

**Before the Nebraska Public Service Commission**

**In the Matter of the Application**

**of**

**TransCanada Keystone Pipeline LP  
For Route Approval of Keystone XL  
Pipeline Project, Pursuant to *MOPSA***

**Intervenors:**

**Susan Dunavan and William Dunavan,  
Bartels Farms, Inc.  
Johnnie Bialas and Maxine Bialas,  
Bonnie Brauer,  
James Carlson and Christine Carlson,  
Timothy Choat, Gary Choat Farms LLC,  
and Shirley Choat Farms, LLC,  
CRC, Inc.,  
Daniel A. Graves and Joyce K. Graves,  
Patricia A. Grosserode a/k/a Patricia A.  
Knust,  
Terri Harrington,  
Donald C. Loseke and Wanda G. Loseke,  
Arla Naber and Bryce Naber,  
Mary Jane Nyberg,  
Kenneth Prosocki and Karen Prosocki,  
Edythe Sayer,  
Dan Shotkoski and Clifford Shotkoski,  
Leonard Skoglund and Joyce Skoglund,  
John F. Small and Ginette M. Small,  
Deborah Ann Stieren and Mary Lou Robak,  
Jim Tarnick,  
Terry J. Van Housen and Rebecca Lynn  
Van Housen,  
Donald D. Widga,**

**Byron Terry “Stix” Steskal and Diana  
Steskal,  
Allpress Brothers, LLC,  
Bergman, Mia  
Germaine G. Berry,  
Karen G. Berry,**

**Application No: OP-003  
(Filed by Applicant on 2/16/17)**

**2<sup>nd</sup> Amended Petition  
of Formal Intervention  
By  
Certain Nebraska Landowners  
With  
Real Estate on Proposed Pipeline Route  
Described In  
TransCanada Keystone Pipeline LP  
Application No. OP-003  
Challenges to Constitutionality  
Of Statutes Asserted**

**Cheri G. Blocher and Michael J. Blocher,  
L.A. Breiner and Sandra K. Breiner,  
Jerry Carpenter and Charlayne Carpenter,  
CHP 4 Farms, LLC,  
Larry D. Cleary,  
Jeanne Crumly and Ronald C. Crumly,  
Ken Dittrich,  
Lloyd Z. Hipke and Vencille M. Hipke.  
R. Wynn Hipke and Jill Hipke,  
Richard Kilmurry and Bonnie Kilmurry,  
Rosemary Kilmurry,  
Beverly Krutz and Robert Krutz,  
LJM Farm, LLC,  
Carol Manganaro,  
Frankie Maughan and Sandra Maughan,  
Beverly Miller and Earl Miller,  
Edna Miller and Glen Miller,  
Milliron Ranch, LLC,  
Frank C. Morrison and Lynn H. Morrison,  
Larry D. Mudloff, J.D. Mudloff, and Lori  
Mudloff,  
Constance Myers a/k/a Constance Ramold,  
Nicholas Family Limited Partnership,  
Ann A. Pongratz and Richard J. Pongratz,  
Donald Rech,  
Schultz Brothers Farms, Inc.,  
Connie Smith and Verdon Smith,  
Joshua R. Stelling,  
Richard Stelling and Darlene Stelling,  
Todd Stelling and Lisa Stelling,  
Arthur R. Tanderup and Helen J.  
Tanderup,  
TMAG Ranch, LLC,  
Tree Corners Farm, LLC,  
Dave Troester and Sharyn Troester,  
and  
Gregory Walmer and Joanne Walmer,**

**Intervenors,**

In support of their 1<sup>st</sup> Amended Petition of Formal Intervention,  
Intervenors, individually and collectively, state as follows:

1. Pursuant to Neb. Admin. Code Title 291, Chpt. 1, §015.01, the Intervenor named above have successfully petitioned the Nebraska Public Service Commission and been granted leave to intervene formally this matter. These Intervenor have become, and are indispensable parties for all purposes. They respectfully assert their legal rights, duties, privileges, immunities, and or other legal interests which are or may be substantially affected by Application No: OP-003 of TransCanada Keystone Pipeline, L.P. (“TransCanada”) for route approval of the Keystone XL Pipeline Project (“KXL”) pursuant to the Major Oil Pipeline Siting Act (“MOPSA”). The Intervenor object to the Petition on all ground permitted by law or equity, including those identified below.

2. The Petitioners/Intervenor identified in the Caption, and by name and number in ¶3 below, are persons or entities who own real estate that TransCanada Keystone Pipeline Co., LP attempted to condemn in County Court eminent domain proceedings TransCanada commenced in January 2015. TransCanada sought to condemn the real estate for its proposed Keystone XL Pipeline. These previous eminent domain proceedings were enjoined by Temporary Injunction Orders issued by two (2) Nebraska District Courts. TransCanada later filed a “Voluntary Dismissal” in each County Court case on or about October 1, 2015. However, pursuant to TransCanada’s February 16, 2017 Application to the PSC, the same preferred route proposed in 2015 that previously affected all Intervenor captioned above, is the same route Applicant now seeks approval for siting of its proposed pipeline.

**Intervenor/Landowners**

3. Intervenor 1 through 37 are:

	Name	Address & Email	Telephone
1-2	Susan Dunavan and William Dunavan	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
3-4	Johnnie Bialas and Maxine Bialas	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100

5	Bonnie Brauer	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
6-7	James Carlson and Christine Carlson	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
8-10	Timothy Choat, Gary Choat Farms LLC & Shirley Choat Farms, LLC	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
11	CRC, Inc.	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
12-13	Daniel A. Graves and Joyce K. Graves	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
14-15	Patricia A. Grosserode a/k/a Patricia A. Knust	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
16	Terri Harrington	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
17-18	Donald C. Loseke and Wanda G. Loseke	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
19-20	Arla Naber and Bryce Naber	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
21	Mary Jane Nyberg	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144	(402) 493-4100

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22-23	Kenneth Prosocki and Karen Prosocki	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:dministra@dominalaw.com">dministra@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
24	Edythe Sayer	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:dministra@dominalaw.com">dministra@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
25-26	Dan Shotkoski and Clifford Shotkoski	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:dministra@dominalaw.com">dministra@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
27-28	Leonard Skoglund and Joyce Skoglund	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:dministra@dominalaw.com">dministra@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
29-30	John F. Small and Ginette M. Small	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:dministra@dominalaw.com">dministra@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
31-32	Deborah Ann Stieren and Mary Lou Robak	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:dministra@dominalaw.com">dministra@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
33	Jim Tarnick	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:dministra@dominalaw.com">dministra@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
34-35	Terry J. Van Housen and Rebecca Lynn Van Housen	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:dministra@dominalaw.com">dministra@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
36	Donald D. Widga	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:dministra@dominalaw.com">dministra@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100

37	Bartels Farms, Inc.	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
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Intervenors 38 through 97 are:

	<b>Name</b>	<b>Address &amp; Email</b>	<b>Telephone</b>
38-39	Byron Terry “Stix” Steskal and Diana Steskal	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
40	Allpress Brothers, LLC	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
41	Germaine G. Berry	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
42	Karen G. Berry	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
43-44	Cheri G. Blocher and Michael J. Blocher	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
45-46	L.A. Breiner and Sandra K. Breiner	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
47-48	Jerry Carpenter and Charlayne Carpenter	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
49	CHP 4 Farms, LLC	c/o DOMINALAW Group pc llo	(402) 493-4100

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50	Larry D. Cleary	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
51-52	Jeanne Crumly and Ronald C. Crumly	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
53	Ken Dittrich	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
54-55	Lloyd Z. Hipke and Vencille M. Hipke	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
56-57	R. Wynn Hipke and Jill Hipke	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
58-59	Richard Kilmurry and Bonnie Kilmurry	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
60	Rosemary Kilmurry	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
61-62	Beverly Krutz and Robert Krutz	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
63	LJM Farm, LLC	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144	(402) 493-4100

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64	Carol Manganaro	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
65-66	Frankie Maughan and Sandra Maughan	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
67-68	Beverly Miller and Earl Miller	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
69-70	Edna Miller and Glen Miller	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
71	Milliron Ranch, LLC	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
72-73	Frank C. Morrison and Lynn H. Morrison	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
74-75	Larry D. Mudloff, J.D. Mudloff, and Lori Mudloff	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
76	Constance Myers a/k/a Constance Ramold	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
77	Nicholas Family Limited Partnership	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100

78-79	Ann A. Pongratz and Richard J. Pongratz	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
80	Donald Rech	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
81	Schultz Brothers Farms, Inc.	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
82-83	Connie Smith and Verdon Smith	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
84	Joshua R. Stelling	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
85-86	Richard Stelling and Darlene Stelling	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
87-88	Todd Stelling and Lisa Stelling	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
89-90	Arthur R. Tanderup and Helen J. Tanderup	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
91	TMAG Ranch, LLC	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
92	Tree Corners Farm, LLC	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St.	(402) 493-4100

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93-94	Dave Troester and Sharyn Troester	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
95-96	Gregory Walmer and Joanne Walmer	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100
97	Mia Bergman	c/o DOMINALAW Group pc llo 2425 S. 144 <sup>th</sup> St. Omaha, NE 68144 <a href="mailto:ddomina@dominalaw.com">ddomina@dominalaw.com</a> <a href="mailto:bjorde@dominalaw.com">bjorde@dominalaw.com</a>	(402) 493-4100

### **Formal Intervention**

4. All paragraphs above are incorporated here.

5. Formal intervention was respectfully requested and leave to do so sought pursuant to 291 *Neb Admin Code* § 015 and has been granted by Order of the Nebraska Public Service Commission (“Commission”).

6. Communications regarding this Petition, including services of notices and orders of the Commission should be addressed to the Intervenors c/o their lawyers, David A. Domina, NSBA #11043 and Brian E. Jorde, NSBA #23613, Domina Law Group pc llo, 2425 S. 144<sup>th</sup> Street, Omaha, Nebraska 68144, (402) 493-4100, [ddomina@dominalaw.com](mailto:ddomina@dominalaw.com) and [bjorde@dominalaw.com](mailto:bjorde@dominalaw.com).

7. In addition to jurisdictional concerns and constitutional concerns, Intervenors have both Special Interests and General Interests in the Application. These are described below.

### **Intervenors’ Positions**

8. Neb Rev Stat § 57-1401 et seq (“MOPSA”) is at issue in this proceeding, as are questions arising under it. This brief overview of the statute is offered.

Purpose of MOPSA<sup>1</sup>:

- 8.1. Ensure the welfare of Nebraskans, including protection of:
  - 8.1.1. property rights,
  - 8.1.2. aesthetic values, and
  - 8.1.3. economic interests;
- 8.2. Consider the lawful protection of Nebraska's natural resources; and
- 8.3. Ensure that the location of routes for major oil pipelines is in compliance with Nebraska law.

9. The pipeline carrier shall have the burden to establish that the proposed route of the major oil pipeline would serve the public interest of Nebraska.

