

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE APPLICATION )  
OF TRANSCANADA KEYSTONE )  
PIPELINE, LP FOR ROUTE APPROVAL OF )  
THE KEYSTONE XL PIPELINE PROJECT )  
PURSUANT TO THE MAJOR OIL )  
PIPELINE SITING ACT )  
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APPLICATION NO. OP-0003

**KEYSTONE'S OPPOSITION TO  
LANDOWNERS' MOTION IN LIMINE**

Applicant TransCanada Keystone Pipeline, LP, (“Keystone”) submits the following response to the Landowner Intervenors’ (“Landowners”) Motion in Limine and requests that the motion be denied or granted throughout the case as set forth below.

The Landowners’ motion does not object to or identify any specific item in Keystone’s pre-filed testimony and exhibits which violates Nebraska’s evidentiary rules. Instead, the Landowners incorrectly try to exclude eighteen broad categories of information citing a lack of relevance or Nebraska Rule of Evidence 403.

For the most part, the Landowners’ motion misses the mark for three separate but equally important reasons. First, the Landowners fail to acknowledge that Keystone’s application, direct testimony, and rebuttal testimony have already been submitted. The deadline to object to that evidence has come and gone. Those simple facts distinguish this proceeding from typical civil litigation and render the Landowners’ rationale of excluding nebulous general topics inapplicable.

The Landowners also fail to acknowledge that Keystone’s objections to many of the discovery questions at issue were *sustained*. A party cannot, for example, ask a hopelessly overbroad question, lose the motion to compel an answer, and then seek to exclude evidence notwithstanding the *sustained* objection. Stated differently, the Landowners’ motion is not an

acceptable vehicle to re-litigate settled questions regarding the nature of the Landowners' discovery. Finally, at best, the Landowners' motion paints an incomplete picture of the discovery from Keystone in this proceeding. Landowners submitted literally hundreds of separate written discovery requests in the form of requests for production of documents, interrogatories and requests for admission. Keystone objected where appropriate, but also provided fulsome answers to many of the Landowners' questions, including the production of more than 90,000 pages of material the Landowners sought. In their motion, the Landowners' description of these responses is, at most, incomplete. When the incomplete characterization of Keystone's discovery are coupled with a request to exclude general categories of evidence, the motion impermissibly seeks to exclude evidence of facts of which the Landowners are well aware, but know are unfavorable to their case. This is not a proper motion in limine.

### **THE LANDOWNERS' CLAIMS**

For the sake of simplicity, Keystone will respond in the order that Landowners chose to present the motion.

**1.1 Other Lawsuits.** The Landowners seek to exclude Keystone from offering evidence of any lawsuits in which the Landowners have been involved other than this case. This extends to prior condemnation matters (including pending attorney fee disputes), and the *Thompson v. Heineman* litigation. Keystone agrees that the condemnation litigation (including fee disputes) is not relevant to the case and should be excluded. The Hearing Officer has already held that eminent domain issues are beyond the scope of this proceeding. (*See* Commission's Order dated June 14, 2017, p. 6-7) Indeed, Keystone has objected to that specific type of testimony in the Landowners' individual pre-filed testimony, and this type of evidence is nowhere to be found in Keystone's pre-filed evidence or application.

The problem with excluding argument relating to *Thompson v. Heineman* is simply that it is the only Nebraska Supreme Court precedent addressing the Major Oil Pipeline Siting Act. Moreover, it involved at least 2 of the Landowners' currently listed witnesses, who expressly advocated that Keystone come to this Commission for routing authority. To the extent any of those witnesses contest the validity of *this process*, then that witness's prior assertions to the Nebraska Supreme Court about *this process* will become appropriate for examination.

