

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

Application No. OP-0003

**IN THE MATTER OF THE APPLICATION
OF TRANSCANADA KEYSTONE
PIPELINE, L.P. FOR ROUTE APPROVAL
OF THE KEYSTONE XL PIPELINE
PROJECT PURSUANT TO THE MAJOR
OIL PIPELINE SITING ACT**

POST-HEARING BRIEF OF PONCA TRIBE OF NEBRASKA

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SUMMARY OF ARGUMENT

The Siting Act expressly places the burden of proof on Keystone in these proceedings. The first part of Keystone meeting that burden is its burden of production, which requires it to come forward – before any opposing evidence is presented – with evidence to support each and every aspect and issue of its case, including each and every factor listed in the Siting Act. Yet, Keystone presented absolutely no evidence regarding social impacts, including impacts on historic and cultural resources, in its presentation to the Commission. Consequently, as a matter of law, the Application must be denied on the grounds Keystone failed to meet its burden of production, without any consideration of whether the pipeline or the proposed routes would serve the public interest.

But, even if the Commission were to consider whether any of the proposed routes would serve the public interest, the Application must still be denied. Along both the Preferred and Mainline Alternative Routes, the pipeline will directly impact the Ponca Trail of Tears, an earthlodge village, and the Ponca Sacred Corn. It may also directly impact existing archaeological Ponca village sites. Each of those sites would be damaged or destroyed by construction of the pipeline or, if miraculously not, by the operation and maintenance of the pipeline. Keystone knew about the existence of most of those resources, but did not present even an iota of evidence on the impacts to those resources or how the impacts to those resources would serve, and not be contrary to, the public interest.

Instead of meeting its burden of proof, Keystone has urged there is no need to consider such historic and cultural resources – that the Commission need only consider historic properties on the National Register of Historic Places. It then suggests handling impacts is not for the Commission to consider, but that the Commission must bow to federal agencies and the laws they follow, leaving any impacts on historic and cultural resources to the Department of State to handle some time in the future. But, the Siting Act is intended to go beyond the scope of federal agencies' considerations and

sites listed in the National Register. The language of the Act and its legislative history make it clear the Commission is required to look at a much broader scope than federal agencies, it is to look at matters unique and important to Nebraska and in its public interest.

Keystone was required to inform the Commission of impacts of the pipeline on all historic and cultural resources important to Nebraska and specifically how those impacts would be avoided or not be contrary to the public interest. Keystone's proposal it will figure out what resources are at issue later or let the Department of State handle it is insufficient. There is no serious dispute the construction and operation of the pipeline along the proposed routes will not merely impact, but likely damage or destroy historic and cultural resources that are unique and important to Nebraska. Those impacts are contrary to Nebraska's public interest and require the Application be denied.

ARGUMENT

I. KEYSTONE BEARS THE BURDEN OF PROOF, BUT ENTIRELY FAILED TO MEET ITS BURDEN WITH RESPECT TO SOCIAL IMPACTS.

A. Keystone Did Not Present Any Evidence on Social Impacts, Requiring the Application to Be Rejected Without Considering the Merits.

When the Commission granted the Tribe's Formal Intervention, it noted the Siting Act requires the Commission to consider evidence of the social impacts of the pipeline and specifically held social impacts "encompasses many concepts and issues, including cultural, anthropological, and historical concepts." Order on Formal Intervention Pet. at 6 (March 31, 2017). Consequently, at the outset of these proceedings, the Commission notified Keystone the Commission was required to consider impacts on historic and cultural resources as part of social impacts.

The Siting Act expressly places the burden of proof on Keystone for all aspects of these proceedings, including providing evidence of social impacts. The Act specifically states, "The pipeline carrier shall have the burden to establish that the proposed route of the major oil pipeline

would serve the public interest.” NEB. REV. STAT. § 57-1407(4). In terms of social impacts, the Act provides, “*In determining whether the pipeline carrier has met its burden,...* the commission shall evaluate... [e]vidence regarding the... social impacts of the major oil pipeline.” *Id.* § 57-1407(4)(d) (emphasis added). In other words, for Keystone to meet its burden the proposed route would serve the public interest, it had the affirmative burden to bring forward evidence regarding social impacts, including cultural, anthropological, and historic resources. Yet, when presenting its case to the Commission, Keystone presented no evidence regarding those issues.

The burden of proof is not just convincing the Commission the proposed route is in the public interest. The burden of proof consists of two separate and distinct elements – the burden of persuasion and the burden of production. *Schneider v. Chavez-Munoz*, 616 N.W.2d 46, 58, 9 Neb. App. 579 (Neb. Ct. App. 2000). The burden of persuasion is the part of the burden of proof where Keystone has to convince the Commission the proposed route is in the public interest. *Hopkins v. Hopkins*, 883 N.W.2d 363, 373, 294 Neb. 417, 428 (2016). On the other hand, the burden of production “requires parties to present particular evidence, regardless of whether that evidence actually persuades the finder of fact.” *Id.* In other words, the burden of production is “a party’s obligation to come forward with evidence to support its claim.” *Office of Workers’ Comp. v. Greenwich Collieries*, 512 U.S. 267, 272 (1994).