### **Special Interests**

10. All paragraphs above are incorporated here.

11. Each Intervenor has a special interest in the Application of TransCanada Keystone XL Pipeline LP; the special interests of the Intervenors are unique among Nebraskans. Each Intervenor owns real estate located upon TransCanada's proposed preferred route for construction of its pipeline, to the best of his, her or its knowledge.

12. TransCanada previously initiated eminent domain proceedings against each of the Intervenors, except for Mia Bergman, in County Court in the county where the real estate owned by each Intervenor is located. TransCanada did so for the purpose of taking property and property rights from each Intervenor under the authority of LB 1161, Laws of Nebraska 2012, for the purpose of acquiring property upon which TransCanada proposed to build the Keystone XL Pipeline. TransCanada abandoned each of these eminent domain proceedings and admitted doing so by the positions it asserted in its appeal to the Nebraska Supreme Court in Case Nos. S-17-116-134. TransCanada's initial application with the PSC in 2015 contained a project area map and a preferred route which depicted the proposed pipeline crossing the land of all of the intervenors mentioned herein. TransCanada's 2017 PSC Application contains that same preferred

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<sup>1</sup> <http://nebraskalegislature.gov/laws/statutes.php?statute=57-1402> (1)

route and those will implicate, again, the land and property of all intervenors referenced herein. For the Intervenor this is a special interest; it impacts them uniquely.

13. TransCanada's actions raise questions about its fitness as an Applicant. For the Intervenor this is a special interest; it impacts them uniquely.

14. TransCanada's proposed easement terms are also not reasonable or just. For the Intervenor this is a special interest; it impacts them uniquely. The unreasonable interests include, with respect to each landowner Intervenor:

- 14.1. The taking of what purports to be an easement but is actually a lease.
- 14.2. A taking on terms that excessively interfere with each landowner's quiet enjoyment of owned real estate.
- 14.3. A taking for perpetuity, i.e., an unreasonable term for a finite project.
- 14.4. A taking that permits uncontrolled transfer of ownership of the interests to be taken.
- 14.5. A taking that is arbitrary, unreasonable, and excessive when compared to the proposed common carriage activity of the Applicant.
- 14.6. A taking that does not outweigh the public interests of Nebraskans in the private ownership of their real estate.
- 14.7. A taking that provides no common carriage of any product mined, pumped, grown, or fabricated in Nebraska, or delivered to Nebraska for any public or private purpose.
- 14.8. A taking that provides no public purpose or public use to Nebraskan.
- 14.9. A taking that is proposed to be unrestricted and would, therefore, permit sale of the interests acquired to any third party including but not limited to potential buyers whose interests are or may be inimical to those of the United States of America and / or Nebraska.

- 14.10. A taking that will create a foreseeable and actual environmental hazard and clean up burden for future Nebraskans and for Nebraska by abandoning in situ a depleted crude oil pipeline.
- 14.11. A taking that will not be regulated for different uses if the pipeline is built.
- 14.12. A taking that is hazardous to the land, waters and groundwater of Nebraska and Nebraska property owners. The hazard exists entirely distinctly from pipeline materials and construction hazards and relates to the ongoing existence and operation of the proposed structure to be placed on the route.
- 14.13. A taking that wastes Nebraska resources by failing to place proposed pipeline in an existing easement corridor held by the Applicant prior to the filing of its Application.

Each and all of these matters make the proposed route improper and the proposed action violative of the rights of each Intervenor under U.S. Const Amend V and Neb Const Art I Sec 21. Intervenors have no legal remedy for the presentation, petitioning, or redress of their grievances and concerns except to present them to the Commission. Refusal by the Commission to hear them will deprive the Intervenors of equal protection of the law because no other condemnee in Nebraska is so deprived; it will also deny each Intervenor of due process of law by denying the opportunity to present these grievances in an adjudicative body. The statute referring this matter to the Commission is unconstitutional because it denies access to Nebraska's courts and denies each Intervenor of due process of law contrary to U.S. Const Amend XIV, and Neb Const Art I, Sec 3; and Neb Const Art I, Sec 21, and Neb Const Art I Sec 16 by granting special privileges and immunities to TransCanada.

15. TransCanada's proposed method of compensation to Landowners is not commercially reasonable or constitutionally just. It violates U.S. Const Amend V and Neb Const Art I Sec. 21, guaranteeing that "The property of no person shall be taken or damaged for public use without just compensation therefor." This foreign for-profit

company seeks to pay Intervenor once for rights it will hold forever while making a daily profit by using Intervenor's property. . It violates Neb Const Art I Sec 16 by granting special privileges and immunities to TransCanada. Intervenor contend they should be paid annually as is typical for energy projects impacting landowners' property such as wind towers and wind projects. For the Intervenor this is a special interest; it impacts them uniquely.

16. TransCanada's plan to take fee simple absolute title to easements is not reasonable or lawful and exceeds the needs and duration of the Keystone XL Pipeline it proposes. KXL has a finite life of approximately fifty (50) years and therefore no interest beyond a fifty (50) year easement should be taken. It violates U.S. Const Amend V and Neb Const Art I Sec. 21, and Neb Const Art I Sec 16 by granting special privileges and immunities to TransCanada. For the Intervenor this is a special interest; it impacts them uniquely.

17. TransCanada plans to construct KXL near homes and structures of Intervenor without regard for appropriate setbacks for construction. For the Intervenor this is a special interest; it impacts them uniquely.

18. TransCanada has not agreed to remove KXL from the land of Intervenor upon the end of the useful life of KXL or pay for this expense, or insure now that money necessary for this expense now exists. TransCanada instead plans to leave the pipeline in place to decay under Intervenor's land. TransCanada has failed to post an adequate bond to guarantee payment of such foreseeable expense. Intervenor and their successors in interests face the clear and present danger of being compelled to clean up TransCanada's environmental mess after it abandons its depleted machine in situ. For the Intervenor this is a special interest; it impacts them uniquely. To the extent MOPSA purports to authorize this it violates Neb Const Art I Sec 16 by granting special privileges and immunities to TransCanada.

19. The easement terms TransCanada proposes allows it to sell the proposed KXL pipeline and all rights that go with it, including all of those negatively impacting Intervenor's land, to any entity or foreign country or Middle Eastern or other sovereign

wealth fund. Intervenor have no say or veto power as to who may own and operate and maintain the proposed project which creates unnecessary uncertainty and risks. For the Intervenor this is a special interest; it impacts them uniquely. This risk compromises the security of the United States and the State of Nebraska as well and Landowners. It does so contrary to US Const I Sec 10, and Neb Const Art I Sec 16 by granting special privileges and immunities to TransCanada.

20. The easement terms TransCanada proposes allows it to convert the proposed KXL pipeline and all rights that go with it, to a future use including but not limited to the transportation of water from Intervenor's land out of Nebraska. Intervenor have no say or veto power as to future conversion of use of this proposed project which creates unnecessary uncertainty and risks. It does so contrary to US Const I Secs 8 & 10, and Neb Const Art I Sec 16 by granting special privileges and immunities to TransCanada. For the Intervenor this is a special interest; it impacts them uniquely.

21. Any siting, construction, operation, maintenance, and existence of the proposed pipeline would have detrimental impact and intrusion upon the fair market value of Intervenor's land both along, near, and surrounding the pipeline route, and thus potential decrease the tax rolls of the communities affected by the potential pipeline. For the Intervenor this, is a general interest.

22. TransCanada seeks to hold Intervenor responsible and liable for any innocent mistake made by them or their family or any other person who may enter upon their land and accidentally cause any damage to KXL in any way. Intervenor should only be liable to TransCanada for intentional harm to KXL and not for any mere negligent act. It does so contrary to US Const Amend XIV, and Neb Const Art I Secs 3 and 16 by denying equal protection of the law and by granting special privileges and immunities to TransCanada. For the Intervenor this is a special interest; it impacts them uniquely.

23. Intervenor are confronted with new risks of liability not of their making, claims and risks of loss, and potentially needing to purchase additional liability insurance to protect themselves against foreseeable damages and negative effects of damage to or operation of KXL. TransCanada is not compensating Intervenor appropriately nor has it

agreed to reimburse Intervenors for the increase in insurance premiums proximately caused by KXL being place upon Intervenors' land. For the Intervenors this is a special interest; it impacts them uniquely.

24. TransCanada has not demonstrated ability to operate Keystone I safely or that it would operate the proposed Keystone XL Pipeline safely, nor has it demonstrated and proven it has necessary human, financial and other resources to keep Intervenors safe from foreseeable releases of the dangerous chemicals it proposes to transport. For the Intervenors these are a special interests; it impacts them uniquely.

25. Any siting, construction, operation, maintenance, and existence of the proposed pipeline would have detrimental impact and intrusion upon the environment, and the natural resources of Intervenors' land both along, near, and surrounding the pipeline route. For the Intervenors this is a special interest; it impacts them uniquely.

26. Any siting, construction, operation, maintenance, and existence of the proposed pipeline would have detrimental impact and intrusion upon the soil of Intervenors' land both along, near, and surrounding the pipeline route. For the Intervenors this is a special interest; it impacts them uniquely.

27. Any siting, construction, operation, maintenance, and existence of the proposed pipeline would have detrimental impact and intrusion upon the groundwater of Intervenors' land both along, near, and surrounding the pipeline route. For the Intervenors this is a special interest; it impacts them uniquely.

28. Any siting, construction, operation, maintenance, and existence of the proposed pipeline would have detrimental impact and intrusion upon the surface water of Intervenors' land both along, near, and surrounding the pipeline route. For the Intervenors this is a special interest; it impacts them uniquely.

29. Any siting, construction, operation, maintenance, and existence of the proposed pipeline would have detrimental impact and intrusion upon the wildlife of Intervenors' land both along, near, and surrounding the pipeline route. It would also adversely affect livestock and livestock product. For the Intervenors this is a special interest; it impacts them uniquely. It also affects them generally.

30. Any siting, construction, operation, maintenance, and existence of the proposed pipeline would have detrimental impact and intrusion upon the plants of Intervenors' land both along, near, and surrounding the pipeline route. For the Intervenors this is a special interest; it impacts them uniquely.

31. Any siting, construction, operation, maintenance, and existence of the proposed pipeline would have detrimental impact and be an intrusion upon the orderly development of Intervenors land affected by the proposed location of this pipeline and would prevent Intervenors from developing and using their land as they see fit and from maximizing it for the greatest economic benefit. For the Intervenors this is a special interest; it impacts them uniquely.

32. Any siting, construction, operation, maintenance, and existence of the proposed pipeline would have detrimental impact and intrusion upon the fair market value of Intervenors' land both along, near, and surrounding the pipeline route. For the Intervenors this is a special interest; it impacts them uniquely.

