

Nebraska Public Service Commission

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

**In the Matter of the Application
of
TransCanada Keystone Pipeline LP
For the Keystone XL Pipeline Project, Pursuant to *MOPSA*
Applicant,
and
Bold Alliance and Sierra Club,
Intervenors**

Sierra Club and Bold Alliance Reply Brief

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INTRODUCTION

This is a very simple case. Although there are thousands of pages of documents, hundreds of people who testified during the public meetings and the hearing, and thousands of comments submitted, it comes down to one question: is TransCanada's application in the public interest?

Examining this question, we must ask whether the proposed KXL pipeline benefits the people of the State of Nebraska, both now and into the future? Did this application fulfill the purposes set out in Neb. Rev. Stat. § 57-1402 (1)(a) to "[e]nsure the welfare of Nebraskans, including protection of property rights, aesthetic values and economic interests"; and to (b) promote the "lawful protection of natural resources"? Did TransCanada meet its burden of proof? The answer to each of these questions is a resounding no.

I. TRANSCANADA FAILED TO MEET ITS BURDEN OF PROOF

TransCanada offered no evidence to show that its proposed pipeline would protect the property rights of Nebraskans. It therefore failed to meet its burden pursuant to Neb. Rev. Stat. § 57-1402(1)(a). There could hardly be a more egregious violation of property rights than a foreign for-profit corporation seeking eminent domain to forcibly acquire perpetual easements from Nebraska farm families for a pipeline that it has no intention to ever remove from the ground.

TransCanada also offered no evidence to demonstrate that it would protect aesthetic values as required by statute. A pipeline that rips up a fifty-foot wide swath of the earth for 275 miles through the heart of Nebraska, forever destroys native prairies, and leaves grass and croplands with years to recover, clearly violates fundamental aesthetic values.

II. TRANSCANADA FAILED TO DEMONSTRATE THAT ITS PROPOSED PIPELINE IS IN THE PUBLIC INTEREST

In its post-hearing brief, TransCanada continuously asserts that its proposed KXL project is in the public interest. A review of the record indicates that what TransCanada really means by

the term “public interest” is actually its own self-interest, divorced from the real interests of the citizens of Nebraska. MOPSA clearly states that “[t]he pipeline carrier shall have the burden to establish that the proposed route of the major oil pipeline would serve the public interest.” Neb. Rev. St. § 57-1407(4). Public interest does equal not private interest.

TransCanada is required to *present evidence* that its proposed project is in the public interest. This means that the record on its face must reflect an adequate basis from which the Commission can base its decision. *In re Application of Northwestern Bell Tel. Co.*, 218 Neb. 563 (1984). The record in this case shows continual efforts by TransCanada witnesses to prevaricate, avoid answering questions, and engage in an ongoing pattern of passing the buck. The one overriding feature of TransCanada’s witnesses was that they were not responsible for anything. Consistently, the answer to critical questions was that they did not know and should ask other witnesses who, in turn, also disclaimed responsibility and attempted to shift responsibility for answering key questions to others.

In the face of its serious failure to present evidence meeting its burden of proof demonstrating that the KXL pipeline is in the public interest, TransCanada nonetheless makes a number of interesting assertions concerning the public interest. For example, in its post-hearing brief, TransCanada argues that its project is in the public interest merely because it is participating in the Commission’s processes and, apparently, knows how to check the boxes when submitting an application. TransCanada Post Hearing Brief, p. 13.

TransCanada then argues that the proposed route for the KXL pipeline is in the public interest because it minimizes environmental damage to Nebraska’s resources. In effect, TransCanada argues that the public interest is met because it could build a worse project. Telling the public that a project is beneficial because it could be worse utterly fails to meet the burden of

proof required with respect to demonstrating that a project is in the public interest. TransCanada carries this specious theme through its post-hearing brief by continuing to argue that it has shown its project to be in the public interest because the alleged lack of evidence attacking the proposed route somehow equates to an automatic showing that its proposed route for the KXL is the best one. TransCanada Post Hearing Brief, p. 23.

Under MOPSA, TransCanada was required to present evidence of the impact due to intrusion of the KXL project on natural resources, including the irreversible and irretrievable commitment of land area and connected natural resources, and the depletion of their beneficial uses. TransCanada was also supposed to provide evidence of methods to minimize or mitigate the potential impacts of its project to natural resources. Neb. Rev. St. § 57-1407(4). Time and again during the hearing, TransCanada failed to do so.