**1.2-1.5 State Statutes, Rules, Regulations, Local Ordinances.** The Landowners' claim that Keystone should be excluded from offering evidence demonstrating compliance with applicable state statutes, rules and regulations and local ordinances because Keystone was "unwilling and unable" to do so in discovery is categorically false. Keystone objected to the Landowners' discovery requests on those topics because the Landowners' requests were hopelessly overbroad, and those objections were sustained by the Hearing Officer. (*See* Commission's Order dated June 14, 2017, p. 4) At the hearing on the motion to compel, and in response to virtually the same argument by the Landowners, the Hearing Officer ruled that:

the Applicant's response is sufficient and a list of citations to statutes, rules, regulations, and local ordinances is unnecessary, the Applicant has agreed to abide by all applicable provisions.

Providing a proper response, and prevailing on its objection to the form of the question, hardly prevents Keystone from offering any evidence on its compliance or intended compliance at the hearing. It also does not make Keystone's evidence *unfairly prejudicial* as Rule 403 requires. *See State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009) (noting that for evidence to be considered unfairly prejudicial it must tend to suggest a decision would be reached on an improper basis). The Landowners' request to exclude evidence on this basis should be denied.

**1.6 Nebraska Benefit of Proposed KXL.** This request mischaracterizes Keystone’s discovery responses and is overbroad. The Landowners are incomplete when they attempt to characterize Keystone’s response as being limited to increased economic activity, tax revenue and jobs, although those impacts are certainly important in this analysis. Keystone explicitly stated in its response to Interrogatory No. 120 (the Interrogatory cited by Landowners in support of their Motion) that, as a matter of Nebraska law (i.e., Neb. Rev. Stat. § 57-1403(3)), the Keystone XL pipeline benefits Nebraskans. Moreover, as evidenced by the Presidential Permit, which found the Keystone XL in the nation’s interest, the citizens of Nebraska benefit from the construction of Keystone XL. Keystone also specifically explained that its Application identified a number of ways Nebraska citizens would benefit from Keystone XL. Any evidence reflected in its Application, in the Presidential Permit, or simply as a matter of Nebraska law is, therefore, permissible in the hearing.

Notwithstanding Keystone’s thorough response, the Landowners’ motion on this topic is overbroad. The topic “Nebraska Benefit of Proposed KXL” is so broad that, even if Keystone had not made a complete disclosure, the topic would encompass evidence that is relevant to a statutorily-enumerated factor in MOPSA, which has been thoroughly discovered. The topic of “Nebraska Benefit of Proposed KXL” is *not* one of the elements for the Commission to evaluate in Neb. Rev. Stat. §57-1407(4). But, there may be evidence of a fact that proves one of the statutory elements *and* which proves there is a benefit to the citizens of Nebraska. In that way, the motion is overbroad; it is also another reason the Landowners’ motion should be denied. Simply put, there are a number of ways which the citizens of Nebraska benefit from Keystone XL, and Keystone has identified those reasons. But, putting that aside, this motion casts a wide net hoping to catch (and exclude) relevant evidence through the use of an overbroad description.

**1.7 Number of Permanent Jobs.** The Landowners’ argument on this issue is unintelligible, and it is not clear what information the Landowners are seeking to exclude. Keystone provided information regarding the estimated number of permanent jobs in Nebraska in its Interrogatory Answers, and Keystone also addressed job creation in its Application through explanation of direct, indirect and induced impacts. Keystone should be permitted to offer this evidence at the hearing, despite the Landowners’ claims.

**1.8 Jobs, Taxes, Economic Activity Elsewhere.** The Landowners cite to no specific testimony or evidence on this issue. But, information concerning jobs, taxes and economic activity from the Keystone XL pipeline outside of the State of Nebraska should not be excluded from the hearing *per se* because that information may be a necessary underpinning of Nebraska-specific jobs, taxes, and economic activity. While the Commission’s focus in this matter is on Nebraska and approving a route through this State, the impacts of Keystone XL in jurisdictions other than Nebraska provide a reasonable basis upon which to gauge the effects of Keystone XL here. Thus, that evidence is relevant under Nebraska’s standards. *See* Neb. Rev. Stat. § 27-402. It also does not suggest the Commission would reach a decision on an improper basis –something which must be shown before evidence can be excluded as unfairly prejudicial under Nebraska Rule of Evidence 403. *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009). Accordingly, the Landowners’ motion on this point should be denied.