33. The 5<sup>th</sup> Amendment to our Federal Constitution and Article 1 Section 21 of the Nebraska Constitution both prevent taking of Intervenors' private property for "public use" unless just compensation is paid. There can be no argument that the proposed TransCanada interstate pipeline is of no "public use" for any Intervenor or Nebraskan. For the Intervenors this, is a special interest; it impacts them uniquely. It also impacts them generally.

34. No Intervenor can "use" the proposed pipeline in any way. There are no on or off-ramps in Nebraska where Intervenors can either on-load or off-load product to or from the proposed pipeline. This is a project is proposed for the purpose of enriching the owners of TransCanada's stock and its executives whose compensation is based upon revenue growth and stock performance. For the Intervenors this, is a special interest; it impacts them uniquely.

35. The Keystone XL Pipeline would not serve the public interest of Intervenors as Nebraskans and is not consistent with the public necessity, convenience,

common carriage needs, or advantages of Intervenors. For the Intervenors this is a special interest; it impacts them uniquely.

36. TransCanada is unsuitable and unfit to be authorized to engage in common carriage in Nebraska. It has lied, and beguiled Nebraskans, filed false documents with public officials, misrepresented the scope, safety, ownership, and benefits of its proposed pipeline, failed to reveal the identities of its customers who will own the substance to be transported and has refused to disclose the compound or composition of the substance(s) to be transported.

### **General Interests**

37. All paragraphs above are incorporated here.

38. The 5<sup>th</sup> Amendment to our Federal Constitution and Article 1 Section 21 of the Nebraska Constitution both prevent taking of private property for “public use” unless just compensation is paid. There can be no argument that the proposed TransCanada interstate pipeline is of no “public use” for Nebraska or its citizens. For the Intervenors this, is a general interest.

39. No Nebraskan can “use” the proposed pipeline in any way. There are no on or off-ramps in Nebraska where our citizens can either on-load or off-load product to or from the proposed pipeline. This is a project is proposed for the purpose of enriching the owners of TransCanada’s stock and its executives whose compensation is based upon revenue growth and stock performance. To the extent MOPSA authorizes this, it does so contrary to US Const Amend XIV, and Neb Const Art I Secs 3 and 16 by denying equal protection of the law and by granting special privileges and immunities to TransCanada. For the Intervenors this, is a general interest.

40. TransCanada has lost industry support for its Keystone XL Pipeline. Shippers have abandoned their prior commitments to KXL. Major oil companies have abandoned investments and ventures in tar sands oil mining in Alberta Canada and no longer support the venture for which TransCanada claims the pipeline capacity is needed. For the Intervenors this, is a general interest. No provision of MOPSA prohibits consideration of need or necessity of the project or the product to be shipped on, under,

across, through, or within Nebraska land. And, if MOPSA is perceived as doing so, then it does so contrary to US Const Amend XIV, and Neb Const Art I Secs 3 and 16 by denying equal protection of the law and by granting special privileges and immunities to TransCanada.

41. The Keystone XL Pipeline would not serve the public interest of Nebraskans or Nebraska and is not consistent with the public necessity, convenience, common carriage needs, or advantages of Nebraskans or Nebraska. For the Intervenors this, is a general interest.

42. The Keystone XL Pipeline will not provide common carriage in Nebraska for Nebraskans. For the Intervenors this, is a general interest.

43. The Keystone XL Pipeline project will be environmentally unsafe, unsound, and deleterious to Nebraska and others. For the Intervenors this, is a general interest.

44. The proposed Keystone XL Pipeline project is not in the best interests of Nebraskans. For the Intervenors this, is a general interest.

45. The proposed Keystone XL Pipeline project will not be net beneficial for Nebraskans. For the Intervenors this, is a general interest.

46. The proposed pipeline carrier has not demonstrated compliance with all applicable statutes, rules, and regulations and local ordinances. For the Intervenors this, is a general interest.

47. Any siting, construction, operation, maintenance, and existence of the proposed pipeline would have detrimental impact and intrusion upon the environment of Nebraska both along, near, and surrounding the pipeline route. For the Intervenors this, is a general interest.

48. Any siting, construction, operation, maintenance, and existence of the proposed pipeline would have detrimental impact and intrusion upon the natural resources of Nebraska both along, near, and surrounding the pipeline route. For the Intervenors this, is a general interest.

49. Any siting, construction, operation, maintenance, and existence of the proposed pipeline would have detrimental impact and intrusion upon the soil of Nebraska land both along, near, and surrounding the pipeline route. For the Intervenors this, is a general interest.

50. Any siting, construction, operation, maintenance, and existence of the proposed pipeline would have detrimental impact and intrusion upon the groundwater of Nebraska both along, near, and surrounding the pipeline route. For the Intervenors this, is a general interest.

51. Any siting, construction, operation, maintenance, and existence of the proposed pipeline would have detrimental impact and intrusion upon the surface water of Nebraska both along, near, and surrounding the pipeline route. For the Intervenors this, is a general interest.

52. Any siting, construction, operation, maintenance, and existence of the proposed pipeline would have detrimental impact and intrusion upon the wildlife of Nebraska both along, near, and surrounding the pipeline route. For the Intervenors this, is a general interest.

53. Any siting, construction, operation, maintenance, and existence of the proposed pipeline would have detrimental impact and intrusion upon the plants of Nebraska both along, near, and surrounding the pipeline route. For the Intervenors this, is a general interest.

54. Any siting, construction, operation, maintenance, and existence of the proposed pipeline would have detrimental impact and intrusion upon the local and state government of Nebraska. For the Intervenors this, is a general interest.

55. Any siting, construction, operation, maintenance, and existence of the proposed pipeline would have detrimental impact and intrusion upon the fair market value of Intervenors' land both along, near, and surrounding the pipeline route, and thus potential decrease the tax rolls of the communities affected by the potential pipeline. For the Intervenors this, is a general interest.

56. TransCanada's proposed method of compensation to Landowners is not commercially reasonable or constitutionally just. This foreign for-profit company seeks to pay Intervenor once for rights it will hold forever while making a daily profit by using Intervenor's property. Intervenor contend they should be paid annually as is typical for energy projects impacting landowners' property such as wind towers and wind projects. If payment would be equitable in the form of annual payments the State of Nebraska would benefit from increased tax revenue collection. For the Intervenor this is a general interest. To the extent MOPSA authorizes this, it does so contrary to US Const Amend XIV, and Neb Const Art I Secs 3 and 16 by denying equal protection of the law and by granting special privileges and immunities to TransCanada.

57. Any construction, operation, maintenance, and existence of the proposed pipeline on, under, over, or across Nebraska land creates an unnecessary heightened risk of terrorist attack. For the Intervenor this, is a general interest. To the extent MOPSA authorizes this, it does so contrary to US Const Amend XIV, and Neb Const Art I Secs 3 and 16 by denying equal protection of the law and by granting special privileges and immunities to TransCanada.

58. The easement terms TransCanada proposes allows it to sell the proposed KXL pipeline and all rights that go with it, including all of those negatively impacting Intervenor's land and by association the land of Nebraska, to any entity or foreign country or Middle Eastern or other sovereign wealth fund. Nebraskans have no say or veto power as to who may own and operate and maintain the proposed project which creates unnecessary uncertainty and risks. To the extent MOPSA authorizes this, it does so contrary to US Const Amend XIV, and Neb Const Art I Secs 3 and 16 by denying equal protection of the law and by granting special privileges and immunities to TransCanada. For the Intervenor this, is a general interest.

59. The easement terms TransCanada proposes allows it to convert the proposed KXL pipeline and all rights that go with it, to a future use including but not limited to the transportation of water from Nebraska out of Nebraska. Nebraskans have

no say or veto power as to future conversion of use of this proposed project which creates unnecessary uncertainty and risks. For the Intervenor this, is a general interest.

60. Any construction, operation, maintenance, and existence of the proposed pipeline would have detrimental impact and intrusion upon existing energy transmission infrastructure that would be affected by the proposed location of this pipeline within Nebraska. For the Intervenor this, is a general interest.

61. Any siting, construction, operation, maintenance, and existence of the proposed pipeline would have detrimental impact and intrusion upon the welfare of Nebraskans. For the Intervenor this, is a general interest.

62. Any siting, construction, operation, maintenance, and existence of the proposed pipeline would have detrimental impact and intrusion upon the protection of aesthetic values within Nebraska. For the Intervenor this, is a general interest.

63. Any siting, construction, operation, maintenance, and existence of the proposed pipeline would have detrimental impact and intrusion upon the protection of economic interests within Nebraska. For the Intervenor this, is a general interest.

64. Any siting, construction, operation, maintenance, and existence of the proposed pipeline would have detrimental impact and intrusion upon the protection of property rights within Nebraska. For the Intervenor this, is a general interest.

65. TransCanada has not demonstrated ability to operate Keystone I safely or that it would operate the proposed Keystone XL Pipeline safely, nor has it demonstrated and proven it has necessary human, financial and other resources to keep Nebraska and Nebraskans safe from foreseeable releases of the dangerous chemicals it proposes to transport. For the Intervenor these are general interests.

66. The fact that a utility corridor currently exists and is occupied by Applicant that could be feasibly utilized for this proposed project where relationships with landowners are already in place and infrastructure already exists is prima facie evidence the proposed preferred and other alternative routes are not the most intelligent routes for such a pipeline. For the Intervenor this, is a general interest.

67. Any siting, construction, operation, maintenance, and existence of the proposed pipeline would have detrimental impact and intrusion upon the orderly development of localities affected by the proposed location of this pipeline within Nebraska. For the Intervenors this, is a general interest.

68. Siting, construction, operation, maintenance, and existence of the proposed pipeline would do nothing to assist Nebraska energy needs. To the extent MOPSA authorizes this, it does so contrary to US Const Amend XIV, and Neb Const Art I Secs 3 and 16 by denying equal protection of the law and by granting special privileges and immunities to TransCanada. For the Intervenors this, is a general interest.

69. Siting, construction, operation, maintenance, and existence of the proposed pipeline is not for the purpose of benefiting Nebraska or Nebraskans in any way but rather, Nebraska is confronted with this proposed pipeline simply because our state is geographically convenient for TransCanada to traverse and such proposed routes are for the financial benefit of TransCanada and not Nebraska. To the extent MOPSA authorizes this, it does so contrary to US Const Amend XIV, and Neb Const Art I Secs 3 and 16 by denying equal protection of the law and by granting special privileges and immunities to TransCanada. For the Intervenors this, is a general interest.

70. The State of Nebraska has failed to use this opportunity in an economically intelligent way such as requiring the Applicant to pay a significant application fee, requiring a significant siting fee upon approval, if any, of the application, by failing to require a sufficient bond be in force to protect all Nebraskans from foreseeable risks and damages, by failing to require bonds put in force at county levels to assist with the foreseeable damages to roads and other infrastructure that come with major construction projects, and by failing to have a tax method to take the flow of product through pipeline to generate tax revenue for a state with a \$900 million budget shortfall. For the Intervenors these, are general interests.

