanada Keystone regarding the volume of spill that would be necessary to have an impact on the Fordville Aquifer, and the time required for such a spill to have an impact, need to be examined in light of this risk analysis. A slow leak, resulting in a large spill that goes undetected for several days or weeks would certainly be capable of contaminating surface water under the analysis outlined by TransCanada Keystone, and would have the potential to contaminate groundwater as well. The large number of streams in the Forest River watershed, discussed in the testimony of TransCanada Keystone's witnesses, makes this area prone to spring floods, which contributes to the the possible impact of an undetected slow leak. The agency did not address this risk analysis or conduct a responsible assessment of the range of possible impacts in formulating this finding.

Statements by the agency and TransCanada Keystone that the selected route in the vicinity of the Fordville Aquifer represents the minimal environmental impact is conclusory and not supported by the evidence in the record. Route alternatives in the vicinity of the Fordville Aquifer were not adequately considered by the agency in light of the agency's obligation to minimize adverse impacts from the pipeline. The agency ignored potential impacts in this area, including the location of private wells on and near the Fordville Aquifer and the potential impacts of an undetected small-rate leak. The agency instead relied on unsubstantiated probability and risk mitigation measures -- such as leak detection and thicker pipeline -- to determine that the proposed route was safe enough. However, the agency is charged with identifying the safest route. Where specific alternatives to the proposed route are available to be analyzed and compared, the agency has an obligation to do so. Stating that an alternative is longer, crosses more parcels of private property, or crosses more wetlands, as the agency does ruling out these route alternatives, does not reflect the detailed analysis and comparison required by a siting statute that favors minimizing the adverse impacts of the pipeline. Risk to drinking water may on balance outweigh risks to wetlands. Risks to wetlands may be mitigated more effectively than risks to drinking water. Land along the alternative route may involve more territory but entail less exposure to water resources and plant and animal life. The agency did not undertake this analysis and comparison, and as such, there is not sufficient evidence in the record to find that the selected route adjacent to Fordville Aquifer does represent the minimal environmental impact when compared to available alternatives.

- d. There is not sufficient evidence to support a finding that the pipeline would not impact public water systems (Finding of Fact No. 76):

Appellants' objection to this finding of fact is premised on potential impacts to the Fordville Aquifer (discussed above) and the Sheyenne River and Lake Ashtabula reservoir (discussed below), as well as the agency's inadequate consideration of the likely frequency and volume of leaks, as discussed in various other sections of this memorandum. In addition, a finding that the pipeline *will not* impact public water systems is not consistent even with the most optimistic assessments offered by

TransCanada Keystone, which admit to at least a low probability that public water systems could be impacted. Finding that an event is unlikely is not the same as finding that it is impossible, particularly in light of the variable factors that affect probability (e.g., detection time for a leak, total volume of a leak, differing flow rates of surface waters at different times of the year, changing hydrology between surface waters and the aquifer, etc.).

This finding regarding impacts to “public” water systems also ignores the impacts to private wells along the pipeline. Neither TransCanada Keystone nor the agency identified private wells along the pipeline or attempted to identify and analyze potential impacts to those wells from the pipeline, yet these wells provide water to the public in rural areas. The North Dakota pipeline route passes almost exclusively through rural areas where residents obtain water for human consumption, irrigation and livestock from private wells located on their property. In a number of cases, the pipeline route passes so near rural residences, that TransCanada Keystone was required to obtain a written waiver from the landowner. Information regarding private is available from the State, from the counties where the route would be located, and from landowners, but was not sought or analyzed by the applicant or the agency.

- e. There is not sufficient evidence to support a finding that the Lake Ashtabula reservoir and the Sheyenne River will not be exposed to crude oil or BTEX contamination, or that the selected route represents the minimal environmental impact (Finding of Fact No. 88):

As discussed above in reference to potential adverse impacts to the Fordville Aquifer, the company’s risk analysis demonstrates that small-rate leaks are the most common, that such leaks could go undetected for days, weeks or months despite the detection measures put in place, and that even very small-rate leaks from a 591,000 barrel per day pipeline would result in a large volume spill over a relatively short time period (thousands of barrels per day from a 0.5 percent leak). Statements by witnesses for TransCanada Keystone regarding the volume of spill that would be necessary to have an impact on the Lake Ashtabula reservoir and the Sheyenne River, and the time required for such a spill to have an impact, need to be examined in light of this risk analysis. The probability of a slow leak, with a long detection time and large total volume, undermines the conclusion of the agency and witnesses for TransCanada Keystone that a leak would not be able to reach Lake Ashtabula or the Sheyenne River. In addition, the pipeline route actually crosses the Sheyenne River, and a leak would not need to travel a substantial distance to contaminate the river. The agency did not analyze the range of possible impacts to Lake Ashtabula and the Sheyenne River in light of the available risk analysis, nor was this analysis ever mentioned in the agency’s final order.

