

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of the Application of)	Application No. OP-0003
TransCanada Keystone Pipeline, L.P.)	
For route approval of the Keystone XL)	JOINT MOTION FOR ENTRY
Pipeline Project pursuant to the Major)	OF AGREED PROTECTIVE
Oil Pipeline Siting Act.)	ORDER
)	
)	

JOINT MOTION FOR PROTECTIVE ORDER

Pursuant to 291 Neb. Admin. Code, ch. 1, § 016.11 and Neb. Ct. R. Disc. §§ 6-326(c), the Yankton Sioux Tribe (“Tribe”), Intervenor in the above-captioned matter, and TransCanada Keystone Pipeline, LP (“Applicant”), Applicant in the above-captioned matter, respectfully submit this Joint Motion for Entry of Agreed Protective Order attached hereto. As grounds for this motion, the parties state as follows:

1. On May 5, 2017, the Tribe served its First Set of Interrogatories and Requests for Production of Documents on Applicant.
2. In response to the Tribe’s First Set of Interrogatories and Requests for Production of Documents, Applicant objected to certain interrogatories and document requests on the grounds of confidentiality, but indicated that it would answer the interrogatories and produce the documents upon the entry of a mutually agreeable protective order governing this proceeding.
3. Accordingly, the parties agreed to the attached Agreed Protective Order and jointly move for entry of the attached Agreed Protective Order.
4. Prompt entry of the Agreed Protective Order is necessary for the conduct of discovery in this proceeding.

WHEREFORE, the Tribe and Applicant respectfully request that the attached Agreed Protective Order be adopted by order of the Public Service Commission.

DATED this 31st day of May, 2017.

FREDERICKS PEEBLES AND MORGAN LLP
FOR THE YANKTON SIOUX TRIBE

By: 

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CERTIFICATE OF SERVICE

The undersigned hereby certify that a true and correct copy of the above and foregoing Joint Motion for Entry of Agreed Protective Order was served by email transmission and by United States mail on this 31st day of May, 2017, upon the following:

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BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

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.)
)

Application No. OP-0003

AGREED PROTECTIVE ORDER

Pursuant to 291 Neb. Admin. Code, ch. 1, § 016.11 and Neb. Ct. R. Disc. §§ 6-326(c), the Hearing Officer enters this Agreed Protective Order (“Protective Order”) in the interests of justice and for the purpose of facilitating discovery in the above-captioned action (“Action”) and assuring the confidentiality of certain documents, material, or information that may be disclosed in the course of discovery. Unless modified by the Hearing Officer or Public Service Commission (“Commission”), this Protective Order shall remain in effect through the conclusion of these proceedings.

IT IS THEREFORE ORDERED:

1. TransCanada Keystone Pipeline, LP, Applicant, and the Yankton Sioux Tribe, Intervenor, and their respective attorneys, successors, executors, personal representatives, administrators, heirs, legal representatives, assigns, subsidiaries, divisions, employees, agents, independent contractors, or other persons, entities, or organizations over which they have control, are each a “Party” and collectively referred to as the “Parties” for the purposes of this Protective Order. The other parties to the Action and their respective attorneys, successors, executors, personal representatives, administrators, heirs, legal representatives, assigns, subsidiaries, divisions, employees, agents, independent contractors, or other persons, entities, or organizations over which they have control are collectively referred to as “Other Intervenors” for

the purposes of this Protective Order and shall be bound by the provisions of this Protective Order.

2. The Parties and the Other Intervenors shall execute the Nondisclosure Agreement attached as Exhibit A to this Order acknowledging each is bound by the terms contained herein.

3. “Protected Information” is information designated in accordance with the terms of this Protective Order.

4. “Keystone XL Pipeline Routes” means and includes the Preferred Route, the Sandhills Alternative Route, and the Keystone Mainline Route as those terms are used for reference proposed routes of the Keystone XL Pipeline in the Application for approval of a route filed by TransCanada on February 16, 2017 in Application No. OP-0003 as well as all lands for all such routes to be utilized during construction, for pumping stations, for access roads, or otherwise for or in support of the Keystone XL Pipeline and its construction.

5. “Cultural resources” means historic, cultural, traditional cultural, sacred, religious, archaeological, paleontological or similar properties, sites, and resources, including locations of human activity, occupation, or usage and locations that contain materials, structures, or landscapes that were used, built, modified, or regarded as culturally or religiously significant by any peoples.

6. Protected Information may be designated as “CONFIDENTIAL” in accordance with the terms of this Protective Order when the producing Party reasonably and in good faith believes that such information constitutes confidential information the producing Party is prohibited from disclosing under applicable law in the absence of this Protective Order or is otherwise non-public information concerning:

a. Surveys and results of surveys of cultural resources, including Traditional Cultural Property (“TCP”) surveys, of the Keystone XL Pipeline Routes;

b. The identity, including location, of all cultural resources found or discovered along any of the Keystone XL Pipeline Routes;

c. All maps or other documents that identify any cultural resources found or discovered along or near each of the Keystone XL Pipeline Routes; and

d. Trade secrets or other confidential research, development, or commercial information.

