

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

Application No. OP-0003

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

POST-HEARING REPLY BRIEF OF PONCA TRIBE OF NEBRASKA

Prepared and Submitted by:

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I. KEYSTONE DID NOT MEET ITS BURDEN BECAUSE IT FAILED TO PRODUCE ANY EVIDENCE OF ACTUAL IMPACTS ON CULTURAL RESOURCES.

Despite its assertion, Keystone has not met its burden on social impacts. Keystone had the obligation to come forward with specific evidence of cultural resource impacts, but it did not. It argues it “has set forth in detail the actions it will take to minimize/mitigate the impacts to natural resources and land,” but will only “address any potential impacts to cultural resources.” (Appl. Brief, 5). This is not evidence of impacts; only a statement it will consider “potential impacts.” Keystone discusses *actual* impacts on natural resources, but never points to any evidence of *actual* impacts on cultural resources. *Id.*, 15. While it states “the Preferred Route has been designed to avoid... known recreation areas; and special interest areas,” *id.*, 14, there is no evidence it designed the route to avoid cultural resources.

A statement to address impacts later does not meet Keystone’s burden. As discussed in the Tribe’s brief, an applicant is required to submit specific analyses of cultural resource impacts, “not a generic representation that, through the general course of doing business,” it will consider them. *See Metro. Utilities Dist. of Omaha v. Aquila*, 712 N.W.2d 280, 286, 271 Neb. 454 (2006). Yet, Keystone merely repeats “we’ll address it in the future.” Rather than identify cultural resources and impacts, Keystone only presents “how cultural resources along the Route will be handled if discovered.” (Appl. Brief, 22). It asserts the Programmatic Agreement (“PA”) is sufficient to handle impacts on cultural resources and falsely asserts Shannon Wright agreed if surveys are conducted “in compliance with the agreement... his concerns would be alleviated.” *Id.*, 28. In actuality, Mr. Wright said cultural surveys would only alleviate his concerns “[i]f they are done correctly,” (T1055), and expressed that the PA does not cover resources part of Nebraska’s public interest, only resources in the National Register, (T1075-76).

It is not that Keystone should have no plan for resources that might be found later, it is that Keystone was required to demonstrate impacts on known cultural resources important and unique to Nebraska now. Keystone was required to provide specific analyses of impacts, not a “plan” to deal with them later. If the legislature intended for Keystone to only provide a representation that it “will deal with social impacts,” it would have said so. But, it did not say that – it required “[e]vidence regarding... social impacts.” NEB. REV. STAT. § 57-1407(4)(d). The Siting Act places an affirmative burden on Keystone to produce evidence of actual cultural resource impacts and that those impacts are not contrary to the public interest, not merely statements they will be considered later.

II. KEYSTONE ONLY PROPOSES DEALING WITH A NARROW SET OF CULTURAL RESOURCES, NOT THOSE IN NEBRASKA’S PUBLIC INTEREST.

Even if Keystone’s “future plans” to handle cultural resources were sufficient, it will not even consider cultural resources with which the Siting Act is concerned. Keystone asserts it “has not identified any *historic property that is subject to protection or eligible for inclusion in the National Register of Historic Places*” and “in the event a *historic property eligible for inclusion* is identified, it will be appropriately handled under the National Historic Preservation Act.” *Id.*, 22 (emphasis added). In other words, it only will deal with cultural resources part of the National Register. But, that is not the scope of the Siting Act. The “primary object” of the Commission is “first and at all times, to serve the interests of the public.” *In re: Application No. 30466*, 230 N.W.2d 190, 196, 194 Neb. 55, 62 (1975). The legislature specifically designed the Siting Act to consider matters important and unique to Nebraska – in its public interest – not to simply repeat the review of federal agencies. *Hearing on LB1 Before the Natural Res. Comm.*, 102nd Leg., 1st Spec. Sess., 9 (Neb. 2011). Yet, Keystone has limited even its proposed “future plans” for cultural resources to the narrow field covered by federal agencies, not the scope required by the Siting Act.

III. KEYSTONE KNOWS THE PROPOSED ROUTES WILL IMPACT CULTURAL RESOURCES, BUT IT STILL PRESENTED NO EVIDENCE OF THOSE IMPACTS.

Keystone was aware of specific cultural resources along its Preferred Route. As discussed in the Tribe's brief, Keystone was acutely aware of the Ponca Trail of Tears, even working to find information on it; Bob Allpress informed Keystone of the earthlodge village in 2012, (T891); and Keystone maintained a table of cultural resources with milepost locations, (CUL-16,27). Yet, Keystone presented no evidence about these resources or how its pipeline would impact them.

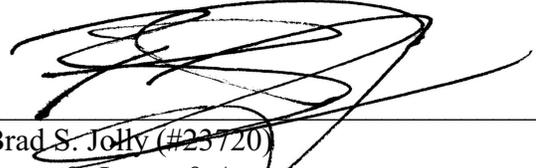
Impacts on cultural resources unquestionably exist. In its brief, Keystone states twinning the Keystone Mainline is not appropriate because it would cross the Lewis and Clark National Historic Trail, "which the Preferred Route avoids." (Appl. Brief, 10). So, it acknowledges crossing a historic trail is contrary to the public interest and needs to be avoided, but never handles crossing the Trail of Tears. If crossing the Lewis and Clark Trail is an impact to be considered and avoided, so is crossing the Trail of Tears. But, Keystone's evidence is silent on the Trail of Tears – it even admitted the Application nowhere deals with the Trail. (T260). When Keystone acknowledges crossing a historic trail is an impact to be considered and avoided, it has no excuse from producing evidence on impacts to the Trail of Tears. The same is true for the earthlodge village and sites listed in Keystone's table. Keystone knows of those sites and knows its pipeline will impact them, but never presented that to the Commission.

Both Keystone and the Economic Intervenors also discussed that the pipeline will be subject to future maintenance and upgrade work. (*E.g.* ECO-1,12). Keystone acknowledges the pipeline will interfere with land areas and their use "during periods of... pipeline maintenance," (Appl. Brief, 24), but presented no evidence regarding cultural resource impacts when it performs upgrades or maintenance. As discussed in the Tribe's brief, that work will destroy cultural resources forever.

CONCLUSION

Keystone's brief merely accentuates its failure to produce evidence of cultural resource impacts and how those impacts are not contrary to the public interest. It has not shown what the actual impacts of the pipeline are or how those impacts are not contrary to the public interest. The Commission must deny Keystone's Application.

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CERTIFICATE OF SERVICE

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by:

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