Furthermore, statements by the agency and TransCanada Keystone that the selected route in the vicinity of the Lake Ashtabula reservoir represents the minimal environmental impact is conclusory and not supported by the evidence in the record. Route alternatives in the vicinity of Lake Ashtabula were not adequately considered by the agency in light of the agency’s obligation to minimize adverse impacts from the pipeline. Where specific alternatives to the proposed route are available to be analyzed and compared, the agency has an obligation to do so. Stating that an alternative is longer, crosses more parcels of private property, or crosses more wetlands, or even runs closer to

an aquifer, does not reflect the detailed analysis and comparison required by a siting statute that favors minimizing the adverse impacts of the pipeline. Surface water in the reservoir may be more easily contaminated than the aquifer located along the alternative route. Impacts to wetlands may be more easily mitigated than impacts to surface water in the event of a leak. Moving the pipeline slightly closer to the Maple River may nevertheless pose a lesser risk to that water body than the selected location poses to the Sheyenne River or Lake Ashtabula. The agency did not undertake this analysis and comparison, and as such, there is not sufficient evidence in the record to find that the selected route adjacent to Lake Ashtabula does represent the minimal environmental impact among available alternatives.

3. The conclusions of law in the agency order are not supported by the findings of fact, pursuant to N.D.C.C. § 28-32-46(6).

- a. The Findings of Fact in the agency order do not support a conclusion that the selected route will produce minimal adverse effects to the environment and the welfare of the citizens of North Dakota, that it is compatible with environmental preservation and the efficient use of resources, and that it will minimize adverse human and environmental impacts (Conclusions of Law Nos. 5, 6, 7 and 8):

As already argued above, the agency order does not comply with the legislative policy expressed in N.D.C.C. § 49-22-02. This statement of legislative policy forms the primary foundation for the agency's selection of a pipeline route pursuant to the specific criteria enumerated in the siting statute. N.D.C.C. § 49-22-02 requires that the agency select a pipeline route that produces minimal adverse effects to the environment and the welfare of the citizens of North Dakota, that is compatible with environmental preservation and the efficient use of resources, and that minimizes adverse human and environmental impact. This is similar to the requirement of N.D.C.C. 49-22-07.2 that the pipeline be designed and located to produce minimal adverse effects. Identification and analysis of adverse impacts, identification and comparison of alternative routes, and identification and avoidance of environmentally sensitive areas all need to be examined in light of what will minimize adverse impacts to the environment and the public welfare. While the agency did not successfully apply the standards of these code provisions to the facts of this case.

In particular, where alternative routes were reasonably available – co-locating the pipeline in an existing pipeline corridor, re-locating the pipeline away from surface waters and shallow aquifers, identifying and re-locating the route away from private wells and other potable water sources, or re-locating the route away from statutory avoidance areas – the agency did not exercise its discretion to fully examine the impacts of each alternative and perform a substantive comparison to identify the safest route that would minimize adverse impacts. The agency failed in its obligation to avoid risk and minimize adverse impacts – through selecting a safer alternative route if necessary – as required by the standards expressed in this legislative policy. Instead, the agency ignored some impacts and proposed mitigation of others in order to justify the proposed route. This failure has been set forth in more detail in previous paragraphs.

4. The findings of fact in the agency order do not sufficiently address the evidence presented to the agency by the Appellants, pursuant to N.D.C.C. § 28-32-45(7).

a. Evidence regarding the frequency and volume of future leaks and spills along the Keystone pipeline.