7. Nothing in this Protective Order shall be construed to permit a non-producing Party to designate documents (electronic or otherwise) or information as Protected Information.

8. Protected Information may be designated by affixing the legend “CONFIDENTIAL” on such documents, material or information prior to production. Stamping such a legend on the cover of a multipage document or on an electronic storage medium (such as, but not limited to, a CD-ROM) designates all pages of such document and/or all contents of such electronic storage medium, unless otherwise indicated by the producing Party.

9. Protected Information in a deposition transcript must be designated by a statement on the record during the deposition classifying the testimony as Protected Information or by providing written notice of the portions of such testimony (by page/line number) to be treated as Protected Information within the witnesses’ time required for the return of the transcript, unless a different time period is agreed to by the Parties. Before the expiration of such time period, the transcript shall be treated as Protected Information.

10. Protected Information designated as “CONFIDENTIAL” may not be disclosed by the receiving Party to any person without the prior written consent of the producing Party or an order of the Hearing Officer or Commission, except that it may be disclosed to:

- a. The Hearing Officer;
- b. The Commission and its staff;
- c. Counsel for the Parties and employees and vendors of counsel, to be used for purposes of this Action only;
- d. Consultants or experts retained by the Parties, to be used for purposes of this Action only;
- e. The Parties to this Action, to be used for purposes of this Action only;
- f. Subject to the restrictions in paragraph 15 of this Order, witnesses in depositions and any hearings before the Commission, including hearings on motions brought by the Parties, to be used for purposes of this Action only; and
- g. Other Intervenors in this Action, but only if such Protected Information is filed in an unsealed filing with the Commission.

11. Subject to Paragraph 10, disclosure of Protected Information received from any Party shall not be made to any person under subparagraphs 10(d) until such person has been provided with a copy of this Protective Order, agreed to be bound by it, and signed an agreement in the same form as Exhibit A to this Protective Order. Counsel obtaining such agreement(s) will retain them.

12. If a document containing Protected Information shows on its face that someone is an author, “cc,” recipient, or addressee of the document, it may be disclosed to such person and

such person is not required to adhere to the provisions of Paragraph 10. Such document will remain Protected Information for the purposes of this Action.

13. Should any court, administrative agency, person or entity subpoena production of Protected Information from a Party who obtained such information under the terms of this Protective Order, such Party shall promptly notify the producing Party of the pendency of such subpoena before disclosing such information.

14. The Parties, the Other Intervenors, and all persons who are bound by this Protective Order agree not to use or disclose any Protected Information other than in connection with this Action.

15. Whenever Protected Information is to be referred to or disclosed in a hearing, deposition or any other proceeding in this Action, any Party claiming confidentiality may exclude from the room any person who is not entitled to receive Protected Information, subject to the Hearing Officer's and/or Commission's discretion.

16. Whenever Protected Information is to be referred to in written pre-filed testimony in this Action, the written testimony shall be prefaced with written notice of the portions of such testimony (by page/line number or question number) to be treated as Protected Information.

17. If any pleadings, motions, memoranda, briefs, deposition transcripts, discovery requests and responses, exhibits, written testimony, and other documents that include, attach, paraphrase, summarize, or otherwise contain any Protected Information are to be filed with the Commission, the filing party must state in the filing of such documents that they are filed under seal and affix the legend "UNDER SEAL" in the court caption of the filed document, if available, or at the top of the filed document if it contains no court caption. The Commission shall accept such documents as filed under seal and hold them under seal in accordance with

applicable law and this Protective Order. The non-filing Party agrees not to oppose such a filing under seal. A separate copy of any such document shall be filed with the legend "COMPLETE DOCUMENT UNDER SEAL" and all Protected Information redacted. Such redacted copy shall not be under seal.

18. Inadvertent or unintentional production of documents or information containing Protected Information that is not designated according to this Protective Order is not a waiver in whole or in part of a claim for confidential treatment. In addition, Protected Information previously produced or disclosed by the Parties may be subsequently designated according to this Protective Order. The receiving Party shall have no liability for any disclosure of undesignated Protected Information occurring before the receiving Party was placed on notice of the producing Party's designation of such Protected Information.

19. A producing Party or non-party that inadvertently fails to designate an item pursuant to this Protective Order at the time of the production shall be entitled to make a correction. Such correction and notice thereof shall be made in writing, accompanied by substitute copies of each document or information appropriately designated. Those individuals who reviewed the documents or information prior to notice of the misdesignation by the producing Party shall return or destroy all copies of such misdesignated documents and honor the provisions of this Protective Order with respect to the use and disclosure of any Protected Information contained in the misdesignated documents. Within a reasonable time after receipt of the substitute copies, the receiving Party shall return or destroy the previously unmarked items and all copies.