### **Jurisdictional Objections**

71. Intervenors shall raise issues of law and fact, including questions of statutory validity or invalidity, interpretation, and issues concerning the jurisdiction of the

Commission to proceed with the Application. Further jurisdictional objections and infirmities may become known and Intervenors do not waive raising further such objection should they found to be absent from this Petition.

### **Constitutional Objections**

#### **I. MOPSA, *Neb Rev Stat §57-1401 et seq.*, is Wholly or Partially Unconstitutional and Void**

72. All allegations above are renewed here. Paragraphs 11-70 are expressly incorporated here.

73. The finding of the Legislature set forth at *Neb Rev Stat §57-1403 (3)* purporting to constitute a declaration that the "construction of major oil pipelines in Nebraska is in the public interest of Nebraska" constitutes an unconstitutional invasion of the authority of the Nebraska Public Service Commission, and a violation of the doctrine of separation of power contrary to *Neb Const Art IV §20* as the determination of public interest as it relates to common carriers is within the express constitutional responsibility of the Commission to regulate "general control of common carriers" as required by the Constitution.

74. The finding of the Legislature set forth at *Neb Rev Stat §57-1403 (3)* purporting to constitute a declaration that the "construction of major oil pipelines in Nebraska is in the public interest of Nebraska" constitutes an unconstitutional invasion of the authority of the Judiciary and a violation of the doctrine of Separation of Powers. What is "in the public interest" in the context of authorizing the taking of property rights with the power of eminent domain is exclusively a judicial responsibility. Yet, *§57-1403 (3)* purports to constitute a legislative commandeering of this judicial responsibility in violation of *Neb Const Art I §2*.

74.1. By doing so, the Act also violates the doctrine of separation of powers contrary to *Neb Const Art II, §1*.

74.2. By doing so, the Act also violates the right to trial by jury contrary to *Neb Const Art I §6*.

74.3. By doing so, the Act also violates the rights of the landowners to that Nebraska's "courts shall be open, and every person, for any injury done him or her in his or her lands, goods, person, or reputation shall have a remedy...." Contrary to *Neb Const Art I §13*.

74.4. To the extent MOPSA authorizes this, it does so contrary to US Const Amend XIV, and Neb Const Art I Secs 3 and 16 by denying equal protection of the law and by granting special privileges and immunities to TransCanada.

75. In conjunction with other provisions of the Act, *Neb Rev Stat §57-1403 (3)* and *§57-1407* deny property owners on the proposed routes rights without due process of law by depriving them an opportunity for a judicial determination, through trial by jury or otherwise, of the question whether the construction of the proposed Keystone XL major oil pipeline is in the public interest or constitutes a public use. It, therefore, deprives the landowners on the route of due process of law contrary to *Neb Const I § 3*.

75.1. By doing so, the Act also violates the doctrine of separation of powers contrary to *Neb Const Art II, §1*.

75.2. By doing so, the Act also violates the right to trial by jury contrary to *Neb Const Art I §6*.

75.3. By doing so, the Act also violates the rights of the landowners to that Nebraska's "courts shall be open, and every person, for any injury done him or her in his or her lands, goods, person, or reputation shall have a remedy...." Contrary to *Neb Const Art I §13*.

75.4. To the extent MOPSA authorizes this, it does so contrary to US Const Amend XIV, and Neb Const Art I Secs 3 and 16 by denying equal protection of the law and by granting special privileges and immunities to TransCanada.

76. In conjunction with other provisions of the Act, *Neb Rev Stat §57-1403 (3)* and *§57-1407* deny persons on the proposed route equal protection of the law contrary to *Neb Const I § 3* by setting them apart from all other Nebraska property

owners as the sole property owners who are deprived of access to the courts and a judicial determination by a jury or otherwise concerning what is in the public interest, and what constitutes a public use of property subject to taking through the power of eminent domain. This constitutes an invidious and unreasonable classification and denies equal protection of the law.

76.1. By doing so, the Act also violates the doctrine of separation of powers contrary to *Neb Const* Art II, §1.

76.2. By doing so, the Act also violates the right to trial by jury contrary to *Neb Const* Art I §6.

76.3. By doing so, the Act also violates the rights of the landowners to that Nebraska's "courts shall be open, and every person, for any injury done him or her in his or her lands, goods, person, or reputation shall have a remedy...." Contrary to *Neb Const* Art I §13.

76.4. To the extent MOPSA authorizes this, it does so contrary to US Const Amend XIV, and *Neb Const* Art I Secs 3 and 16 by denying equal protection of the law and by granting special privileges and immunities to TransCanada.

77. Invades the judicial role and obligation to determine whether, when, or if the power of eminent domain may be lawfully exercised in a particular context by determining whether the use for the taking is a public use. By doing so it violates *Neb Const* Art I Sec 3, Art I Sec 10, Art I Sec 16, Art I Sec 21 and Art II, Sec I.

## **II. MOPSA's Unconstitutional Limitations Regarding "Safety"**

78. The Major Oil Siting Act ("MOPSA"), *Neb Rev Stat* §57-1401 to §57-1413, contains inconsistent declarations and direction for its implementation as to safety issues. §57-1402 states as follows:

- 78.1. The Major Oil Pipeline Siting Act is intended to deal solely with the issue of siting or choosing the location of the route aside and apart from **safety considerations**. (emphasis added)
- 78.2. The Legislature acknowledges and respects the exclusive federal authority over safety issues established by the federal law, the Pipeline Safety Act of 1994, 49 U.S.C. 60101 et seq., and the express preemption provision stated in that act.
- 78.3. The Major Oil Pipeline Siting Act is intended to exercise only the remaining sovereign powers and purposes of Nebraska which are not included in the category of **safety regulation**. (emphasis added)

79. MOPSA simultaneously precludes the PSC from reviewing any “safety consideration” of any kind in its analysis of major oil pipeline route applications but then provides that the PSC under MOPSA may exercise in consideration of major oil pipeline route applications any and all remaining powers which not specifically preempted by the Pipeline Safety Act (“PSA”) of 1994, 49 U.S.C. 60101 et seq. The tension between these two inconsistent directives and laws unconstitutionally prevents the PSC from conducting a thorough and lawful analysis of the permit application in question because the PSC is unconstitutionally prevented from considering any safety aspect of any kind. However, such limitation is inconsistent with the finite issues of safety preempted by the PSA.

80. The PSA’s preemption relative to “safety” is that exclusively of “safety standards” specifically, “State authority may not adopt or continue in force safety standards for interstate pipeline facilities or interstate pipeline transportation.” 49 U.S.C. § 60104(c). Therefore, the PSC is in fact allowed and must review and consider any and all safety issues and considerations other than specific “safety standards” when evaluating the veracity of a major oil pipeline route application. Therefore, the portion of MOPSA stating – “The Major Oil Pipeline Siting Act is intended to deal solely with the issue of siting or choosing the location of the route aside and apart from safety considerations” is an unconstitutional limitation on the powers of the PSC and until such unconstitutional law is corrected and the powers of the PSC restored, no review or

evaluation of the application in question can occur and any such evaluation that does occurs does so unconstitutionally. To the extent MOPSA authorizes this, it does so contrary to US Const Amend XIV, and Neb Const Art I Secs 3 and 16 by denying equal protection of the law and by granting special privileges and immunities to TransCanada.

81. The PSC is purportedly prohibited from reviewing the risk and impact of oil spills or leaks within, on, under, through, or upon the lands and water of Nebraska in the determination of Application denial, approval, or modification. However, the only aspect of “safety” pre-empted by federal law is that of the safety standards related to aspects of the physical design, installation, inspection, testing, construction, operation, maintenance, and replacement of such a pipeline as noted above. Federal Law does not preempt the PSC from reviewing, on behalf of Nebraska’s citizens and stakeholders, the risks and impacts of potential spills and leaks when determining the most prudent and intelligent location, if any, of such a major oil pipeline across Nebraska. To the extent MOPSA authorizes this, it does so contrary to US Const Amend XIV, and Neb Const Art I Secs 3 and 16 by denying equal protection of the law and by granting special privileges and immunities to TransCanada. It also violates Neb Const Art IV Sec 20 concerning the Commission.

82. Any law of this state purportedly restricting the PSC in such a manner unconstitutionally limits the power of the very constitutional body that is charged with the responsibility on behalf of the entire State of Nebraska to site major oil pipelines. If the PSC is prohibited from considering the risk and impact of foreseeable and predicable spills and leaks of tar sands crude oil and other dangerous chemicals, who exactly is looking out for Nebraska and the economic viability of our State in this regard?

83. The FAQ section of the PSC’s website devoted to the KXL Pipeline Application at [http://www.psc.nebraska.gov/natgas/Oil\\_Pipeline/FAQs%20on%20MOPSA.pdf](http://www.psc.nebraska.gov/natgas/Oil_Pipeline/FAQs%20on%20MOPSA.pdf) states as follows:

6. Does the Commission consider safety concerns regarding risk of any spills or leaks with the pipeline as proposed to be constructed by the pipeline carrier?

Answer: No, the Commission's review does **not** include an evaluation of safety concerns including the potential risks of spills or leaks. MOPSA explicitly prohibits the Commission from evaluating the safety of the pipeline proposed. *Neb. Rev. Stat. § 57-1407(4)*. The safety considerations and other environmental issues are reviewed as part of the federal permitting process. Agencies such as the U.S. Pipeline and Hazardous Materials Safety Administration (PHMSA) are responsible for overseeing the construction, safe operation and maintenance of interstate pipelines.

84. However, pipeline safety statutes allow for States to assume safety authority over gas and hazardous liquid pipelines through Certifications and Agreements with PHMSA under 49 U.S.C. §§ 60105- 60106. The District of Columbia, Puerto Rico, and all States (including Nebraska) except Alaska and Hawaii participate in the pipeline safety program. If States did not participate in the pipeline safety program, these pipeline facilities would be PHMSA's responsibility for inspection and enforcement. To participate in the pipeline safety program States must adopt the minimum pipeline safety regulations; however, States may pass more stringent regulations for pipeline safety through their State Legislatures. PHMSA does not preempt a States consideration of risks and impacts of major oil pipelines when making routing and siting decisions. When analyzing risks and impacts the PSC may also consider aspects related to safety.

85. Regardless of whether the PSA or PHMSA or both preempt certain limited safety standards as to the construction aspects of major oil pipelines, it is constitutionally within the purview and powers of the PSC to consider safety in terms of the risks and impacts of the construction, operation, maintenance, and existence of major oil pipelines, as well as, risks and impacts of spills or leaks within, on, under, though, or upon the lands and water of Nebraska in the determination of Application denial, approval, or modification and such considerations should be undertaken by the PSC in review of Application No: OP-003.

86. The restrictions upon the PSC of the Legislature as set forth Act purporting to prohibit the PSC from reviewing safety considerations and issues of any kind constitutes an unconstitutional invasion of the authority of the Nebraska Public Service

Commission, and a violation of the doctrine of separation of power contrary to *Neb Const* Art I Sec to and Art IV §20 as the determination of public interest as it relates to common carriers is within the express constitutional responsibility of the Commission to regulate "general control of common carriers" as required by the Constitution.