As has been discussed at length in other sections of this memorandum, the agency did not consider the company's own risk analysis regarding the frequency and volume of leaks along the pipeline (submitted by Appellants as Joint Intervenor's Exhibit 1). This risk analysis demonstrated that small-rate leaks were the most common, that such leaks could go undetected for days, weeks or months despite the detection measures put in place, and that even very small-rate leaks from a 591,000 barrel per day pipeline would result in a large volume spill over a relatively short time period (thousands of barrels per day for a 0.5 percent leak). The analysis also indicated that risk of leaks may be more or less than the predicted average depending on location, and several of the higher risk portions of the pipeline were located in North Dakota. This analysis was prepared for the company, available to the agency, and analyzed and argued in Appellants' post-hearing submissions. Nevertheless, the agency does not mention the analysis in its final order, and does not consider the range of adverse impacts suggested by the analysis.

b. Evidence regarding risks to public and private water supplies

The largest category of impacts that were not considered at all by the agency were impacts to private wells along the pipeline. Neither TransCanada Keystone nor the agency identified private wells along the pipeline or attempted to identify and analyze potential impacts to those wells from the pipeline. The North Dakota pipeline route passes almost exclusively through rural areas where residents, including the Appellants, obtain water for human consumption, irrigation and livestock from private wells located on their property. In a number of cases, the pipeline route passes so near rural residences, that TransCanada Keystone was required to obtain a written waiver from the landowner. Information regarding private is available from the State, from the counties where the route would be located, and from landowners, but was not sought or analyzed by the applicant or the agency. Appellants have already set forth in previous sections of this memorandum that risks to public water supplies and private wells were not adequately considered in light of the frequency and volume leak analysis prepared for the company and submitted by Appellants as Joint Intervenors' Exhibit 1.

c. Evidence regarding safer alternatives to the route through the Forest River watershed.

This memorandum has already set forth the agency's failure to consider evidence regarding safer route alternatives in the Forest River watershed, including uncontroverted testimony by state water specialist Jim Horner, who stated that a western re-route option would provide additional safety to the Forest River basin. Joint Intervenors' Exhibit 1 has also been discussed as evidence of the nature and extent of risks the selected route poses to surface waters, private wells and the Fordville Aquifer. In addition, as response to a late submission by TransCanada Keystone (accepted by the agency as Docket Nos. 372 and 373), Appellants offered evidence, including a map, of retention dams to the west of the Fordville Aquifer that would provide an extra measure of protection to

surface waters and the aquifer if the pipeline were re-routed to the west. This evidence is either not mentioned in the agency's final order, or not given proper consideration in the findings of fact arrived at by the agency.

III. Appellants will suffer irreparable injury if a stay is not granted.

Pursuant to the requirements of N.D.C.C. § 49-22-07, TransCanada Keystone cannot begin pipeline construction in North Dakota, or exercise the right of eminent domain in connection with that construction, without first having obtained a route permit for the pipeline from the Public Service Commission. The final agency order appealed from in this case is a route permit that grants TransCanada Keystone the right to commence pipeline construction in North Dakota along the approved route and to exercise the right of eminent domain in connection with that construction. Appellants' initial motion and memorandum in support thereof already outlines the harms that will result if a stay is not granted, including:

- The disturbance of topsoil and subsoil, including both agriculturally productive land and undisturbed native habitat
- The disturbance of native plants and the displacement of native animal species
- The clear-cutting of trees and shrubs, including native woodlands and established shelterbelts and windbreaks
- The disturbance of native wetlands and resident plant and animal species
- Cutting trenches or boring holes for water body crossings, and the disturbance of resident fish and other species
- The disturbance of cultural artifacts and archaeological resources that were not uncovered in previous surveys of the pipeline route

On the timeline suggested by the company, the entire North Dakota segment of the pipeline could be complete before the appellate process has exhausted itself. These harms cannot be monetarily compensated, either through the eminent domain process or otherwise, and will result in irreparable harm to the natural resources along the pipeline route that Appellants seek to protect. In particular, native soil and native species of plant life and animal life that are disturbed or destroyed by pipeline construction can never be returned to their original state. A stay is therefore necessary to prevent irreparable harm to Appellants' interests.

IV. TransCanada Keystone has not demonstrated that it will suffer substantial harm that outweighs the irreparable harm to the Appellants if a stay is granted.

The estimate of damages outlined by TransCanada Keystone is not substantiated and does not justify denying a stay that would preserve the status quo among the parties. TransCanada Keystone has the ability to mitigate many of the alleged damages and would not suffer substantial harm from a temporary delay of construction activities in North Dakota over the several months of this appeal.