The burden of production is fundamental. The burden of production is the legal standard which must be met before the Commission can even consider Keystone’s Application. *Schneider*, 616 N.W.2d at 58. It is not an issue of fact to be determined as part of Keystone’s case, but an issue of law. *Id.* In fact, the Commission does not even consider whether Keystone has meet its burden of persuasion unless and until Keystone meets its initial burden of production. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330-31 (1986) (Brennan, J., dissenting). “[T]he impact of the burden of producing

evidence is substantive if the burden is not met: The party who fails to carry his burden loses on the issue to which the burden applies, and the ultimate burden of persuasion... plays no role.” *In Re Kim*, 71 B.R. 1011, 1015-16 (Bankr. C.D. Cal. 1987).

Keystone had an affirmative and absolute duty to produce evidence on all of the issues required to make its case the proposed route is in the public interest. And it had to produce that evidence prior to any of the Intervenors presenting any evidence. Keystone cannot rely on any rebuttal evidence it intended to submit or even actually submitted – it had to carry its burden of production during its presentation of evidence, not in response to the Intervenors, whose only obligation was to produce evidence to show Keystone has not proven the route is in the public interest. *See Office of Workers’ Comp.*, 512 U.S. at 273 (stating that once a party with the burden of proof presents evidence, the burden to produce evidence shifts to the other side). Unless a party provides a “quantum of proof on an issue [to] reach[] a certain threshold, no issue is raised that the opposing party is required to meet.” *In Re Kim*, 71 B.R. at 1016. In other words, Keystone had to meet its burden of production before it rested its case and before the Intervenors presented any evidence whatsoever. Evidence presented as rebuttal to the Intervenors is not sufficient, particularly since the Intervenors had no obligation to produce anything until Keystone first fulfilled its burden of production.

Keystone’s Application is entirely silent on social impacts, including impacts on cultural resources. While the Application sets out each of the required issues that must be presented by Keystone under Section 57-1407(4) in separate sections, the section where the Application discusses “Evidence Regarding the Economic and Social Impacts of the Major Oil Pipeline,” only discusses the “socio-economic impact of the Project along the Preferred Route” and the economic report of Dr. Ernie Goss. (KXL-1,64). The Application is entirely silent on social issues overall and, in particular, historic and cultural resources.

At the hearing, Keystone failed to present even a single witness to discuss social or cultural resource impacts. The Commission informed Keystone it would consider impacts on historic and cultural issues at the end of March when it granted the Tribe's Petition of Formal Intervention, giving Keystone *five months* to present pre-filed testimony of at least one witness regarding social and cultural resource impacts. But, after more than a day and a half of presenting witnesses and evidence at the hearing, Keystone never provided even a single witness or single exhibit regarding social or cultural resource impacts and simply rested, (T684). The absence of such witnesses and evidence is glaring when compared to the presentation of witnesses and exhibits regarding every other factor to be considered by the Commission. Each witness presented asserted responsibility for particular sections of the Application and incorporated those sections into their pre-filed written testimony. Yet, not a single witness had any responsibility for cultural resources.

The failure of Keystone to present evidence on any issue that is part of its case, as a legal matter, means Keystone "loses on the issue." *In Re Kim*, 71 B.R. at 1016. Keystone failed to present even a single piece of evidence with respect to social and cultural resource impacts, as required by the Siting Act and the Commission's regulations. Therefore, it loses on the issue. And that alone requires denial of the Application on the grounds Keystone failed to meet its burden of proof by not overcoming the first part of its burden – the burden of production of evidence.

"[A] party is not permitted to prevail [on an issue... unless the party introduces a certain quantum of evidence sufficient to put his opponent to the burden of producing evidence." *Id.* When Keystone ended its presentation of evidence and rested, the Landowners moved to dismiss the Application on the precise grounds Keystone had not presented evidence on specific matters it is required to prove. (T684-86). The Tribe joined in that motion, adding the Applicant had presented no evidence of social or cultural resource impacts. (T686). While the Hearing Officer denied the

motion, she expressly stated, if it were true Keystone failed to meet its burden of production, denial of the Application “would be the result of the Commission.” (T687). As discussed, the burden of producing evidence in support of each issue and aspect of the Application is the legal standard which must be met before a case can even be considered by a trier of fact, including the Commission. *Schneider*, 616 N.W.2d at 58. The Commission must revisit the issue of Keystone not presenting any evidence on social and cultural resource impacts and deny the Application on those grounds.

B. Even If the Commission Considered Keystone’s Rebuttal Evidence, it Still Failed to Meet its Burden of Production.

Even if the Commission were to consider Keystone’s rebuttal evidence as part of its burden of production, it still did not come close to meeting its burden. Keystone’s only “[e]vidence regarding the... social impacts of the major oil pipeline,” is a short section in Keystone’s Construction Mitigation and Reclamation Plan (“CMRP”) and the pre-filed rebuttal testimony of Erin Salisbury. The CMRP contains a single short section – Section 2.19 – simply saying “Keystone intends to avoid cultural resources to the extent practicable” and will “implement the measures outlined in any unanticipated discovery plan or any Programmatic Agreement.” (KXL-1,105). Nowhere in the Application or the CMRP is there any detail of the actual historic and cultural resources along the proposed routes or the impact on those resources.