### **III. MOPSA's Review Standard of "Public Interest" as Opposed to "Public Use" is Unconstitutional**

87. PSC approval of any route of a major oil pipeline within or across Nebraska is the trigger for eminent domain rights to vest within a foreign for-profit oil company. Because the PSC approval would trigger rights of eminent domain, the PSC process must consider the application of TransCanada in terms of the Federal and State constitutional requirements and limitations defining when the power of eminent domain may be utilized to take land of private citizens such as Intervenors here.

88. The 5th Amendment to our Federal Constitution and Article 1 Section 21 of the Nebraska Constitution both prevent taking of private property for "public use" unless just compensation is paid. There can be no argument that the proposed TransCanada interstate pipeline is of any "public use" for Intervenors, for Nebraska, or for its citizens.

89. No Intervenor and no Nebraskan can "use" the proposed pipeline in any way. There are no on or off-ramps in Nebraska where Intervenors or Nebraska citizens can either on-load or off-load product to or from the proposed pipeline. This is a project is proposed for the purpose of enriching the owners of TransCanada's stock and its executives whose compensation is based upon revenue growth and stock performance.

90. While the PSC has the exclusive power to make routing decisions and whether or not TransCanada's application be granted in whole or in part or denied in whole or in part, the PSC cannot review such application against an unconstitutional standard of "public interest" when "public use" is the determining factor for grant of eminent domain powers.

91. Because neither the Federal or State constitutional requirements for the use of eminent domain against a private landowner – i.e. "public use" exist in reference to the

present TransCanada application, any PSC approval that would trigger and vest eminent domain powers with TransCanada over Intervenors would be unconstitutional under U.S. Const Amend V and Neb Const Art I Sec 21.

92. The restrictions upon the PSC of the Legislature as set forth Act purporting to confine the PSC to a purely “public interest” standard as opposed to the constitutional “public use” standard constitutes an unconstitutional invasion of the authority of the Nebraska Public Service Commission, and a violation of the doctrine of separation of power contrary to *Neb Const* Art II Sec 20 and Art IV Sec20. The Act denies property owners on the proposed routes rights without due process of law by depriving them an opportunity for a judicial determination, through trial by jury or otherwise, of the question whether the siting or construction of the proposed Keystone XL major oil pipeline is for a project that constitutes a public use and whether landowners’ property will therefore be taken for public use. It, therefore, deprives the landowners on the route of due process of law contrary to *Neb Const* I § 3.

93. MOPSA is unconstitutional and void. It suffers from individual and distinct constitutional infirmities each of which alone, and all of which collectively, require adjudication that MOPSA, and its pertinent provisions as described above or so much thereof as offends any constitutional guarantee, be declared null and void.

### **Conclusion**

94. For all the foregoing reasons, TransCanada’s Application No: OP-003 must be denied. The application contains no proposed route that satisfies the elements necessary for PSC approval.

### **Requests for Relief**

95. On the foregoing basis, Intervenors, individually and collectively, respectfully request that:

95.1. The filing of this Amended Petition be allowed.

95.2. The PSC issue an Order denying TransCanada’s Application No: OP-003 for its Preferred Route of its proposed Keystone XL pipeline;

- 95.3. The PSC issue an Order denying TransCanada's Application No: OP-003 for its Mainline Alternative Route of its proposed Keystone XL pipeline;
- 95.4. The PSC issue an Order denying TransCanada's Application No: OP-003 for its Sandhills Alternative Route of its proposed Keystone XL pipeline;
- 95.5. The PSC issue an Order finding MOPSA's review standard of "serves the public interest" as the trigger for eminent domain powers to TransCanada is unconstitutional as alleged;
- 95.6. The PSC issue an Order finding MOPSA's limitations denies property owners on the proposed routes rights without due process of law by depriving them an opportunity for a judicial determination, through trial by jury or otherwise, of the question whether the construction of the proposed Keystone XL major oil pipeline is in the public interest or constitutes a public use and the MOPSA is unconstitutional as alleged.;
- 95.7. The PSC issue an Order finding MOPSA's limitations on PSC review and consideration regarding elements of safety issues and impacts and concerns, other than the limited issues preempted by Federal law, is unconstitutional as alleged;
- 95.8. The PSC issue an Order finding MOPSA's declaration that the "construction of major oil pipelines in Nebraska is in the public interest of Nebraska" constitutes an unconstitutional invasion of the authority of the Judiciary and a violation of the doctrine of Separation of Powers as alleged; and
- 95.9. Such other relief as may be deemed necessary, just, and or appropriate be granted to Intervenors, including but not limited to, reimbursement of reasonable costs and reasonable legal fees.

96. In the alternative to the above relief and should the PSC not find unconstitutional infirmities with the PSC process and MOPSA and not deny TransCanada's Application No: OP-003 in its entirety, Intervenors respectfully request that:

- 96.1. The PSC issue an Order finding that the only permissible route for Keystone XL major oil pipeline in Nebraska be that of completely twinning or closely paralleling TransCanada's now existing Keystone I pipeline corridor owned and controlled by them;
- 96.2. Such other relief as may be deemed necessary, just, and or appropriate be granted to Intervenors, including but not limited to, reimbursement of reasonable costs and reasonable legal fees.

97. In the alternative to the above relief and should the PSC approve one of the three routes submitted in TransCanada's Application No: OP-003, Intervenors respectfully request that:

- 97.1. The PSC impose upon TransCanada at least the following conditions:
  - 97.1.1. Applicant, at its sole cost, must remove the pipeline and all associated structures at the conclusion of its useful life and/or cessation of use whichever occurs first; and
  - 97.1.2. Applicant must compensate Landowner/Easement Grantees not less than annual and for an equivalent length of time of the existence of the Easement; and
  - 97.1.3. Applicant shall remain solely liable for any damages whatsoever related to the existence of the pipeline and any associated equipment or structures other than for any damage proximately caused by another's gross negligence or willful conduct; and
  - 97.1.4. Applicant shall list each and every Landowner/Easement Grantee as additional insureds on any liability insurance

policy related to the Keystone XL pipeline located in Nebraska; and

97.1.5. Applicant or its successor or assigns shall re-apply for continued permit approval should a controlling interest of the entity with ownership of the Keystone XL pipeline change from that as it existed as of the date of Application No. OP-003 was filed with the PSC; and

97.1.6. Applicant be required to post a performance bond of \$200,000,000 with the State of Nebraska to help ensure that Nebraska Taxpayers will be less likely at risk for any non-performance of the conditions requested herein; and

97.1.7. Applicant be required a per barrel access fee for each 42 gallons of product it ships through the across the South Dakota Nebraska border; and

97.1.8. Each and every condition found within Attachment “A” of the South Dakota Public Utilities Commission’s Amended Final Decision and Order; Notice of Entry HP 09-001 regarding Permit Application for Keystone XL Project dated June 29, 2010; and

97.2. Such other relief as may be deemed necessary, just, and or appropriate be granted to Intervenors, including but not limited to, reimbursement of reasonable costs and reasonable legal fees.

June 27, 2017.

Signatures on Next Page

Susan Dunavan, *et al.*, Intervenors,



By: \_\_\_\_\_

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## Certificate of Service

Pursuant to 291 *Neb Admin Code* § 015.01(b), a copy of the foregoing is served upon all Intervenors of record to this proceeding or their attorneys of record as follows:

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Brian E. Jorde

# ATTACHMENT “A”

## Exhibit A

### **AMENDED PERMIT CONDITIONS**

#### **I. Compliance with Laws, Regulations, Permits, Standards and Commitments**

1. Keystone shall comply with all applicable laws and regulations in its construction and operation of the Project. These laws and regulations include, but are not necessarily limited to: the federal Hazardous Liquid Pipeline Safety Act of 1979 and Pipeline Safety Improvement Act of 2002, as amended by the Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006, and the various other pipeline safety statutes currently codified at 49 U.S.C. § 60101 et seq. (collectively, the "PSA"); the regulations of the United States Department of Transportation implementing the PSA, particularly 49 C.F.R Parts 194 and 195; temporary permits for use of public water for construction, testing or drilling purposes, SDCL 46-5-40.1 and ARSD 74:02:01:32 through 74:02:01:34.02 and temporary discharges to waters of the state, SDCL 34A-2-36 and ARSD Chapters 74:52:01 through 74:52:11, specifically, ARSD § 74:52:02:46 and the General Permit issued thereunder covering temporary discharges of water from construction dewatering and hydrostatic testing.

2. Keystone shall obtain and shall thereafter comply with all applicable federal, state and local permits, including but not limited to: Presidential Permit from the United States Department of State, Executive Order 11423 of August 16, 1968 (33 Fed. Reg. 11741) and Executive Order 13337 of April 30, 2004 (69 Fed. Reg. 25229), for the construction, connection, operation, or maintenance, at the border of the United States, of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels to or from a foreign country; Clean Water Act § 404 and Rivers and Harbors Act Section 10 Permits; Special Permit if issued by the Pipeline and Hazardous Materials Safety Administration; Temporary Water Use Permit, General Permit for Temporary Discharges and federal, state and local highway and road encroachment permits. Any of such permits not previously filed with the Commission shall be filed with the Commission upon their issuance. To the extent that any condition, requirement or standard of the Presidential Permit, including the Final EIS Recommendations, or any other law, regulation or permit applicable to the portion of the pipeline in this state differs from the requirements of these Conditions, the more stringent shall apply.

3. Keystone shall comply with and implement the Recommendations set forth in the Final Environmental Impact Statement when issued by the United States Department of State pursuant to its Amended Department of State Notice of Intent To Prepare an Environmental Impact Statement and To Conduct Scoping Meetings and Notice of Floodplain and Wetland Involvement and To Initiate Consultation Under Section 106 of the National Historic Preservation Act for the Proposed Transcanada Keystone XL Pipeline; Notice of Intent—Rescheduled Public Scoping Meetings in South Dakota and extension of comment period (FR vol. 74, no. 54, Mar. 23, 2009). The Amended Notice and other Department of State and Project Documents are available on-line at: <http://www.keystonepipeline-xl.state.gov/clientsite/keystonexl.nsf?Open>.

4. The permit granted by this Order shall not be transferable without the approval of the Commission pursuant to SDCL 49-41B-29.

5. Keystone shall undertake and complete all of the actions that it and its affiliated entities committed to undertake and complete in its Application as amended, in its testimony and

exhibits received in evidence at the hearing, and in its responses to data requests received in evidence at the hearing.