20. If Protected Information is disclosed inadvertently in violation of this Protective Order, the Party who learns of such a disclosure shall inform the other Party of the disclosure and

shall make every effort to recover any disclosed documents or information and prevent any further disclosure in violation of this Protective Order.

21. A dispute as to confidentiality shall not be grounds for delay of or for a refusal to permit discovery. If any disputes arise concerning the designation of any Protected Information under the terms of this Protective Order, the Party challenging the designation may seek a ruling by the Hearing Officer and/or Commission on the propriety of the designation. All of the documents and information that are the subject of the dispute will continue to be treated as Protected Information unless and until the Hearing Officer or Commission rules otherwise. The Parties agree that no presumption of confidentiality shall arise merely because of the existence of this Protective Order.

22. If information or testimony is sought in discovery in this Action from a non-party, and such non-party reasonably believes that the information sought is Protected Information, such non-party may designate such information in accordance with the provisions of this Protective Order and become bound by or seek the protection of the terms of this Protective Order by an agreement executed by the Parties and such non-party.

23. Upon final termination of this Action (whether by judgment, settlement or otherwise), including all appeals, each Party, at its election, shall either request that all Protected Information be returned or destroyed. In response, the other Party will either destroy the material and provide a letter certifying such destruction or return the Protected Information and destroy all copies, extracts and summaries of such materials. For archival purposes, the attorneys in the law firms or legal departments representing the Parties may retain one copy of all pleadings, transcripts, exhibits, written discovery responses, documents attached as exhibits to pleadings or transcripts, including portions designated under this Protective Order, and any

written work product that deals with Protected Information, but such Protected Information shall remain subject to this Protective Order.

24. Upon final termination of this Action (whether by judgment, settlement or otherwise), including all appeals, the provisions of this Protective Order shall continue to be binding, except with respect to those documents and information that become a matter of public record. The Commission retains and shall have continuing jurisdiction over the Parties, Other Intervenors, and recipients of the Protected Information for enforcement of the provisions of this Protective Order following termination of this Action.

25. Nothing in this Protective Order prevents any Party or other person from seeking modification of this Protective Order or from objecting to disclosure or discovery it believes to be otherwise improper. In particular, nothing in this Protective Order precludes any Party from seeking and obtaining, on an appropriate showing, such additional protection for any information, document, or thing as the Party may consider appropriate in the circumstances.

26. If information subject to any claim of privilege, work product or any other ground for withholding production is inadvertently produced to another Party, such production will not prejudice or otherwise be a waiver of, or estoppel as to, any claim of privilege, work product or any other ground for withholding production to which the producing Party would otherwise be entitled.

27. The Parties enter into this Protective Order without waiver of, or prejudice to, any claim, defense or objection to any issue of law or fact in this Action. Upon discovery of any inadvertently produced privileged information, the disclosing party shall promptly notify the receiving party. The receiving party shall return and destroy all inadvertently privileged

information, and the inadvertently privileged information shall be treated as privileged unless and until an order from the Hearing Officer or the Commission directs otherwise.

ENTERED AND MADE EFFECTIVE at Lincoln, Nebraska this ____ day of May, 2017.

BY:

Tim Schram
Hearing Officer

(Party signatures on next page)

AGREED AND ENTRY REQUESTED BY:



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ATTORNEYS FOR TRANSCANADA KEYSTONE

PIPELINE, LP

EXHIBIT A

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE APPLICATION)	
OF TRANSCANADA KEYSTONE)	Application No. OP-0003
PIPELINE, L.P. FOR ROUTE APPROVAL)	
OF THE KEYSTONE XL PIPELINE)	NON-DISCLOSURE AGREEMENT AND
PROJECT PURSUANT TO THE MAJOR)	AGREEMENT TO BE BOUND BY
OIL PIPELINE SITING ACT.)	AGREED PROTECTIVE ORDER
)	

The undersigned, having read the Protective Order issued by the Hearing Officer, in the above-captioned action, a copy of which is attached hereto, which protects the Protected Information of the parties produced or obtained during discovery in said action, agrees to be bound as follows:

1. The undersigned agrees to be bound by the provisions of the Protective Order.
2. All Protected Information disclosed to the undersigned pursuant to the Protective Order shall not be disclosed, disseminated, or published by the undersigned except as permitted in the Protective Order.
3. The undersigned agrees that he, she, or it shall not acknowledge the existence of the Protected Information to anyone for any reason at any time, except as permitted in the Protective Order.
4. The undersigned agrees that he, she, or it shall take all appropriate and necessary precautions to avoid loss or inadvertent disclosure of the Protected Information as designed under the Protective Order.
5. The undersigned agrees that, after his, her, or its permitted use of the protected materials and documents is completed, he, she, or it shall return any and all confidential

materials and documents received to the person or entity from which he, she, or it received the protected materials and documents.

6. The undersigned agrees that the terms of this Nondisclosure Agreement shall continue after return of the protected materials and documents.

Date: _____

Signature – Recipient of Confidential Information

Name (Print)

Address: _____

Employer: _____