**1.9-1.10 Energy Needs / Energy Security.** The Landowners’ argument misinterprets MOPSA, and again mischaracterizes Keystone’s discovery responses. MOPSA does not require proof that Nebraska has an “energy need” that will be solved or assisted by the Keystone XL project. *See* Neb. Rev. Stat. § 57-1407. The Legislature has already decided that issue. In Neb. Rev. Stat. § 57-1403, the following guidance exists:

The Legislature *finds* that:

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(3) The construction of major oil pipelines in Nebraska is in the public interest of Nebraska and the nation *to meet increasing need for energy*;

(Neb. Rev. Stat. § 57-1403(3))(emphasis added). Keystone did not “refuse to answer” the Landowners’ interrogatories so as to preclude Keystone from offering any evidence suggesting that energy needs of Nebraska will be met by the Keystone XL pipeline. Rather, Keystone, properly objected to the Landowners’ questions on these issues, and despite Landowners making the same tutorial statutory investigation argument as in this motion, those objections were *sustained* by the Hearing Officer. (See Commission’s Order dated June 14, 2017, p. 6-7) Keystone, nevertheless, alerted the Landowners to the applicable Legislative finding relating to major oil pipelines and the Presidential Permit which was based, in part, on the Department of State’s finding that the Keystone XL pipeline will enhance the nation’s energy security. While the “energy needs” of the state are not a determination for the Commission, evidence of facts tending to prove the elements of public interest as reflected in Neb. Rev. Stat. § 57-1407(4) may also prove that Nebraska’s energy needs are going to be met due to Keystone XL. But simply because a piece of evidence proves two matters (one relevant, one not) does not mean the evidence is *per se* excluded. For example, the Department of State’s finding of enhanced “energy security” was part of its “national interest” determination, which obviously includes Nebraska’s interest as a member of the United States of America.

**1.11 Economic Purpose.** Keystone has not “chosen to only rely upon” Section 19 of its Application to show an economic purpose of the Keystone XL pipeline as the Landowners contend. Rather, Keystone has made abundantly clear, and the Hearing Officer has agreed, that legal conclusions as to the meaning of words such as “economic purposes” is within the province

of the Commission based upon the evidence that Keystone submits. (*See* Commission’s Order dated June 14, 2017, page. 3-4.) Keystone informed the Landowners of this fact, and that all of the evidence presented at the hearing along with Keystone’s Application could be pertinent to the Commission’s decision. There is no basis for imposing any limitation on Keystone’s evidence (which has been pre-filed), and there is no basis for claiming unfair prejudice as the Landowners claim.

**1.12 Aesthetic Purpose.** As with the Landowners’ “economic purpose” questions, these interrogatories were the subject of *sustained* objections because they attempted to invade the purview of the Commission. (*See*, Commission’s Order dated June 14, 2017, page 3-4) There is no basis to limit *evidence* because Keystone properly declined to give *legal conclusions*. More importantly, Keystone’s supplemental answer to interrogatory number 48 was complete and thorough. Limiting evidence on this issue is improper. Any claims of unfair prejudice in connection with Keystone’s evidence regarding aesthetic purpose of the Keystone XL pipeline are feigned. Although the Landowners may not like this evidence and it may not be favorable to their position, that in-and-of-itself does not make it prejudicial or subject to exclusion. *See State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009) (noting that the fact that evidence may be prejudicial is not enough to exclude evidence in limine because, most, if not all, evidence offered by a party is prejudicial to the opposing party.)

**1.13 Widely Accepted by Landowners.** The Landowners’ position on this topic is based solely upon their belief that the evidence does not support Keystone’s assertion that the Preferred Route is “widely accepted” by the Landowners. Landowners raised this issue in discovery and Keystone has produced the legal descriptions of the tracks of real estate where easements have been obtained. Keystone believes its testimony of easement acquisition and the

confidential documents reflecting the property descriptions of land through which easements have been obtained support that statement. Simply put, a motion in limine is not the proper method to argue the weight of evidence.