## **II. Reporting and Relationships**

6. The most recent and accurate depiction of the Project route and facility locations is found on the maps in Exhibit TC-14. The Application indicates in Section 4.2.3 that Keystone will continue to develop route adjustments throughout the pre-construction design phase. These route adjustments will accommodate environmental features identified during surveys, property-specific issues, and civil survey information. The Application states that Keystone will file new aerial route maps that incorporate any such route adjustments prior to construction. Ex TC-1.4.2.3, p. 27. Keystone shall notify the Commission and all affected landowners, utilities and local governmental units as soon as practicable if material deviations are proposed to the route. Keystone shall notify affected landowners of any change in the route on their land. At such time as Keystone has finalized the pre-construction route, Keystone shall file maps with the Commission depicting the final pre-construction route. If material deviations are proposed from the route depicted on Exhibit TC-14 and accordingly approved by this Order, Keystone shall advise the Commission and all affected landowners, utilities and local governmental units prior to implementing such changes and afford the Commission the opportunity to review and approve such modifications. At the conclusion of construction, Keystone shall file detail maps with the Commission depicting the final as-built location of the Project facilities.

7. Keystone shall provide a public liaison officer, approved by the Commission, to facilitate the exchange of information between Keystone, including its contractors, and landowners, local communities and residents and to promptly resolve complaints and problems that may develop for landowners, local communities and residents as a result of the Project. Keystone shall file with the Commission its proposed public liaison officer's credentials for approval by the Commission prior to the commencement of construction. After the public liaison officer has been approved by the Commission, the public liaison officer may not be removed by Keystone without the approval of the Commission. The public liaison officer shall be afforded immediate access to Keystone's on-site project manager, its executive project manager and to contractors' on-site managers and shall be available at all times to the Staff via mobile phone to respond to complaints and concerns communicated to the Staff by concerned landowners and others. Keystone shall also implement and keep an up-dated web site covering the planning and implementation of construction and commencement of operations in this state as an informational medium for the public. As soon as the Keystone's public liaison officer has been appointed and approved, Keystone shall provide contact information for him/her to all landowners crossed by the Project and to law enforcement agencies and local governments in the vicinity of the Project. The public liaison officer's contact information shall be provided to landowners in each subsequent written communication with them. If the Commission determines that the public liaison officer has not been adequately performing the duties set forth for the position in this Order, the Commission may, upon notice to Keystone and the public liaison officer, take action to remove the public liaison officer.

8. Until construction of the Project, including reclamation, is completed, Keystone shall submit quarterly progress reports to the Commission that summarize the status of land acquisition and route finalization, the status of construction, the status of environmental control activities, including permitting status and Emergency Response Plan and Integrity Management Plan development, the implementation of the other measures required by these conditions, and the overall percent of physical completion of the project and design changes of a substantive nature. Each report shall include a summary of consultations with the South Dakota Department of Environment and Natural Resources and other agencies concerning the issuance of permits. The

reports shall list dates, names, and the results of each contact and the company's progress in implementing prescribed construction, land restoration, environmental protection, emergency response and integrity management regulations, plans and standards. The first report shall be due for the period ending June 30, 2010. The reports shall be filed within 31 days after the end of each quarterly period and shall continue until the project is fully operational.

9. Until one year following completion of construction of the Project, including reclamation, Keystone's public liaison officer shall report quarterly to the Commission on the status of the Project from his/her independent vantage point. The report shall detail problems encountered and complaints received. For the period of three years following completion of construction, Keystone's public liaison officer shall report to the Commission annually regarding post-construction landowner and other complaints, the status of road repair and reconstruction and land and crop restoration and any problems or issues occurring during the course of the year.

10. Not later than six months prior to commencement of construction, Keystone shall commence a program of contacts with state, county and municipal emergency response, law enforcement and highway, road and other infrastructure management agencies serving the Project area in order to educate such agencies concerning the planned construction schedule and the measures that such agencies should begin taking to prepare for construction impacts and the commencement of project operations.

11. Keystone shall conduct a preconstruction conference prior to the commencement of construction to ensure that Keystone fully understands the conditions set forth in this order. At a minimum, the conference shall include a Keystone representative, Keystone's construction supervisor and Staff.

12. Once known, Keystone shall inform the Commission of the date construction will commence, report to the Commission on the date construction is started and keep the Commission updated on construction activities as provided in Condition 8.

### **III. Construction**

13. Except as otherwise provided in the conditions of this Order and Permit, Keystone shall comply with all mitigation measures set forth in the Construction Mitigation and Reclamation Plan (CMR Plan) as set forth in Exhibit TC-1, Exhibit B. If modifications to the CMR Plan are made by Keystone as it refines its construction plans or are required by the Department of State in its Final EIS Record of Decision or the Presidential Permit, the CMR Plan as so modified shall be filed with the Commission and shall be complied with by Keystone.

14. Keystone shall incorporate environmental inspectors into its CMR Plan and obtain follow-up information reports from such inspections upon the completion of each construction spread to help ensure compliance with this Order and Permit and all other applicable permits, laws, and rules.

15. Prior to construction, Keystone shall, in consultation with area NRCS staff, develop specific construction/reclamation units (Con/Rec Units) that are applicable to particular soil and subsoil classifications, land uses and environmental settings. The Con/Rec Units shall contain information of the sort described in response to Staff Data Request 3-25 found in Exhibit TC-16.

a) In the development of the Con/Rec Units in areas where NRCS recommends, Keystone shall conduct analytical soil probing and/or soil boring and analysis in areas of

particularly sensitive soils where reclamation potential is low. Records regarding this process shall be available to the Commission and to the specific land owner affected by such soils upon request.

b) Through development of the Con/Rec Units and consultation with NRCS, Keystone shall identify soils for which alternative handling methods are recommended. Alternative soil handling methods shall include but are not limited to the "triple-lift" method where conditions justify such treatment. Keystone shall thoroughly inform the landowner regarding the options applicable to their property, including their respective benefits and negatives, and implement whatever reasonable option for soil handling is selected by the landowner. Records regarding this process shall be available to the Commission upon request.

c) Keystone shall, in consultation with NCRS, ensure that its construction planning and execution process, including Con/Rec Units, CMR Plan and its other construction documents and planning shall adequately identify and plan for areas susceptible to erosion, areas where sand dunes are present, areas with high concentrations of sodium bentonite, areas with sodic, saline and sodic-saline soils and any other areas with low reclamation potential.

d) The Con/Rec Units shall be available upon request to the Commission and affected landowners. Con/Rec Units may be evaluated by the Commission upon complaint or otherwise, regarding whether proper soil handling, damage mitigation or reclamation procedures are being followed.

e) Areas of specific concern or of low reclamation potential shall be recorded in a separate database. Action taken at such locations and the results thereof shall also be recorded and made available to the Commission and the affected property owner upon request.

16. Keystone shall provide each landowner with an explanation regarding trenching and topsoil and subsoil/rock removal, segregation and restoration method options for his/her property consistent with the applicable Con/Rec Unit and shall follow the landowner's selected preference as documented on its written construction agreement with the landowner, as modified by any subsequent amendments, or by other written agreement(s).

a) Keystone shall separate and segregate topsoil from subsoil in agricultural areas, including grasslands and shelter belts, as provided in the CMR Plan and the applicable Con/Rec Unit.

b) Keystone shall repair any damage to property that results from construction activities.

c) Keystone shall restore all areas disturbed by construction to their preconstruction condition, including their original preconstruction topsoil, vegetation, elevation, and contour, or as close thereto as is feasible, except as is otherwise agreed to by the landowner.

d) Except where practicably infeasible, final grading and topsoil replacement and installation of permanent erosion control structures shall be completed in non-residential areas within 20 days after backfilling the trench. In the event that seasonal or other weather conditions, extenuating circumstances, or unforeseen developments beyond Keystone's control prevent compliance with this time frame, temporary erosion controls shall be maintained until conditions allow completion of cleanup and reclamation. In the event

Keystone can not comply with the 20-day time frame as provided in this Condition, it shall give notice of such fact to all affected landowners, and such notice shall include an estimate of when such restoration is expected to be completed.

e) Keystone shall draft specific crop monitoring protocols for agricultural lands. If requested by the landowner, Keystone shall provide an independent crop monitor to conduct yield testing and/or such other measurements of productivity as he shall deem appropriate. The independent monitor shall be a qualified agronomist, rangeland specialist or otherwise qualified with respect to the species to be restored. The protocols shall be available to the Commission upon request and may be evaluated for adequacy in response to a complaint or otherwise.

f) Keystone shall work closely with landowners or land management agencies to determine a plan to control noxious weeds. Landowner permission shall be obtained before the application of herbicides.

g) Keystone's adverse weather plan shall apply to improved hay land and pasture lands in addition to crop lands.

h) The size, density and distribution of rock within the construction right-of-way following reclamation shall be similar to adjacent undisturbed areas. Keystone shall treat rock that cannot be backfilled within or below the level of the natural rock profile as construction debris and remove it for disposal offsite except when the landowner agrees to the placement of the rock on his property. In such case, the rock shall be placed in accordance with the landowner's directions.

i) Keystone shall utilize the proposed trench line for its pipe stringing trucks where conditions allow and shall employ adequate measures to decompact subsoil as provided in its CMR Plan. Topsoil shall be decompacted if requested by the landowner.

j) Keystone shall monitor and take appropriate mitigative actions as necessary to address salinity issues when dewatering the trench, and field conductivity and/or other appropriate constituent analyses shall be performed prior to disposal of trench water in areas where salinity may be expected. Keystone shall notify landowners prior to any discharge of saline water on their lands or of any spills of hazardous materials on their lands of one pint or more or of any lesser volume which is required by any federal, state, or local law or regulation or product license or label to be reported to a state or federal agency, manufacturer, or manufacturer's representative.

k) Keystone shall install trench and slope breakers where necessary in accordance with the CMR Plan as augmented by Staff's recommendations in Post Hearing Commission Staff Brief, pp. 26-27.

l) Keystone shall apply mulch when reasonably requested by landowners and also wherever necessary following seeding to stabilize the soil surface and to reduce wind and water erosion. Keystone shall follow the other recommendations regarding mulch application in Post Hearing Commission Staff Brief, p. 27.

m) Keystone shall reseed all lands with comparable crops to be approved by landowner in landowner's reasonable discretion, or in pasture, hay or native species areas with comparable grass or forage crop seed or native species mix to be approved by landowner in

landowner's reasonable discretion. Keystone shall actively monitor revegetation on all disturbed areas for at least two years.

n) Keystone shall coordinate with landowners regarding his/her desires to properly protect cattle, shall implement such protective measures as are reasonably requested by the landowner and shall adequately compensate the landowner for any loss.

o) Prior to commencing construction, Keystone shall file with the Commission a confidential list of property owners crossed by the pipeline and update this list if route changes during construction result in property owner changes.

p) Except in areas where fire suppression resources as provided in CMR Plan 2.16 are in close proximity, to minimize fire risk, Keystone shall, and shall cause its contractor to, equip each of its vehicles used in pre-construction or construction activities, including off-road vehicles, with a hand held fire extinguisher, portable compact shovel and communication device such as a cell phone, in areas with coverage, or a radio capable of achieving prompt communication with Keystone's fire suppression resources and emergency services.