The rebuttal testimony of Ms. Salisbury is no more enlightening. She simply reiterates Keystone will comply with the Programmatic Agreement (“PA”) of the Department of State (“DOS”). (KXL-14,6). She testified Keystone will conduct surveys to look for cultural resources after the Commission approves its route, but will leave it to DOS to handle them. *Id.*,3,4-5. She also testified consulting with tribes was something for DOS, not Keystone. *Id.*,3-4. Even on redirect, she repeatedly stated everything is for “The State Department,” (T1182), not Keystone.

Nowhere did Ms. Salisbury identify any historic or cultural resources or indicate how the pipeline will impact those resources. She only testified Keystone did “a literature search” and reviewed some records and files. (KXL-14,4). But, when asked if she consulted a published article specifically about existing Ponca village sites, (CUL-8,9-10), she passed the buck to DOS, saying consideration “would have occurred between the State Department and the Ponca.” (T1178). Noticeably absent from her testimony is any indication Keystone asked any tribes or even local governments about the historic and cultural resources along the proposed routes. She even admitted, while Keystone has presented the Mainline Alternative Route for consideration, it never conducted a single survey for historic or cultural resources along that route. (KXL-14,3).

The Siting Act places the burden of proof on an applicant and lists specific factors for consideration in determining whether the applicant met that burden. The Nebraska Supreme Court has specifically considered the burden of production an applicant must meet to establish such factors. Each factor requires a specific analysis by the applicant, “not a generic representation that, through the general course of doing business, [the factor] is considered.” *Metro. Utilities Dist. of Omaha v. Aquila*, 712 N.W.2d 280, 286, 271 Neb. 454 (2006). The Court considered a statute which involved a public interest determination and factors to be considered by utility districts for a natural gas pipeline. One of the factors is evaluating “[t]he economic feasibility of the extension or enlargement.” NEB. REV. STAT. § 66-1860 (formerly Section 57-1303). The Supreme Court specifically held that factor “requires a specific economic feasibility analysis of a proposed extension or enlargement, not a generic representation that, through the general course of doing business, economic feasibility is considered.” *Metro. Utilities Dist. of Omaha*, 712 N.W.2d at 286. In other words, the listed factors in a statute which a public body must consider in approving a pipeline require the applicant to present specific evidence on those factors, not mere representations of future actions or considerations.

By the Supreme Court’s holding, it is not sufficient for Keystone to simply state “we will handle it in the future.” The factor of “[e]vidence regarding the... social impacts” requires specific study and evidence. In the absence of specific study and evidence, Keystone fails to meet its burden. Keystone presented no study of the impacts of its proposed routes on historic or cultural resources. Ms. Salisbury said Keystone “performed field surveys,” (KXL-14,4), but Keystone never produced those surveys or the results of those surveys. Keystone was aware of specific historic and cultural resources along its proposed routes, but never bothered to present any evidence about those resources or impacts on those resources. (T891, T1152-1154, CUL-16,27).

The failure of Keystone to meet its burden of production with impacts on historic and cultural resources is glaring when contrasted to Keystone’s presentation on the other factors. It provided a six page table in its Application listing specific natural resources that would be impacted. (KXL-1,40-45). It dedicated 10 pages with 21 subsections discussing impacts on species, from large and small game to aquatic species and insects. *Id.*,46-56. It even provided six pages with 10 subsections on impacts to plants. *Id.*,56-62. It provided a biological opinion and a study of economic impacts. It included pre-filed written testimony for each of these factors and presented the witnesses for its case in chief. Yet, nowhere did Keystone provide any reports, information, or witnesses on cultural resource impacts. The Commission must deny the Application without considering the merits of the proposed routes on the grounds Keystone failed to meet its burden of producing evidence of social impacts.

II. THE SITING ACT REQUIRES CONSIDERATION OF HISTORIC AND CULTURAL RESOURCES THAT ARE PART OF NEBRASKA’S PUBLIC INTEREST.

A. The Proposed Route and Each Factor for the Commission to Consider must Result in a Finding the Route Is in the Public Interest.

The Siting Act requires Keystone to “establish that the proposed route of the major oil pipeline would serve the public interest.” NEB. REV. STAT. § 57-1407(4). The Nebraska Supreme Court has

noted “the words ‘public interest’ in a... regulatory statute take meaning from the purposes of the regulatory legislation.” *In re Application of GCC License Corp.*, 647 N.W.2d 45, 54, 264 Neb. 167 (2002). The Siting Act deals with the very narrow field of pipelines greater than six inches which transport petroleum products. NEB. REV. STAT. § 57-1404(2). By the Siting Act, the legislature has recognized the transportation of petroleum products in large pipelines is a specialized type of pipeline. *See Application of Paulson*, 81 N.W.2d 875, 881 (Minn. 1957) (analyzing meaning of public interest with respect to public utilities commission regulation of oil transportation). As such, and even though the Siting Act limits evaluation safety, the term “public interest” in the Act “necessarily has reference to the inherently dangerous character of the commodity involved and comprehends the concerns and interests of the public in the handling and carrying of petroleum under conditions which will not be inimical to the public welfare.” *Id.* at 881-82.