**1.14 Ensures the Welfare of Nebraskans.** First, the discovery questions at issue were hopelessly overbroad, and Keystone properly objected to them as such. Improper discovery questions do not serve as a basis for limiting evidence. Second, as reflected in its answers, Keystone did not rely solely upon Section 19 of its Application to show how the Keystone XL pipeline would insure the welfare of Nebraskans, and the Landowners' attempt limit Keystone to only that evidence is improper. Keystone has made abundantly clear that the entirety of its Application is pertinent to this issue, and the national interest determination associated with the Presidential Permit is likewise reflective of the fact that the welfare of Nebraskans is ensured. Third, this is another instance where the topic is not a specifically enumerated factor for the Commission to evaluate according to Neb. Rev. Stat. § 57-1407(4) and by submitting evidence that may tend to prove the welfare of Nebraskans while also proving an element of Neb. Rev. Stat. § 57-1407(4), Keystone does not agree the welfare of Nebraskans is an independent element of its burden.

**1.15 Future Use of Land.** This is another instance where the weight, meaning or significance of the evidence is a decision for the Commission. Interrogatory number 111 was directed towards property rights. The concept of the future use of land is discussed in numerous places throughout Keystone's evidence and discovery. Keystone's evidence shows that it will follow the Oil Pipeline Reclamation Act, and it will reclaim the land to as close to its original condition as is practicable. Keystone's evidence shows that as part of its routing decisions it identified beneficial topography and land uses, which for the overwhelming majority of the route



was rural agricultural. Keystone's evidence also reflects that it has already come to agreements with the majority of landowners relating to irrigation system consideration during and following construction. Simply put, the topic of evidence relating to future uses of land is discussed in significantly greater detail throughout the application than in a single cherry-picked interrogatory directed at property rights (not future use of land).

**1.16 Fixed Entry Point.**

This is a valid and well understood routing criteria for pipelines. Keystone was clear that its fixed entry point is a result of a permitting decision in South Dakota. It is directly relevant to the question of whether other utility corridor *may be feasibly and beneficially* used. Neb. Rev. Stat. § 57-1407(4)(e)(emphasis added).

**1.17 Comparative Cost for Twinning.**

Keystone agrees that it does not have specific comparative cost data for the Landowners' concept of twinning the Keystone mainline. As explained in numerous discovery responses, rebuttal testimony, and in the application, the "twinning" concept is not a possible alternative because of the fixed entry point from South Dakota, and because crossing nearby Yankton does not allow for a true co-location or twinning opportunity.

**1.18 National Interest Determination.**

Keystone agrees with the Landowners that the question is not whether the Keystone XL pipeline is in the public interest but rather whether the Preferred Route is in the public interest. Of course, the Landowners have asked a number of questions and raised a number of issues relating to the merits of the Keystone XL pipeline in discovery, and because discovery is broader than merely relevance, Keystone has frequently pointed to the National Interest Determination (among other things) to respond to portions of the Landowners' queries. Even though the

question for the Commission is narrowly focused on the Preferred Route, the Department of State's National Interest Determination remains relevant. In its analysis of whether to grant the border crossing permit, the DOS evaluated the entire route in the United States, including the Preferred Route, and it published a Final Supplemental Environmental Impact Statement, which, among other things, described the impacts to natural resources, wildlife, socioeconomics, and cultural resources. There is significant overlap between the FSEIS and the elements of MOPSA. The FSEIS incorporated into the National Interest Determination, and in that regard, the National Interest Determination remains relevant.

WHEREFORE, Applicant TransCanada Keystone Pipeline, LP hereby respectfully requests the Commission deny the Landowners' Motion in Limine in its entirety.