For example, land reclamation is a key issue. While TransCanada made promises to comply with requirements, it failed to present testimony from scientists experienced with local conditions. Transcript (“Tr.”), p. 348. More critically, TransCanada failed to conduct adequate due diligence with respect to endangered species (Tr., p. 657-58), and failed to examine crucial issues concerning irrigation interruption, loss of crop yields and construction mitigation and reclamation (Tr. p. 656). Although TransCanada claims to have presented its application as a “product of all those years of effort,” (TransCanada Post-Hearing Brief, p. 1), its inability to address key questions undermines its credibility on this issue.

These issues are important with respect to the burden of proof TransCanada must meet to prove that its project is in the public interest. TransCanada has made multiple unsupported assertions – both in the hearing and in its post-hearing brief. These types of unsupported assertions have no probative effect because they are not the type of statements that reasonably

prudent people accept and rely on in the conduct of their affairs. *County of Sioux v. State Board of Equalization*, 185 Neb. 741, 178 N.W.2d 754 (1970).

TransCanada had the burden of presenting evidence that the KXL pipeline project was in the public interest. It has failed to prove that. Simply asserting that its preferred route is the least bad alternative is insufficient.

III. TRANSCANADA FAILED TO MEET ITS BURDEN OF PROOF REGARDING PROTECTION OF NATURAL RESOURCES

As noted in our trial brief, TransCanada offered no evidence regarding one of Nebraska's most valuable natural resources, the Ogallala Aquifer. They offered no maps and no discussion of how many miles their Preferred Route or Mainline Alternative would traverse this most valuable resource. TransCanada completely ignored the findings in Neb. Rev. Stat. § 57-1403(2) about the value of water, both economically and strategically, and (4) its value to Nebraska's irrigation economy.

TransCanada's application and testimony also failed to meet its burden of proof regarding impacts on other natural resources, including the threat it poses to the endangered and iconic whooping crane.

Bold and Sierra Club presented un rebutted evidence from one of the world's most renowned ornithologists, Dr. Paul Johnsgard, that the proposed route presents a threat to the continued existence of the endangered whooping crane. This is due to proposed transmission lines in areas where telemetry data showed that whooping cranes rest and feed, the locations where they are most vulnerable. NR-6. None of this evidence was rebutted.

Rather than attempt to rebut the testimony from Dr. Johnsgard and the peer-reviewed supporting documentation, TransCanada attempted to attack his credibility. None of their attempts were successful.

First, they attacked him because he had not read the US Fish and Wildlife Service (“USFWS”) Biological Opinion related to the whooping cranes prior to offering his opinion. However, the Biological Opinion is suspect because it relies on outdated data. Bold and Sierra Club presented more current information, as well as federal authority for the proposition that the opinion should be revised. In addition, the USFWS recognizes the threat that power lines present to whooping cranes, which supports our position. Biological Opinion 3.0-22.

At the hearing, Dr. Johnsgard testified that he had subsequently read the Biological Opinion. Tr. p.1019, lines 4-6. He has not changed his opinion about the threat transmission lines pose to endangered whooping cranes: he is one of the world’s experts on this subject, he knows their migration patterns and knows that transmission lines are the major cause of whooping crane mortality. His testimony was corroborated by peer-reviewed documents. NR-5, NR-6 and NR-7.

TransCanada tries to claim that Dr. Johnsgard’s testimony supports their position. Under hostile cross-examination, the 86 year old Dr. Johnsgard did discuss the threat posed to whooping cranes by adding some 70 miles of additional transmission lines. Contrary to TransCanada’s assertions, his testimony enhanced his credibility as a witness, as did his statement that he opposed all new transmission lines in the crane migration path – in contrast to TransCanada’s witnesses who avoided taking a stand on anything. The reality is that even a relatively small threat to an endangered species is still a threat. The whooping crane was on the brink of extinction just a few years ago and major investments of time, money and other resources were necessary to bring it back to its current population, but it is still very rare. The Commission should not tolerate a proposal to increase the likelihood of loss of life, which Dr. Johnsgard testified was the likely outcome of putting transmission lines in areas where whooping cranes take off and land.

On the other hand, TransCanada relied on the testimony of Mr. Schmidt, whose unreliability was set out in detail in our post-hearing brief. There is ample authority for the position that the testimony of a witness may be impeached by prior inconsistent testimony. *See State v. Wilson*, 16 Neb. App. 878, 885 (2008) (*citing State v. Rodriguez*, 272 Neb. 930 (2007)).