- In calculating damages, TransCanada Keystone improperly relies on a timeframe for appeal that includes an additional appeal to the North Dakota Supreme Court. An

additional appeal to a higher court is not relevant to a stay in the present proceedings, which would presumably remain in effect only during the pendency of these proceedings. A delay of several months is very different in its potential impact from the 1 year delay estimated by TransCanada Keystone. In addition, TransCanada Keystone has not requested an expedited schedule in this matter, and has instead chosen to rely on a more expansive timeframe to estimate the extent of alleged damages.

- TransCanada Keystone proposes completing the North Dakota portion of the pipeline by November 2008. If this timeframe is accurate, the North Dakota portion of the pipeline could be constructed entirely during 2009, without extra construction crews working in the state or any delay in achieving the desired November 2009 in-service date for the pipeline.
- Construction of the North Dakota portion of the pipeline cannot reasonably be argued to prevent activities along other portions of the pipeline. In particular, TransCanada Keystone alleges that a delay in North Dakota would delay construction activities along the Canadian segment of the pipeline, would delay a pump station program in Canada, and would require shifting construction activities in other states and provinces from 2008 to 2009 and 2010. TransCanada Keystone does not substantiate these assertions or explain why construction cannot proceed largely as planned in Canada and other U.S. states during the pendency of this appeal.
- Many of the major pre-construction activities cited by TransCanada Keystone along the North Dakota portion of the pipeline can continue during the months of this appeal, including but not limited to: staking the pipeline centerline and construction right of way, counting and documenting trees to be removed, biologist surveys for threatened or endangered species, biologist surveys for migratory bird nests and raptors, biologist surveys for weeds, and cultural resource surveys.
- Trials in eminent domain proceedings to acquire pipeline easements in Walsh and Nelson Counties in North Dakota are not scheduled to take place until December 2008 and January 2009. (Walsh Co. Civil No. 50-08-C-68; Nelson Co. Civil No. 32-08-C-00020). Trials in eminent domain proceedings to acquire pipeline easements in Benson County, North Dakota have yet to be scheduled.
- TransCanada Keystone has chosen to commence construction in May 2008 in North Dakota, knowing that the siting permit, which was not granted until the end of February 2008, was the subject of contested proceedings that may lead to an appeal in district court. Other states that do not have contested permitting proceedings, or where time for appeal has already expired, would have been less risky starting points for construction in 2008. TransCanada Keystone's self-selected construction schedule and order of construction is arbitrary and creates a false sense of urgency to allow construction to commence along the 218 miles in North Dakota, when hundreds of miles of additional pipeline await construction in other states and provinces.

V. Granting a stay will not harm the public interest.

There is no substantial support to argue that the desired in service date for the pipeline will be delayed at all, much less for a period of one-year as alleged by TransCanada Keystone. Any potential harm to the public interest should be considered in light of the likelihood that this appeal will delay construction activities, at most, for several months, and may not delay the in service date of the pipeline at all.

- Delay will not cost the State of North Dakota and its counties their projected tax revenue from the pipeline. At most, the revenue will be delayed for several months if construction and pipeline operation are delayed. The revenue will still be received by the counties and the State in the full amount once the pipeline is in service.
- There is no evidence that the pipeline will substantially affect the price “discounts” imposed on oil production in North Dakota, and if there is an impact, there is no firm indication of the extent of that impact. TransCanada Keystone acknowledges that this pipeline is being built to serve increased oil production in the Canadian tar sands region. This pipeline is not displacing existing demand for pipeline capacity, but instead is intended to meet new demand for pipeline capacity. Whether and to what extent a new tar sands pipeline that serves new demand would help to free up capacity for North Dakota oil producers is not substantially answered by TransCanada Keystone.
- The pipeline will not be in operation for another year-and-a-half, even if there is no delay to the in-service date. The pipeline cannot reasonably be argued to address current petroleum prices, but can at best be seen as part of long-term energy planning that would not be substantially impacted by several months of delay at most.
- The public has an interest in preserving and protecting the environment and the welfare of the citizens of this state through the proper siting of pipelines carrying hazardous materials. Constructing a pipeline along a problematic route, and causing unnecessary and irreparable environmental harm while an appeal is still pending, does not serve the public interest.
- The public also has an interest in preserving rights of private property owners and the efficiency of the judicial process. Using the judicial process to seize land via eminent domain while the pipeline route is being challenged in an appeal and therefore inherently uncertain does not serve the public interest.