TRANSCANADA KEYSTONE PIPELINE,  
LP

By: 

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James G. Powers (17780)  
Patrick D. Pepper (23228)  
McGrath North Mullin & Kratz, PC LLO  
First National Tower, Suite 3700  
1601 Dodge Street  
Omaha, Nebraska 68102  
(402) 341-3070  
(402) 341-0216 fax  
James G. Powers -  
jpowers@mcgrathnorth.com  
Patrick D. Pepper -  
ppepper@mcgrathnorth.com

## CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2017, a copy of the foregoing was served by email to the individuals and entities listed below:

Jayne Antony  
16064 Spring Street  
Omaha, NE 68130  
[jaynevan@yahoo.com](mailto:jaynevan@yahoo.com)

Fredericks Peebles and Morgan LLP  
Jennifer S Baker  
1900 Plaza Drive  
Louisville, CO 80027  
[jbaker@ndnlaw.com](mailto:jbaker@ndnlaw.com)

Wrexie Bardaglio  
9748 Arden Road  
Trumansburg, NY 14886  
[Wrexie.bardaglio@gmail.com](mailto:Wrexie.bardaglio@gmail.com)

Leverne A. Barrett  
1909 Co Rd E  
Ceresco, NE 68017  
[vernbarrett@fururetk.com](mailto:vernbarrett@fururetk.com)

O'Donoghue & O'Donoghue LLP  
Ellen O Boardman  
4748 Wisconsin Avenue, NW  
Washington, DC 20016  
[eboardman@odonoghuelaw.com](mailto:eboardman@odonoghuelaw.com)

O'Donoghue & O'Donoghue LLP  
Anna Friedlander  
4748 Wisconsin Avenue, NW  
Washington, DC 20016  
[afriedlander@odonoghuelaw.com](mailto:afriedlander@odonoghuelaw.com)

O'Connor Law Firm  
Robert O'Connor, Jr  
PO Box 45116  
Omaha, NE 68145  
[reolaw@aol.com](mailto:reolaw@aol.com)

Sierra Club  
Dara Illowsky  
1650 38th Street Ste 102W  
Boulder, CO 80301  
[Dara.illowsky@sierraclub.org](mailto:Dara.illowsky@sierraclub.org)

Kimberly E Craven  
33 King Canyon Road  
Chadron, NE 69337  
[kimecraven@gmail.com](mailto:kimecraven@gmail.com)

Cathie (Kathryn) Genung  
902 East 7th St  
Hastings, NE 68901  
[Tg64152@windstream.net](mailto:Tg64152@windstream.net)

Louis (Tom) Genung  
902 East 7th St  
Hastings, NE 68901  
[Tg64152@windstream.net](mailto:Tg64152@windstream.net)

Andy Grier  
916 S. 181st St.  
Elkhorn, NE 68022  
[Griea01@cox.net](mailto:Griea01@cox.net)

Christy J Hargesheimer  
620 S 30th St  
Lincoln, NE 68510  
[chrispaz@neb.rr.com](mailto:chrispaz@neb.rr.com)

Richard S Hargesheimer  
620 South 30th St  
Lincoln, NE 68510  
[rshargy@gmail.com](mailto:rshargy@gmail.com)

Blake & Uhlig, PA  
Robert J Henry  
753 State Avenue Ste 475  
Kansas City, KS 66101  
[rjh@blake-uhlig.com](mailto:rjh@blake-uhlig.com)

Blake & Uhlig, PA  
Michael J Stapp  
753 State Avenue Ste 475  
Kansas City, KS 66101  
[mjs@blake-uhlig.com](mailto:mjs@blake-uhlig.com)

Blake & Uhlig, PA  
Michael E Amash  
753 State Avenue Ste 475  
Kansas City, KS 66101  
[mea@blake-uhlig.com](mailto:mea@blake-uhlig.com)

Becky Hohnstein  
PO Box 272  
Minatare, NE 69356  
[jimhohnstein@gmail.com](mailto:jimhohnstein@gmail.com)

Marvin E Hughes  
714 W 5th St Ste 120  
Hastings, NE 68901  
[bhughes@gtmc.net](mailto:bhughes@gtmc.net)