Although the Siting Act includes specific factors to evaluate, that does not detract from the Commission’s overall consideration of the public interest. “[T]he statute requires the commission to undertake its traditional public-interest determination.... [T]he statute contains no language limiting the public-interest evaluation.” *In re Excelsior Energy Inc.*, 782 N.W.2d 282, 294 (Minn. Ct. App. 2010). In other words, the factors do not limit or define “public interest” in the Siting Act. *Id.* The factors are specific items the Commission must consider as part of its larger public interest analysis.

Under the Siting Act, each of the listed factors needs to be considered in light of the public interest. The Act expressly states the pipeline carrier has the burden to establish the proposed route would serve the public interest and then immediately provides, “[i]n determining whether the pipeline carrier has met its burden,” the Commission must evaluate the listed factors. The legislature noted the Commission would look to the listed factors to determine whether a proposed route passed the public interest test. *Hearing on LB1 Before the Natural Res. Comm.*, 102nd Leg., 1st Spec. Sess., 4

(Neb. 2011). In other words, the factors are part of the Commission’s overall public interest analysis and neither separate from it nor a replacement for it.

B. The Siting Act Requires Considering Resources That Are in the Public Interest, Not the Narrow Definition of “Historic Properties” Proposed by Keystone.

Keystone asserted “the Preferred Route will not impact an identified *historic property*.” (KXL-14,4-5) (emphasis added). The PA defines “historic property” as “Any prehistoric or historic district, site, building, structure, or object *included in, or eligible for inclusion in, the* [National Register].... [and] properties of traditional religious and cultural importance to an Indian tribe ... *that meet the National Register criteria.*” *Id.*,16 (emphasis added). In other words, Keystone only plans to consider or deal with “historic properties” under the PA, and those are limited to resources either listed in or meeting the criteria for the National Register of Historic Places (“National Register”). But, that is an entirely different definition and consideration than what the Siting Act requires.

In construing terms in a statute, “[o]ne of the basic rules of statutory construction is that statutory language will be given its plain and ordinary meaning.” *Caruso v. City of Omaha*, 383 N.W.2d 41, 44, 222 Neb. 257, 260 (1986). The ordinary meaning of a word or phrase generally means using the dictionary definition of the term. *E.g., id.; O’Neill Prod. Credit Ass’n v. Schnoor*, 302 N.W.2d 376, 379, 208 Neb. 105, 109 (1981). Black’s Law Dictionary defines “public interest” as the “general welfare of the public that warrants recognition and protection” and “something in which the public as a whole has a stake.” BLACK’S LAW DICTIONARY. This definition matches the intent of the legislature. In discussing what the Siting Act would consider differently than the federal National Environmental Policy Act, Senator Dubas stated, “we’re looking more specifically to our specific state... and all of the uniqueness of our state.” *Hearing on LB1* at 9. He said the Siting Act would allow the state “to look at it from a Nebraska perspective.” *Id.* The legislature specifically intended

to go beyond what typical federal laws governing environmental and resource review provide. The legislature wanted to ensure the citizens of Nebraska, through the Commission, could consider the unique issues and resources of Nebraska, not merely those federal agencies review.

“Public interest” in the Siting Act is much more broad than “historic property.” The Siting Act is concerned with historic and cultural resources which are in *the public interest of Nebraska*. Keystone would tie the Commission’s hands to only considering impacts on historic and cultural resources eligible for the National Register. But, that is not what the Siting Act requires. The Siting Act requires the Commission to consider impacts on historic and cultural resources that are part of Nebraska’s public interest – resources the people of Nebraska have a stake in and that warrant recognition and protection because of their unique value and importance to Nebraska. Those historic and cultural resources are not always in the National Register. (T1076).

By its own admission, Keystone has only concerned itself with “historic properties” and only considered whether the Preferred Route would “impact an identified historic property.” (KXL-14,4). But, Keystone was required to present evidence on historic and cultural resources that, under Nebraska’s unique view, “warrant recognition and protection” and “in which the public as a whole has a stake.” It failed to do so and, consequently, failed to meet its burden of proof on social and cultural resource impacts. As a result, the Application must be denied. But, at a minimum, the Commission must consider historic and cultural resources which are important to Nebraska, warrant recognition and protection from Nebraska’s perspective, and in which the public has an interest.

III. EVEN IF THE COMMISSION CONSIDERS THE MERITS OF THE APPLICATION, THE IMPACTS ON HISTORIC AND CULTURAL RESOURCES DICTATES THE PIPELINE WILL NOT SERVE THE PUBLIC INTEREST.