VI. Appellants are not required under the applicable statute to post a supersedeas bond, and requiring the bond requested by TransCanada Keystone would improperly preclude Appellants from obtaining meaningful relief in the administrative appeal process.

An appeal from a final agency order is governed by the Administrative Agencies Practice Act. N.D.C.C. § 28-32-01 *et seq.* A stay of a final agency order pending appeal is permitted by N.D.C.C. § 28-32-48. This statutory provision states only that the Court may order a stay “upon

application and after a hearing or the submission of briefs” and that the Court “may impose terms and conditions for a stay of the enforcement of the order.” *Id.* The statute does not require the posting of a supersedeas bond, and does not place substantive requirements on the terms and conditions that the Court may impose on a stay.

TransCanada Keystone’s argument relies on the Rules of Civil Procedure, which are not directly applicable to the granting of a stay in this matter and should not supersede the statute that does govern Appellants’ request. N.D.R.Civ.P. 62(d), which is cited by TransCanada Keystone, does not specify any standard for the Court to approve a particular amount of bond upon granting a stay. This rule merely provides that an appellant may obtain a stay by filing a supersedeas bond at or after the time of filing a notice of appeal, and that the stay is effective when the Court approves the bond. Nothing in the rule limits an appellant to obtaining a stay only by filing a supersedeas bond, and nothing in the rule indicates that the bond is required to be of the nature and extent suggested by TransCanada Keystone.

N.D.R.Civ.P. 62(j), the other rule cited by TransCanada Keystone, would not apply to these proceedings even if the Rules of Civil Procedure were directly applicable to administrative appeals. This rule states in part, “If the judgment appealed from directs the doing of any particular act or thing ... the execution thereof is not stayed by the appeal therefrom unless an undertaking is entered into on the part of the appellant.” The agency order appealed from in this case does not direct the doing of any particular act or thing by either the Appellants or by TransCanada Keystone, and as such, this particular rule does not govern or even provide relevant guidance to the granting of a stay in this matter.

Requiring a supersedeas bond in the amount suggested by TransCanada Keystone would prevent Appellants from seeking and obtaining meaningful relief in this appeal. The Appellants are a non-profit public interest group and six individual citizens that are seeking to protect and preserve the environment and the welfare of the citizens of North Dakota by enforcing the terms of the pipeline siting statute that is at issue in this case. None of the Appellants have financial resources that would allow for the posting of a bond in the amount requested by TransCanada Keystone. Appellants posted an undertaking of costs at the time of filing the Notice of Appeal and Specifications of Error in this case, demonstrating a good faith intent to diligently pursue this appeal. In contrast, TransCanada Keystone is a large multi-national company with more than \$24 billion in assets² and a 2007 net income of over \$1.2 billion.³ If non-profits and citizen groups are required to post substantial bonds in public interest cases in order to secure a stay pending appeal, the appellants in many cases would be precluded from effective and meaningful appellate review. Such bonds would seriously undermine the mechanism in the Administrative Agencies Practice Act for appeals by public interest and citizen groups that have been permitted to intervene in agency proceedings.

² Testimony of Michael Diller, Public Service Commission Case Nos. PU-06-421, PU-07-152, Public Hearing at Valley City, North Dakota, Transcript at p. 112 (July 23, 2007).

³ TransCanada Corporation 2007 Annual Report, *available at* http://www.transcanada.com/investor/annual_reports/2007/index.html.

On the federal level, courts routinely impose either no bond or a minimal bond in environmental and other public interest cases. *See, e.g., City of South Pasadena v. Slater*, 56 F.Supp.2d 1106, 1148 (C.D.Cal. 1999) (no bond required to stay construction in proposed freeway extension project). The court in *Slater* noted that courts have discretion to dispense with the security requirement – or to require mere nominal security – where requiring security would effectively deny access to judicial review.⁴ *Id.* Courts across the country have long accepted a similar view of security bonds in cases where injunctive relief is sought by a public interest plaintiff. *See, e.g., Natural Resources Defense Council v. Morton*, 337 F.Supp. 167, 168 (D.D.C. 1971) (requiring a security bond in the amount of \$100, despite the defendant’s request for a multi-million dollar bond to compensate for lost revenue from off-shore oil and gas operations); *Friends of the Earth, Inc. v. Brinegar*, 518 F.2d 322, 323 (9th Cir. 1975) (overturning the district court’s requirement of a \$4.5 million bond as unreasonable and ordering a \$1,000 bond, because the plaintiffs were public interest organizations and citizens with limited resources).