John Jarecki  
6112 Bedford Ave  
Omaha, NE 68104  
[Johnjarecki110@gmail.com](mailto:Johnjarecki110@gmail.com)

Karen Jarecki  
6112 Bedford Ave  
Omaha, NE 68104  
[tenbuckstwo@yahoo.com](mailto:tenbuckstwo@yahoo.com)

Brad S Jolly & Associates  
Brad S Jolly  
15355 Gadsen Dr  
Brighton, CO 80603  
[bsj@bsjlawfirm.com](mailto:bsj@bsjlawfirm.com)

Domina Law Group PC LLO  
Brian F Jorde  
2425 S 144th Street  
Omaha, NE 68144  
[bjorde@dominalaw.com](mailto:bjorde@dominalaw.com)

Domina Law Group PC LLO  
Dave Domina  
2425 S 144th Street  
Omaha, NE 68144  
[ddomina@dominalaw.com](mailto:ddomina@dominalaw.com)

Taylor R M Keen  
5022 Hamilton St  
Omaha, NE 68132  
[Taylorkeen7@gmail.com](mailto:Taylorkeen7@gmail.com)

Judy King  
1261 Fall Creek Rd  
Lincoln, NE 68510  
[kingjud@gmail.com](mailto:kingjud@gmail.com)

Michelle C. LaMere  
PO Box 514  
Winnebago, NE 68071  
[lamere@rocketmail.com](mailto:lamere@rocketmail.com)

Pamela Luger  
8732 Granville Pkwy  
LaVista, NE 68128  
[Pam1181@yahoo.com](mailto:Pam1181@yahoo.com)

350.org  
Kendall Maxey  
20 Jay Street  
Brooklyn, NY 11201  
[kendall@350.org](mailto:kendall@350.org)

Elizabeth (Liz) Mensinger  
6509 Wirt St.  
Omaha, NE 68104  
[lizmensinger@gmail.com](mailto:lizmensinger@gmail.com)

Cindy Myers  
PO Box 104  
Stuart, NE 68780  
[Csmyers77@hotmail.com](mailto:Csmyers77@hotmail.com)

Crystal Miller  
7794 Greenleaf Drive  
LaVista, NE 68128  
[neccmiller@juno.com](mailto:neccmiller@juno.com)

Janece Mollhoff  
2354 Euclid Street  
Ashland, NE 68003  
[wjmollhoff@windstream.net](mailto:wjmollhoff@windstream.net)

Greg Nelson  
3700 Sumner St  
Lincoln, NE 68506  
[gnelson@inetnebr.com](mailto:gnelson@inetnebr.com)

Julie Nichols  
1995 Park Ave  
Lincoln, NE 68502  
[Willpower2@earthlink.net](mailto:Willpower2@earthlink.net)

Jana Osborn  
1112 Meadowlark  
Alliance, NE 69301  
[janajearyb@gmail.com](mailto:janajearyb@gmail.com)

James Douglas Osborn  
43110 879th Rd  
Ainsworth, NE 69210  
[Jdosborn3@yahoo.com](mailto:Jdosborn3@yahoo.com)

Dave Polson  
4923 Valley Street  
Omaha, NE 68106  
[honk@cox.net](mailto:honk@cox.net)

Joseph Pomponio  
551B Sand Creek Rd  
Albany, NY 12205  
[lukaz@msn.com](mailto:lukaz@msn.com)

Collin A Rees  
4721 Heather Lane  
Kearney, NE 68845  
[collin@priceofoil.org](mailto:collin@priceofoil.org)

Donna Roller  
2000 Twin Ridge Rd.  
Lincoln, NE 68506  
[rollerski@gmail.com](mailto:rollerski@gmail.com)

Cecilia Rossiter  
949 N 30th St  
Lincoln, NE 68503  
[punion@gmail.com](mailto:punion@gmail.com)

Corey Runmann  
2718 S. 12th St.  
Lincoln, NE 68502  
[rumannc@gmail.com](mailto:rumannc@gmail.com)