Despite Keystone’s blanket assertion otherwise, both the Preferred and Mainline Alternative Routes would directly impact historic, archaeological, and cultural resources – resources known to

Keystone prior to filing its Application, yet not disclosed or discussed by Keystone. Keystone was aware each of those Routes would cross the Ponca Trail of Tears at two locations, that earth lodge villages were present on the Allpress Farm, and that the Tanderups maintain Ponca Sacred Corn. Yet, Keystone never bothered to discuss these resources or how it would avoid damaging or destroying them by construction, operation, and maintenance of the pipeline. Keystone's only supposition is there is a PA and DOS will be responsible for any historic properties. But, that is wholly inadequate.

A. The Preferred and Mainline Alternative Routes Will Directly Impact Historic and Cultural Resources Important to Nebraska and in its Public Interest.

Historic and cultural resources are important to Nebraska and their protection is squarely within its public interest. That has been universally expressed by the citizens of Nebraska testifying before the Commission. (T817, T875-76, T917-18, T931). Art Tanderup testified "history is important and should be important to our state" and cultural resources "are sacred and they need to be protected." (T754). Robert Krutz, referencing finds of cultural resources in Antelope County, specifically expressed he was concerned construction of the pipeline would run into unknown cultural resources there. (T933).

1. *The Trail of Tears is a historic and cultural resource important to Nebraska and must be considered under the Siting Act.*

Although Keystone asserted the Ponca Trail of Tears "has not been recorded as an archaeological resource in Nebraska" because "it is not included in the files of the Nebraska SHPO office," (KXL-14,5), Keystone in no way disputed the existence of the Ponca Trail of Tears or its importance to Nebraska. Instead, Keystone attempted to dismiss the significance of the Trail by asserting it is not something in the National Register. But, as discussed, this is not the standard under the Siting Act – it involves considering cultural and historic resources that are important and unique to Nebraska, not just a limited set of what happens to be on a list. Even Keystone's Ms. Salisbury

acknowledged just because a resource is not in the National Register does not mean it is not important. (T1117).

The importance of the Trail of Tears is without question and undisputed. Keystone's own documents reveal Oliver Littlecook filed a report entirely dedicated to his "observations and Opinion of the Ponca Trail of Tears as it relates to the up coming [sic] Keystone XL Pipeline." (CUL-13,21). Mr. Littlecook noted, with the Trail of Tears, "[t]he historical trauma is still alive and well among the Ponca's [sic]." *Id.* Shannon Wright also testified the Trail of Tears is important to the Tribe, noting the Tribe held a Remembrance Walk this year commemorating the 140th anniversary of the Trail of Tears and that it is planned again for the future. (CUL-19,48).

The Trail of Tears is not only important to the Tribe, it is important to Nebraska and part of its public interest. The State holds the Chief Standing Bear Breakfast in the capitol every year, hosted by the Nebraska Commission of Indian Affairs, a state agency. *Id.*,48-49. The Commission even maintains a website, (T1149, T1156), showing a map of the Trail and locations where the Ponca stopped. Nebraska congressmen have introduced legislation to recognize and protect the Trail at the federal level. (CUL-19,49). The State also maintains the gravesites of White Buffalo Girl and Praireflower, two children who died on the Trail and are buried along it; a historical marker at the Milford rest area on I-80; and another historical marker outside of Niobrara State Park on Highway 12. *Id.*,50. The history of the Trail of Tears is even taught as part of Nebraska's fourth grade history curriculum. (T757).

Beyond official State action, the Trail of Tears is important to the public. Mr. Wright noted, "many non-tribal members... supported the Tribe along the [Remembrance] walk." (CUL-19,48). The Nebraska Trails Foundation gifted the Tribe a 19 mile stretch of the Trail. *Id.* Robert Krutz explained, "In Antelope County, we have the Trail of Tears. And in Neligh, Nebraska, they have a burial ground

of an Indian girl, baby Indian girl. And it's a historical marker. And it's been there – well, it was in the paper just this last week, 140 years ago of – it's called the Trail of Tears.” (T932). He even noted “there's the museum down there in Neligh that has a display for it.” (T933). The people of Nebraska hold celebrations for White Buffalo Girl – when Frank Morrison described his particular involvement with the Trail, he said, “we do decorate the grave.” (T919).

Mr. Tanderup discussed the fact the Trail of Tears crosses his family's land, (T752, T755), and that his family held a Trail of Tears camp on their land in November 2013, (T751). He pointed out, “we felt it was important that people needed to know that the Keystone XL Pipeline would cross the Ponca Trail of Tears.” (T752). He noted the Trail of Tears “is absolutely an important part of Nebraska history” and “it is absolutely important to preserve it.” (T757, T758). Susan Dunavan expressed, “[i]t is extremely important that these cultural gifts be preserved,” explaining “the tribes of Nebraska,... this is the history of the state. And if we lose our history, I think we have lost a lot. And I don't ever want to risk that... [e]specially [for] the Ponca Trail of Tears.” (T798-99). Bonny Kilmurry discussed how cultural resources are “who we are. It's our history.... losing history is a sad thing.” (T817). Diana Steskal noted the Trail “is very important to my husband and I. We have participated in the planting and the harvest of the Ponca sacred corn at Art's. We have been to many different ceremonies there...” (T876).