17. Keystone shall cover open-bodied dump trucks carrying sand or soil while on paved roads and cover open-bodied dump trucks carrying gravel or other materials having the potential to be expelled onto other vehicles or persons while on all public roads.

18. Keystone shall use its best efforts to not locate fuel storage facilities within 200 feet of private wells and 400 feet of municipal wells and shall minimize and exercise vigilance in refueling activities in areas within 200 feet of private wells and 400 feet of municipal wells.

19. If trees are to be removed that have commercial or other value to affected landowners, Keystone shall compensate the landowner for the fair market value of the trees to be cleared and/or allow the landowner the right to retain ownership of the felled trees. Except as the landowner shall otherwise agree in writing, the width of the clear cuts through any windbreaks and shelterbelts shall be limited to 50 feet or less, and the width of clear cuts through extended lengths of wooded areas shall be limited to 85 feet or less. The environmental inspection in Condition 14 shall include forested lands.

20. Keystone shall implement the following sediment control practices:

a) Keystone shall use floating sediment curtains to maintain sediments within the construction right of way in open water bodies with no or low flow when the depth of non-flowing water exceeds the height of straw bales or silt fence installation. In such situations the floating sediment curtains shall be installed as a substitute for straw bales or silt fence along the edge or edges of each side of the construction right-of-way that is under water at a depth greater than the top of a straw bale or silt fence as portrayed in Keystone's construction Detail #11 included in the CMR Plan.

b) Keystone shall install sediment barriers in the vicinity of delineated wetlands and water bodies as outlined in the CMR Plan regardless of the presence of flowing or standing water at the time of construction.

c) The Applicant should consult with South Dakota Game, Fish and Parks (SDGFP) to avoid construction near water bodies during fish spawning periods in which in-stream

construction activities should be avoided to limit impacts on specific fisheries, if any, with commercial or recreational importance.

21. Keystone shall develop frac-out plans specific to areas in South Dakota where horizontal directional drilling will occur. The plan shall be followed in the event of a frac-out. If a frac-out event occurs, Keystone shall promptly file a report of the incident with the Commission. Keystone shall also, after execution of the plan, provide a follow-up report to the Commission regarding the results of the occurrence and any lingering concerns.

22. Keystone shall comply with the following conditions regarding construction across or near wetlands, water bodies and riparian areas:

a) Unless a wetland is actively cultivated or rotated cropland or unless site specific conditions require utilization of Keystone's proposed 85 foot width and the landowner has agreed to such greater width, the width of the construction right-of-way shall be limited to 75 feet in non-cultivated wetlands unless a different width is approved or required by the United States Army Corps of Engineers.

b) Unless a wetland is actively cultivated or rotated cropland, extra work areas shall be located at least 50 feet away from wetland boundaries except where site-specific conditions render a 50-foot setback infeasible. Extra work areas near water bodies shall be located at least 50 feet from the water's edge, except where the adjacent upland consists of actively cultivated or rotated cropland or other disturbed land or where site-specific conditions render a 50-foot setback infeasible. Clearing of vegetation between extra work space areas and the water's edge shall be limited to the construction right-of-way.

c) Water body crossing spoil, including upland spoil from crossings of streams up to 30 feet in width, shall be stored in the construction right of way at least 10 feet from the water's edge or in additional extra work areas and only on a temporary basis.

d) Temporary in-stream spoil storage in streams greater than 30 feet in width shall only be conducted in conformity with any required federal permit(s) and any applicable federal or state statutes, rules and standards.

e) Wetland and water body boundaries and buffers shall be marked and maintained until ground disturbing activities are complete. Keystone shall maintain 15-foot buffers where practicable, which for stream crossings shall be maintained except during the period of trenching, pipe laying and backfilling the crossing point. Buffers shall not be required in the case of non-flowing streams.

f) Best management practices shall be implemented to prevent heavily silt-laden trench water from reaching any wetland or water body directly or indirectly.

g) Erosion control fabric shall be used on water body banks immediately following final stream bank restoration unless riprap or other bank stabilization methods are utilized in accordance with federal or state permits.

h) The use of timber and slash to support equipment crossings of wetlands shall be avoided.

i) Subject to Conditions 37 and 38, vegetation restoration and maintenance adjacent to water bodies shall be conducted in such manner to allow a riparian strip at least 25 feet wide as measured from the water body's mean high water mark to permanently re-vegetate with native plant species across the entire construction right-of way.

23. Keystone shall comply with the following conditions regarding road protection and bonding:

a) Keystone shall coordinate road closures with state and local governments and emergency responders and shall acquire all necessary permits authorizing crossing and construction use of county and township roads.

b) Keystone shall implement a regular program of road maintenance and repair through the active construction period to keep paved and gravel roads in an acceptable condition for residents and the general public.

c) Prior to their use for construction, Keystone shall videotape those portions of all roads which will be utilized by construction equipment or transport vehicles in order to document the pre-construction condition of such roads.

d) After construction, Keystone shall repair and restore, or compensate governmental entities for the repair and restoration of, any deterioration caused by construction traffic, such that the roads are returned to at least their preconstruction condition.

e) Keystone shall use appropriate preventative measures as needed to prevent damage to paved roads and to remove excess soil or mud from such roadways.

f) Pursuant to SDCL 49-41B-38, Keystone shall obtain and file for approval by the Commission prior to construction in such year a bond in the amount of \$15.6 million for the year in which construction is to commence and a second bond in the amount of \$15.6 million for the ensuing year, including any additional period until construction and repair has been completed, to ensure that any damage beyond normal wear to public roads, highways, bridges or other related facilities will be adequately restored or compensated. Such bonds shall be issued in favor of, and for the benefit of, all such townships, counties, and other governmental entities whose property is crossed by the Project. Each bond shall remain in effect until released by the Commission, which release shall not be unreasonably denied following completion of the construction and repair period. Either at the contact meetings required by Condition 10 or by mail, Keystone shall give notice of the existence and amount of these bonds to all counties, townships and other governmental entities whose property is crossed by the Project.

24. Although no residential property is expected to be encountered in connection with the Project, in the event that such properties are affected and due to the nature of residential property, Keystone shall implement the following protections in addition to those set forth in its CMR Plan in areas where the Project passes within 500 feet of a residence:

a) To the extent feasible, Keystone shall coordinate construction work schedules with affected residential landowners prior to the start of construction in the area of the residences.

- b) Keystone shall maintain access to all residences at all times, except for periods when it is infeasible to do so or except as otherwise agreed between Keystone and the occupant. Such periods shall be restricted to the minimum duration possible and shall be coordinated with affected residential landowners and occupants, to the extent possible.
- c) Keystone shall install temporary safety fencing, when reasonably requested by the landowner or occupant, to control access and minimize hazards associated with an open trench and heavy equipment in a residential area.
- d) Keystone shall notify affected residents in advance of any scheduled disruption of utilities and limit the duration of such disruption.
- e) Keystone shall repair any damage to property that results from construction activities.
- f) Keystone shall separate topsoil from subsoil and restore all areas disturbed by construction to at least their preconstruction condition.
- g) Except where practicably infeasible, final grading and topsoil replacement, installation of permanent erosion control structures and repair of fencing and other structures shall be completed in residential areas within 10 days after backfilling the trench. In the event that seasonal or other weather conditions, extenuating circumstances, or unforeseen developments beyond Keystone's control prevent compliance with this time frame, temporary erosion controls and appropriate mitigative measures shall be maintained until conditions allow completion of cleanup and reclamation.

25. Construction must be suspended when weather conditions are such that construction activities will cause irreparable damage, unless adequate protection measures approved by the Commission are taken. At least two months prior to the start of construction in South Dakota, Keystone shall file with the Commission an adverse weather land protection plan containing appropriate adverse weather land protection measures, the conditions in which such measures may be appropriately used, and conditions in which no construction is appropriate, for approval of or modification by the Commission prior to the start of construction. The Commission shall make such plan available to impacted landowners who may provide comment on such plan to the Commission.

26. Reclamation and clean-up along the right-of-way must be continuous and coordinated with ongoing construction.

27. All pre-existing roads and lanes used during construction must be restored to at least their pre-construction condition that will accommodate their previous use, and areas used as temporary roads during construction must be restored to their original condition, except as otherwise requested or agreed to by the landowner or any governmental authority having jurisdiction over such roadway.

28. Keystone shall, prior to any construction, file with the Commission a list identifying private and new access roads that will be used or required during construction and file a description of methods used by Keystone to reclaim those access roads.

29. Prior to construction, Keystone shall have in place a winterization plan and shall implement the plan if winter conditions prevent reclamation completion until spring. The plan shall be provided to affected landowners and, upon request, to the Commission.

30. Numerous Conditions of this Order, including but not limited to 16, 19, 24, 25, 26, 27 and 51 relate to construction and its effects upon affected landowners and their property. The Applicant may encounter physical conditions along the route during construction which make compliance with certain of these Conditions infeasible. If, after providing a copy of this order, including the Conditions, to the landowner, the Applicant and landowner agree in writing to modifications of one or more requirements specified in these conditions, such as maximum clearances or right-of-way widths, Keystone may follow the alternative procedures and specifications agreed to between it and the landowner.

#### **IV. Pipeline Operations, Detection and Emergency Response**

31. Keystone shall construct and operate the pipeline in the manner described in the application and at the hearing, including in Keystone's exhibits, and in accordance with the conditions of this permit, the PHMSA Special Permit, if issued, and the conditions of this Order and the construction permit granted herein.

32. Keystone shall require compliance by its shippers with its crude oil specifications in order to minimize the potential for internal corrosion.

33. Keystone's obligation for reclamation and maintenance of the right-of-way shall continue throughout the life of the pipeline. In its surveillance and maintenance activities, Keystone shall, and shall cause its contractor to, equip each of its vehicles, including off-road vehicles, with a hand held fire extinguisher, portable compact shovel and communication device such as a cell phone, in areas with coverage, or a radio capable of achieving prompt communication with emergency services.

34. In accordance with 49 C.F.R. 195, Keystone shall continue to evaluate and perform assessment activities regarding high consequence areas. Prior to Keystone commencing operation, all unusually sensitive areas as defined by 49 CFR 195.6 that may exist, whether currently marked on DOT's HCA maps or not, should be identified and added to the Emergency Response Plan and Integrity Management Plan. In its continuing assessment and evaluation of environmentally sensitive and high consequence areas, Keystone shall seek out and consider local knowledge, including the knowledge of the South Dakota Geological Survey, the Department of Game Fish and Parks and local landowners and governmental officials.

35. The evidence in the record demonstrates that in some reaches of the Project in southern Tripp County, the High Plains Aquifer is present at or very near ground surface and is overlain by highly permeable sands permitting the uninhibited infiltration of contaminants. This aquifer serves as the water source for several domestic farm wells near the pipeline as well as public water supply system wells located at some distance and upgradient from the pipeline route. Keystone shall identify the High Plains Aquifer area in southern Tripp County as a hydrologically sensitive area in its Integrity Management and Emergency Response Plans. Keystone shall similarly treat any other similarly vulnerable and beneficially useful surficial aquifers of which it becomes aware during construction and continuing route evaluation.