Requiring the substantial bond requested by TransCanada Keystone would effectively deny Appellants access to the courts and discourage judicial review sought by public interest and citizen groups to protect the environment and the public welfare. This undermines the enforcement of the express legislative policy set forth in the pipeline siting statute that pipelines shall be sited to produce minimal adverse impacts on the environment and the welfare of the citizens of this state. N.D.C.C. § 49-22-02. In addition, Appellants in this case do not have a significant financial stake in the outcome of this appeal. Appellants have undertaken this appeal for the purpose of protecting and preserving the environment and the public welfare through the proper enforcement of North Dakota’s pipeline siting statute. Bond requirements generally are premised on the theory of unjust enrichment – parties seeking injunctive relief should not receive unfair financial benefit from the wrongful granting of that relief. Because Appellants would not be unjustly enriched by the granting of a stay in this matter, the underlying policy of a bond requirement would not be served. *See, e.g., Wisconsin Heritages, Inc. v. Harris*, 476 F. Supp. 300, 302 (E.D. Wis. 1979) (no bond required where plaintiff was a non-profit organization with no apparent financial stake in the outcome of the suit). Therefore, Appellants should be granted the requested stay without the \$100 to \$445 million dollar bond requested by TransCanada Keystone.

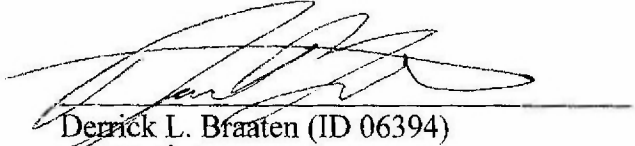
Dated this 6th day of May, 2008.

⁴ In *Slater*, the Court was faced with a specific requirement under Fed.R.Civ.P. 65(c), which states, “No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.”

Respectfully submitted,

SARAH VOGEL LAW FIRM, PC

By:



Derrick L. Braaten (ID 06394)

222 N 4th Street

Bismarck, ND 58501

Phone: (701) 221-2911

Facsimile: (701) 221-5842

E-mail: derrick@svogellaw.com

PLAINS JUSTICE

By:



Jana M. Linderman (IA # AT0004750)

100 1st Street SW

Cedar Rapids, IA 52404

Phone: (319) 362-2120

Facsimile: (866) 484-2373

E-mail: jlinderman@plainsjustice.org

ATTORNEYS FOR APPELLANTS

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Dakota Resource Council,)
)
 Janie and John Capp,)
)
 Ramona Klein,)
)
 Linette and Merle Kratochvil, and)
)
 Mark Novak,)
)
)
 Appellants)
)
 vs.)
)
)
 Public Service Commission, and)
)
 TransCanada Keystone Pipeline, LP,)
)
)
 Appellees)
)

Case No. 08-08-C-00814
 Agency Case No. PU-06-421

AFFIDAVIT OF SERVICE

On May 6, 2008, I, Trina Gilhooly served the party(s) described below with the attached documents by depositing such documents in the United States mail (at Bismarck, North Dakota), with postage prepaid. The address of each party served is the last reasonably ascertainable post office address of such party. I am of legal age and not a party to this action.


Document Served:

- Supplemental Memorandum in Support of Motion to Stay Order Pending Appeal

Names of Parties Served:

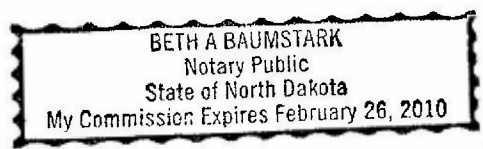
Thomas Kelsch
 Kelsch Kelsch Ruff & Kranda
 103 Collins Avenue
 PO Box 126
 Mandan, ND 58554-7266

William Binek
 ND Public Service Commission
 600 E. Boulevard, Dept. 408
 Bismarck, ND 58505-0480


 Trina Gilhooly

STATE OF NORTH DAKOTA)
) ss
 COUNTY OF BURLEIGH)

On April 23, 2008, before me personally appeared Donna Abrahamson, known to me to be the same person described in and who executed the within and foregoing instrument and acknowledged to me that she executed the same.




 Notary Public