Each and every witness from Nebraska that testified at the hearing and was asked uniformly agreed the Trail of Tears is important to Nebraska and in its public interest. And they each expressed damaging or disturbing the Trail would be contrary to Nebraska's public interest. (T818-19, T876, T899, T919, T933, T1077-78). Ms. Kilmurry said damage or destruction of the Trail would be “a sad day.” (T819). Not a single witness or other piece of evidence contradicts or disputes the importance of the Trail to Nebraska or its public interest. In fact, Keystone never challenged the importance of

the Trail, only asserting it is not listed in the National Register, dismissing its importance to Nebraska and its people. The Ponca Trail of Tears is precisely the type of resource the legislature intended to protect in enacting the Siting Act.

2. *The Allpress earthlodge village sites are historic and cultural resources important to Nebraska and must be considered under the Siting Act.*

Both Bob Allpress and Mr. Wright discussed a site of an earthlodge village located on the Allpress Farm, where Keystone proposes to construct and operate its pipeline. The site is large and very significant, consisting of about three-quarters of an acre. (T1078). On the site, there are approximately six depressions where previous earthlodges would have stood, each one being about 25 to 30 feet in diameter. (T1051). At least one of the earthlodge rings contained a fire ring in its center where the Ponca inhabitants “would have cooked, seasoned stuff, any buffalo skins you would have had in the lodge” and which typically contain “tools, busted pieces of tools, [and] animal bones.” (T1078-79). It is likely the site is eligible for inclusion in the National Register, (T1077), but it is, without a doubt, important to Nebraska and part of its public interest.

The existence of the earthlodge village on the Allpress Farm goes beyond archaeology. The site is unique to Nebraska and important to its history and public interest. As Mr. Wright explained:

The fact that these artifacts are in this area shows that the tribes did inhabit this area. We did travel through there. Finding the earth lodge depression shows that it was a longer-term habitation. It’s not an area where normally... stuff like this is found due to the fact that a lot of these materials that are found there are not from that area. They had to have been brought in there to be used.

(T1052-53). Finding the Ponca lived at what is now the Allpress Farm, is very significant. The site could expand the understanding of how and where the Ponca lived in Nebraska, significantly adding to the knowledge of Nebraska’s history. There can be no doubt the earthlodge village is important to Nebraska and, as Mr. Wright expressed, part of its public interest, (T1077).

3. ***The Ponca Sacred Corn is a cultural resource important to Nebraska and must be considered under the Siting Act.***

Ponca Sacred Corn is grown on the Tanderup Farm. The Sacred Corn is not a typical variety of corn grown in mass production – it is a special variety of corn the Ponca historically grew. (T755). The Sacred Corn originates from corn found in a 137-year old medicine bundle, *id.*, and planting it each year has brought back that 137-year old strain that otherwise could have been wiped out. (T756). The corn is not only used for food, but also ceremony. (T752). The entire planting of the Sacred Corn is unique to Nebraska – it is “a group activity where people are invited in and we have native ceremony and we plant and we have more native ceremony. And... we plant it[] all by hand.” (T727). The Sacred Corn is certainly important to Nebraska and a historic and cultural resource within its public interest. Ms. Steskal even expressed the Sacred Corn and its protection are part of Nebraska’s public interest. (T876). The Sacred Corn is something unique to Nebraska – a variety of corn grown historically in the State and brought back to it after 137 years. It is precisely the type of resource the legislature intended the Commission to consider and protect under the Siting Act.

B. **The Preferred and Mainline Alternative Routes Each Threaten to Damage or Destroy Historic and Cultural Resources During Construction and Operation.**

Keystone affirmatively acknowledged both the Preferred and Mainline Alternative Routes would each cross the Trail of Tears at two points. (T619-20, CUL-1,1). And both routes would also cross the Allpress Farm with its earthlodge village and the Sacred Corn on the Tanderup Farm. (T756). The Routes also go through areas of known archaeological Ponca village sites, perhaps even crossing through some of those sites. (CUL-9,11, T1177-78). In constructing the pipeline, Keystone will remove topsoil in up to 110 foot wide strips, followed by an 8 foot wide by 7 foot deep trench. (T261-62, KXL-1,30). As Keystone admitted, it would be disturbing a lot of soil and ground. (T262). Common sense dictates digging up the Trail of Tears or the earthlodge village would entirely remove

them from the landscape, destroying them entirely. Mr. Wright noted, “Peeling off the topsoil could remove any cultural remains that might still be there” and can result in “significant loss of sacred sites.” (CUL-19,52,53). If the pipeline is constructed, “sacred sites along the Trail... will be lost forever” and the earthlodge village “would be destroyed by removal of the topsoil and the trenching.” *Id.*,53, 56. Even Mr. Allpress expressed, “I do believe they will damage [the earthlodge village] irreparably.” (T899).