36. Prior to putting the Keystone Pipeline into operation, Keystone shall prepare, file with PHMSA and implement an emergency response plan as required under 49 CFR 194 and a manual of written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies as required under 49 CFR 195.402. Keystone shall also prepare and implement a written integrity management program in the manner and at such time as required under 49 CFR 195.452. At such time as Keystone files its Emergency Response Plan and

Integrity Management Plan with PHMSA or any other state or federal agency, it shall also file such documents with the Commission. The Commission's confidential filing rules found at ARSD 20:10:01:41 may be invoked by Keystone with respect to such filings to the same extent as with all other filings at the Commission. If information is filed as "confidential," any person desiring access to such materials or the Staff or the Commission may invoke the procedures of ARSD 20:10:01:41 through 20:10:01:43 to determine whether such information is entitled to confidential treatment and what protective provisions are appropriate for limited release of information found to be entitled to confidential treatment.

37. To facilitate periodic pipeline leak surveys during operation of the facilities in wetland areas, a corridor centered on the pipeline and up to 15 feet wide shall be maintained in an herbaceous state. Trees within 15 feet of the pipeline greater than 15 feet in height may be selectively cut and removed from the permanent right-of-way.

38. To facilitate periodic pipeline leak surveys in riparian areas, a corridor centered on the pipeline and up to 10 feet wide shall be maintained in an herbaceous state.

## **V. Environmental**

39. Except to the extent waived by the owner or lessee in writing or to the extent the noise levels already exceed such standard, the noise levels associated with Keystone's pump stations and other noise-producing facilities will not exceed the L10=55dbA standard at the nearest occupied, existing residence, office, hotel/motel or non-industrial business not owned by Keystone. The point of measurement will be within 100 feet of the residence or business in the direction of the pump station or facility. Post-construction operational noise assessments will be completed by an independent third-party noise consultant, approved by the Commission, to show compliance with the noise level at each pump station or other noise-producing facility. The noise assessments will be performed in accordance with applicable American National Standards Institute standards. The results of the assessments will be filed with the Commission. In the event that the noise level exceeds the limit set forth in this condition at any pump station or other noise producing facility, Keystone shall promptly implement noise mitigation measures to bring the facility into compliance with the limits set forth in this condition and shall report to the Commission concerning the measures taken and the results of post-mitigation assessments demonstrating that the noise limits have been met.

40. At the request of any landowner or public water supply system that offers to provide the necessary access to Keystone over his/her property or easement(s) to perform the necessary work, Keystone shall replace at no cost to such landowner or public water supply system, any polyethylene water piping located within 500 feet of the Project with piping that is resistant to permeation by BTEX. Keystone shall not be required to replace that portion of any piping that passes through or under a basement wall or other wall of a home or other structure. At least forty-five (45) days prior to commencing construction, Keystone shall publish a notice in each newspaper of general circulation in each county through which the Project will be constructed advising landowners and public water supply systems of this condition.

41. Keystone shall follow all protection and mitigation efforts as identified by the US Fish and Wildlife Service ("USFWS") and SDGFP. Keystone shall identify all greater prairie chicken and greater sage and sharp-tailed grouse leks within the buffer distances from the construction right of way set forth for the species in the FEIS and Biological Assessment (BA) prepared by DOS and USFWS. In accordance with commitments in the FEIS and BA, Keystone shall avoid or restrict

construction activities as specified by USFWS within such buffer zones between March 1 and June 15 and for other species as specified by USFWS and SDGFP.

42. Keystone shall keep a record of drain tile system information throughout planning and construction, including pre-construction location of drain tiles. Location information shall be collected using a sub-meter accuracy global positioning system where available or, where not available by accurately documenting the pipeline station numbers of each exposed drain tile. Keystone shall maintain the drain tile location information and tile specifications and incorporate it into its Emergency Response and Integrity Management Plans where drains might be expected to serve as contaminant conduits in the event of a release. If drain tile relocation is necessary, the applicant shall work directly with landowner to determine proper location. The location of permanent drain tiles shall be noted on as-built maps. Qualified drain tile contractors shall be employed to repair drain tiles.

## **VI. Cultural and Paleontological Resources**

43. In accordance with Application, Section 6.4, Keystone shall follow the "Unanticipated Discoveries Plan," as reviewed by the State Historical Preservation Office ("SHPO") and approved by the DOS and provide it to the Commission upon request. Ex TC-1.6.4, pp. 94-96; Ex S-3. If during construction, Keystone or its agents discover what may be an archaeological resource, cultural resource, historical resource or gravesite, Keystone or its contractors or agents shall immediately cease work at that portion of the site and notify the DOS, the affected landowner(s) and the SHPO. If the DOS and SHPO determine that a significant resource is present, Keystone shall develop a plan that is approved by the DOS and commenting/signatory parties to the Programmatic Agreement to salvage avoid or protect the archaeological resource. If such a plan will require a materially different route than that approved by the Commission, Keystone shall obtain Commission and landowner approval for the new route before proceeding with any further construction. Keystone shall be responsible for any costs that the landowner is legally obligated to incur as a consequence of the disturbance of a protected cultural resource as a result of Keystone's construction or maintenance activities.

44. Keystone shall implement and comply with the following procedures regarding paleontological resources:

- a) Prior to commencing construction, Keystone shall conduct a literature review and records search, and consult with the BLM and Museum of Geology at the S.D. School of Mines and Technology ("SDSMT") to identify known fossil sites along the pipeline route and identify locations of surface exposures of paleontologically sensitive rock formations using the BLM's Potential Fossil Yield Classification system. Any area where trenching will occur into the Hell Creek Formation shall be considered a high probability area.
- b) Keystone shall at its expense conduct a pre-construction field survey of each area identified by such review and consultation as a known site or high probability area within the construction ROW. Following BLM guidelines as modified by the provisions of Condition 44, including the use of BLM permitted paleontologists, areas with exposures of high sensitivity (PFYC Class 4) and very high sensitivity (PFYC Class 5) rock formations shall be subject to a 100% pedestrian field survey, while areas with exposures of moderately sensitive rock formations (PFYC Class 3) shall be spot-checked for occurrences of scientifically or economically significant surface fossils and evidence of subsurface fossils. Scientifically or economically significant surface fossils shall be avoided by the Project or mitigated by collecting them if avoidance is not feasible. Following BLM guidelines for the assessment

and mitigation of paleontological resources, scientifically significant paleontological resources are defined as rare vertebrate fossils that are identifiable to taxon and element, and common vertebrate fossils that are identifiable to taxon and element and that have scientific research value; and scientifically noteworthy occurrences of invertebrate, plant and trace fossils. Fossil localities are defined as the geographic and stratigraphic locations at which fossils are found.

c) Following the completion of field surveys, Keystone shall prepare and file with the Commission a paleontological resource mitigation plan. The mitigation plan shall specify monitoring locations, and include BLM permitted monitors and proper employee and contractor training to identify any paleontological resources discovered during construction and the procedures to be followed following such discovery. Paleontological monitoring will take place in areas within the construction ROW that are underlain by rock formations with high sensitivity (PFYC Class 4) and very high sensitivity (PFYC Class 5), and in areas underlain by rock formations with moderate sensitivity (PFYC Class 3) where significant fossils were identified during field surveys.

d) If during construction, Keystone or its agents discover what may be a paleontological resource of economic significance, or of scientific significance, as defined in subparagraph (b) above, Keystone or its contractors or agents shall immediately cease work at that portion of the site and, if on private land, notify the affected landowner(s). Upon such a discovery, Keystone's paleontological monitor will evaluate whether the discovery is of economic significance, or of scientific significance as defined in subparagraph (b) above. If an economically or scientifically significant paleontological resource is discovered on state land, Keystone will notify SDSMT and if on federal land, Keystone will notify the BLM or other federal agency. In no case shall Keystone return any excavated fossils to the trench. If a qualified and BLM-permitted paleontologist, in consultation with the landowner, BLM, or SDSMT determines that an economically or scientifically significant paleontological resource is present, Keystone shall develop a plan that is reasonably acceptable to the landowner(s), BLM, or SDSMT, as applicable, to accommodate the salvage or avoidance of the paleontological resource to protect or mitigate damage to the resource. The responsibility for conducting such measures and paying the costs associated with such measures, whether on private, state or federal land, shall be borne by Keystone to the same extent that such responsibility and costs would be required to be borne by Keystone on BLM managed lands pursuant to BLM regulations and guidelines, including the BLM Guidelines for Assessment and Mitigation of Potential Impacts to Paleontological Resources, except to the extent factually inappropriate to the situation in the case of private land (e.g. museum curation costs would not be paid by Keystone in situations where possession of the recovered fossil(s) was turned over to the landowner as opposed to curation for the public). If such a plan will require a materially different route than that approved by the Commission, Keystone shall obtain Commission approval for the new route before proceeding with any further construction. Keystone shall, upon discovery and salvage of paleontological resources either during pre-construction surveys or construction and monitoring on private land, return any fossils in its possession to the landowner of record of the land on which the fossil is found. If on state land, the fossils and all associated data and documentation will be transferred to the SDSM; if on federal land, to the BLM.

e) To the extent that Keystone or its contractors or agents have control over access to such information, Keystone shall, and shall require its contractors and agents to, treat the locations of sensitive and valuable resources as confidential and limit public access to this information.

## **VII. Enforcement and Liability for Damage**

45. Keystone shall repair or replace all property removed or damaged during all phases of construction and operation of the proposed transmission facility, including but not limited to, all fences, gates and utility, water supply, irrigation or drainage systems. Keystone shall compensate the owners for damages or losses that cannot be fully remedied by repair or replacement, such as lost productivity and crop and livestock losses or loss of value to a paleontological resource damaged by construction or other activities.

46. In the event that a person's well is contaminated as a result of construction or pipeline operation, Keystone shall pay all costs associated with finding and providing a permanent water supply that is at least of similar quality and quantity; and any other related damages, including but not limited to any consequences, medical or otherwise, related to water contamination.

47. Any damage that occurs as a result of soil disturbance on a persons' property shall be paid for by Keystone.

48. No person will be held responsible for a pipeline leak that occurs as a result of his/her normal farming practices over the top of or near the pipeline.

49. Keystone shall pay commercially reasonable costs and indemnify and hold the landowner harmless for any loss, damage, claim or action resulting from Keystone's use of the easement, including any resulting from any release of regulated substances or from abandonment of the facility, except to the extent such loss, damage claim or action results from the gross negligence or willful misconduct of the landowner or its agents.

50. The Commission's complaint process as set forth in ARSD 20:10:01 shall be available to landowners, other persons sustaining or threatened with damage or the consequences of Keystone's failure to abide by the conditions of this permit or otherwise having standing to obtain enforcement of the conditions of this Order and Permit.