Lois Schreur  
2544 N. 61st Street  
PO Box 4376  
Omaha, NE 68104  
[leschreur@centruylink.net](mailto:leschreur@centruylink.net)

Tristan Scorpio  
208 S Burlington Ave Ste 103  
Box 325  
Hasting, NE 68901  
[linka@boldnebraska.org](mailto:linka@boldnebraska.org)

Julie Shaffer  
5405 Northern Hills Dr  
Omaha, NE 68152  
[Jshaffer59@gmail.com](mailto:Jshaffer59@gmail.com)

Sandra Slaymaker  
102 E 3rd St #2  
Atkinson, NE 68713  
[sandyslaymaker@gmail.com](mailto:sandyslaymaker@gmail.com)

Susan Soriente  
1110 Rockhurst Drive  
Lincoln, NE 68510  
[ssoriente@gmail.com](mailto:ssoriente@gmail.com)

Oil Change International  
Lorne Stockman  
714 G St., SE Suite 202  
Washington, DC 20003  
[lorne@priceofoil.org](mailto:lorne@priceofoil.org)

Susan Straka-Heyden  
46581 875th Rd  
Stuart, NE 68780  
[Suzie\\_sl@hotmail.com](mailto:Suzie_sl@hotmail.com)

Kimberly L Stuhr  
19303 Buffalo Rd  
Springfield, NE 68059  
[Kimberlystuhr13@yahoo.com](mailto:Kimberlystuhr13@yahoo.com)

Jacques Tallichet  
2821 S. 79th St  
Lincoln, NE 68506  
[Jacques.tallichet@gmail.com](mailto:Jacques.tallichet@gmail.com)

Paul Theobald  
85718 544th Avenue  
Foster, NE 68765  
[Ptheobald36@gmail.com](mailto:Ptheobald36@gmail.com)

Jonathan H Thomas  
960 S Cotner Blvd  
Lincoln, NE 68510  
[Thewild\\_things@yahoo.com](mailto:Thewild_things@yahoo.com)

Elizabeth L Troshynski  
87769 484th Ave  
Atkinson, NE 68713  
[btroshyn@hotmail.com](mailto:btroshyn@hotmail.com)

Christine Troshynski  
101 S. 1st St.  
Emmet, NE 68734  
[ctroshynski@gmail.com](mailto:ctroshynski@gmail.com)

Julie Walker  
2570 West Luther St.  
Martell, NE 68404  
[Jw9095@yahoo.com](mailto:Jw9095@yahoo.com)

Susan C Watson  
2035 N 28th St Apt 213  
Lincoln, NE 68503  
[Scwatson1965@gmail.com](mailto:Scwatson1965@gmail.com)

Susan J Weber  
2425 Folkways Blvd Apt 329  
Lincoln, NE 68521  
[Susanjweber4@yahoo.com](mailto:Susanjweber4@yahoo.com)

Douglas Whitmore  
8856 N 83rd Ave  
Omaha, NE 68122  
[douglas@whitmore4congress.com](mailto:douglas@whitmore4congress.com)

Kenneth C Winston  
1327 H St Ste 300  
Lincoln, NE 68508  
[kwinston@inebraska.com](mailto:kwinston@inebraska.com)

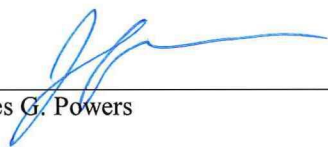
Sandy Zdan  
4817 Douglas  
Omaha, NE 68132  
[sandywz@cox.net](mailto:sandywz@cox.net)

Sarah Zuekerman  
1729 K St #7  
Lincoln, NE 68508  
[Sarahj1182@gmail.com](mailto:Sarahj1182@gmail.com)

[Matt.effken@nebraska.gov](mailto:Matt.effken@nebraska.gov)

[Nichole.mulcahy@nebraska.gov](mailto:Nichole.mulcahy@nebraska.gov)

[Jeff.pursley@nebraska.gov](mailto:Jeff.pursley@nebraska.gov)

  
\_\_\_\_\_  
James G. Powers