The maintenance and operation of the pipeline would also damage or destroy historic and cultural resources. As Keystone admitted, if a pump station – which is up to 17 acres – is on a historic or cultural site, it would be fenced and no one would be able to access it. (T259). The resource would essentially be removed from existence. Keystone discussed using the Cowboy Trail as an existing corridor, but decided not to, in part, because the trail would have to be taken out of service and “disturbed periodically over the life of the pipeline for maintenance work.” (KXL-1,66). That is not unique to the Cowboy Trail – Keystone will be doing maintenance along the entire pipeline. So, Keystone would do maintenance where the pipeline crosses the Trail of Tears, the earthlodge village, and the Sacred Corn. (T663). And, as with the Cowboy Trail, maintenance work would disturb those historic and cultural resources. In the case of the Trail of Tears, it would require the Trail to be “taken out of service,” potentially preventing the Tribe’s Remembrance Walk. *Id.*, (T666). Maintenance of the pipeline cannot be done with boring or HDD drilling – it will require digging up the Trail, earthlodge villages, and Sacred Corn. Nebraska will lose those historic and cultural resources forever.

Keystone even has the right to move the pipeline after construction. (T669). But, there is no law requiring Keystone to protect the Trail or earthlodge villages after construction, whether from maintenance or moving the pipeline. (T667). While Keystone claims it has a policy of working with “stakeholders,” there is no way for anyone to enforce that policy, (T667-68). And its claim to have

worked with “stakeholders” in preparing the Preferred Route meant using another tribe to influence the Ponca Tribe and simply passing the buck to DOS, (T1182).

With the Sacred Corn, the damage from construction and operation of the pipeline prevents additional concern. Mr. Tanderup testified extensively about the delicate soils on his land. Depending on the time of year when Keystone constructs the pipeline, it would dig up the Sacred Corn, obviously destroying it. (T756). Mr. Tanderup noted the pipeline would “damage the root structure and we would have a loss of yield in that area.” (T742). Even after construction, the heat of the pipeline could destroy the Sacred Corn. Because of the Tanderups’ no-till farming, the roots of corn on his land are “anywhere between four foot and six and a half foot deep.” (T737-38). But, the top of the pipeline will only be four feet below the surface. (T739). So, the pipeline could prevent the Sacred Corn’s roots from growing to their needed depth. In addition, the heat of the pipeline would likely destroy those roots as they grew near the pipeline. (T757). Of course, that all assumes the Sacred Corn would even grow again on the location. Rick Hammond testified existing gas pipelines on his land have irreparably damaged the soil despite claims of reclamation. (T950). He discussed how the existing pipeline causes continuous erosion problems and the fact the grasses that grow over those lines has never been the same even after 35 years. *Id.*

The Siting Act requires the Commission to evaluate “the irreversible and irretrievable commitments of land areas.” NEB. REV. STAT. § 57-1407(4)(b). The maintenance of the pipeline will require historic and cultural resources to irreversibly and irretrievably be committed to Keystone. And in that commitment for maintenance, Keystone will damage or destroy those historic and cultural resources. Consequently, the Preferred and Mainline Alternative Routes are contrary to the public interest of Nebraska because they will both negatively impact historic and cultural resources and irreversibly and irretrievably commit the land areas of those historic and cultural resources.

C. Keystone Has Not Shown the Impacts to Historic and Cultural Resources During Construction and Operation Are Not Contrary to the Public Interest.

Keystone has entirely failed to show how it would avoid or even minimize impacts to historic and cultural sites, particularly the Trail of Tears, the earthlodge village, and the Sacred Corn. First, by its own admission, Keystone has only concerned itself with “historic properties” and only considered whether the Preferred Route would “impact an identified historic property.” (KXL-14,4). It admits it has not even looked for any historic or cultural resources along the Mainline Alternative Route. *Id.*,3. Keystone has nowhere presented evidence of impacts on historic and cultural resources important to Nebraska. Keystone has merely said it would turn to DOS and have impacts handled under the PA. *Id.*,4-5. But, the PA itself only covers historic properties on the National Register and has absolutely no provision for handling historic and cultural resources in Nebraska’s public interest. (T1075). Consequently, Keystone has entirely failed to show impacts on historic and cultural resources in the public interest will not be contrary to the public interest.

Keystone knew of the historic and cultural resources threatened and impacted by its routes. Mr. Allpress testified he informed Keystone of the earthlodge village located on his property in 2012. (T891). Keystone even maintained a table which identified historic and cultural resources with milepost locations. (T1152-1154, CUL-16,27). Although Keystone claims it did not know about the location of the Trail of Tears until the Tribe intervened and provided location points from the Nebraska Commission on Indian Affairs’ Chief Standing Bear website, Keystone had actually been looking at the Trail for quite some time and knew where its routes would cross. In 2015, Oliver Littlecook informed Keystone he “was able to obtain the trail of tears map.” (CUL-15,26). Keystone’s table of historic and cultural resources included two locations where the pipeline would cross the Trail and a camp along the Trail. (CUL-16,27). Though Ms. Salisbury asserted Keystone did not know the

location of the Trail until the Tribe provided information, Keystone's table reveals they actually had found a website with a map of the Trail. *Id.*,28. Yet, Keystone admitted the Application nowhere deals with the Trail. (T260).

The Trail is not some unknown resource that cannot be found. Mr. Wright testified the maps Keystone produced and provided to the Commission are reasonably accurate locations of the Trail. (T1083). He also testified there are "very good records of the Trail's location" and its location is known well enough to conduct cultural surveys. (CUL-19,49). He even noted on cross-examination the Trail is visible at certain places. (T1059). Yet, while Keystone asserted it did not know the location of the Trail, it never bothered to ask Mr. Wright about its location, (T1083), instead choosing to use the Ponca Tribe of Oklahoma to influence the Tribe into supporting the pipeline. (CUL-10,16, CUL-11,19, CUL-12,20).

While Keystone asserts it selected the Preferred Route to minimize impacts, (KXL-1,19), it admitted the Preferred and Mainline Alternative Routes would each cross the Trail of Tears twice. But, it admitted if it paralleled or twinned the existing Keystone Mainline, the pipeline would only cross the Trail once. (T619-20, CUL-1,1). Twinning or paralleling the Keystone Mainline would also entirely avoid the earthlodge villages and the Sacred Corn since it would not pass through Keya Paha or Antelope Counties. (KXL-1,11). Its proposed routes certainly do not minimize impacts over other routes. Keystone even admitted it only considered routes which would start from its desired exit point in South Dakota, (T149, T540, T632), not because it provides the least impacts in Nebraska.

Keystone says it could use boring or HDD drilling under historic and cultural resources. (KXL-1,105, T262-63). But, it admitted if a drill hit human remains, it would never know until after the fact. (T265). No unanticipated discoveries plan can remedy the destruction of a gravesite and the remains in that grave. During the Tribe's forced march along the Trail of Tears, 9 Tribal members

died, but the location of only 4 of those are known. (T1080-81, CUL-19,48). Consequently, human remains may be found where the pipeline crosses the Trail. (T1081). Mr. Allpress also noted a sacred burial site was found on his land. (T889). While Keystone promotes using shovel tests to check for historic and cultural resources, a shovel test will not reveal the existence of human remains, (T1081).

Keystone's primary assertion for handling impacts on historic and cultural resources is it will follow the PA and leave it to DOS. Setting aside that such a "we will figure it out later" approach in no manner meets Keystone's burden of proof, the PA and passing the buck to DOS does not provide appropriate protection of historic and cultural resources, particularly those of Indian tribes. Tribes are not allowed to be actual parties to the PA, being limited to "consulting parties" who only "have consultative roles" and cannot even enforce the PA against Keystone or DOS. (T1074, KXL-14,15). On behalf of Keystone, Ms. Salisbury confirmed that fact. (T1107). Furthermore, as discussed, the PA does not even deal with resources that are in Nebraska's public interest and not on the National Register, (T1075-76), which Keystone also confirmed, (T1117).

Keystone has also proposed it will avoid cultural resources by "rerouting the pipeline corridor and related appurtenances." (KXL-1,105). And it admitted it has had to move its proposed route nearly one mile in order to avoid a burial site. (T623). Keystone knew of the existence of specific historic and cultural resources along its proposed routes, but nowhere demonstrated those routes have been placed to avoid those known resources. It can provide very detailed maps of its proposed routes that include precise land locations and cultural resource locations, (CUL-19,63-169). Yet, it proposes the Commission approve a route while admitting it could entirely change the location of the route after approval or during construction.

Where Keystone would reroute the pipeline to avoid historic and cultural resources needed to be determined prior to submitting its proposed routes to the Commission. That is the only way the


Commission could evaluate the actual impacts of the pipeline on historic and cultural resources – “we will figure it out later” in no way meets the burden of Keystone to prove impacts on cultural resources will not be contrary to the public interest. Keystone has not even bothered to present evidence for the Commission to determine that required factor under the Siting Act. As a result, the Application must be denied because none of the proposed routes have been or can be shown to not impact historic and cultural resources during construction and operation contrary to the public interest.

CONCLUSION

Keystone entirely failed to produce any evidence whatsoever regarding social impacts, including and especially impacts on historic and cultural resources. As a result, the Commission must deny the Application on the grounds Keystone failed to meet its burden of production. But, even if the Commission were to consider whether the proposed route would serve the public interest, it clearly does not, especially with respect to impacts on historic and cultural resources.

The Commission must deny the Application with respect to all proposed routes – the Preferred, Mainline Alternative, and Sandhills Routes. If the Commission considers allowing Keystone a route through Nebraska, it should require Keystone to present evidence on a route paralleling the Keystone Mainline, including evidence of all historic and cultural resources that would be impacted and how those impacts are not contrary to Nebraska’s public interest.

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A large, stylized handwritten signature in black ink, written over a horizontal line. The signature is highly cursive and difficult to decipher, but it appears to be the name of the person who signed the document.