In addition, Dr. Thomas Hayes testified that the whooping crane is a keystone species, that protecting it provides benefits to other species. *See* KXL-061 p. 71, lines 22-23, and p. 72, lines 4-15. TransCanada failed to rebut that testimony. TransCanada's witness, Salisbury, admitted that the whooping crane was culturally important to Native American tribes. Tr. p. 1135, lines 2-5. The Commission's order of July 12th stated that it will weigh the testimony from the public meetings. Bill Taddicken testified at the public meeting on July 26th that ecotourism related to cranes, including whooping cranes, brings \$14 million in annual economic impact to the state of Nebraska. Loss of whooping cranes as a species would have a major negative economic impact on the state and its people.

IV. REBUTTAL OF OTHER TRANSCANADA ARGUMENTS ABOUT NATURAL RESOURCE IMPACTS

TransCanada stated that "any [environmental] impacts of Keystone XL will be largely temporary and certainly not major." TransCanada Brief, p. 15. This statement is false. Several witnesses testified about major and continual environmental impacts from the Preferred Route.

Multiple witnesses also testified as to the pipeline's impact on agriculture and vegetation. *See generally* Bold and Sierra Club Brief, p. 18-23. Witnesses raised concerns that the pipeline's heat would require more pesticides, make corn more difficult to grow, and will preclude certain native vegetation from growing. *See* testimony of witnesses Diana Steskal, Art Tanderup, Susan Dunavan, Rick Hammond and Dave Wedin.

Joseph Trungale testified about the pipeline's impact on shallow aquifers, wildlife habitats and groundwater. NR-4, p. 9. Dr. Thomas Hayes testified that porous, sandy soils will be heavily impacted, reducing permeability of soil, as well as decreasing the aeration, percolation and storage of water, drainage, root biomass, and plant productivity. NR-3, p. 5. These examples demonstrate that the environmental impact from the pipeline will not only be significant, but will also be an irreversible, irretrievable commitment of the land.

Throughout its brief, TransCanada made references to Bold and Sierra Club witnesses that are cherry-picked snippets of testimony and are inaccurate when considered in the context of their entire testimonies. Dr. Johnsgard's credibility has already been discussed, therefore the following will address other attacks on relevant witness testimony.

TransCanada attacked Dr. Thomas Hayes and Joseph Trungale using irrelevant and inaccurate information. TransCanada witness Beaver claimed Dr. Hayes relied on outdated standards for Best Management Practices. However, the standards Beaver cites are from a 1985 Ramsey and Burgess paper. Beaver, rebuttal p. 2, 24:39. Beaver also indicates the CMRP uses these standards in its mitigation process. *Id.* p. 2, 20:22.

Dr. Hayes cited studies as recent as 2014 which show that soil compaction is a problem during pipeline construction "despite inclusion of best management practices" due to the lack of follow through in practice. NR-3, p. 5/15, 26:30; p. 6/15, 1:10. Dr. Hayes also cited 2017 research from a University of Kansas specialist in native prairies indicating the importance of native prairies in biological systems. NR-3, p. 10, lines 13-17. This strikingly reveals that TransCanada's practices are the ones which are seriously outdated. There was also no evidence, scientific or otherwise, that TransCanada's proposed mitigation and reclamation practices were effective.

TransCanada witness Portnoy also attempted to minimize the impact the pipeline would have on natural resources by claiming the preferred route represents only 0.2% of total acres of Nebraska farm and ranch land, therefore the scope of possible damages cannot be said to be significant amount of total land in Nebraska. Portnoy rebuttal p. 2, 25:28. This is irrelevant and does not mean that the land area involved would not be significantly impacted. Nor does it discount the potential impact on specific land or landowners. TransCanada misrepresents the impact on specific natural resources and is an insult to landowners who would be affected.

In addition, Beaver's rebuttal testimony regarding irretrievable, irreversible impacts to native prairie soils and vegetation is largely irrelevant, as the research he cites refers to cropland, not native prairies. Beaver Rebuttal, p. 6, 107:126.

TransCanada claimed that groundwater flow paths will not be altered because the pipeline would cross groundwater in the same direction of flow, TransCanada brief p. 29; Portnoy Rebuttal p. 2-3, 36:4. This testimony is contradicted by maps of the proposed route, because the proposed route runs basically north and south, and water flows in Nebraska for both streams and groundwater are primarily east and west. Trungale's testimony that construction and location of the pipeline can impact river flows and species, and thus result in depletion of beneficial uses of natural resources is therefore accurate. NR-4, p. 9, 3:5.

As with the other expert environmental witnesses, TransCanada attempts to minimize Joseph Trungale's testimony by referencing a portion of his testimony taken out of context. Brief, p. 30. During his deposition, Trungale stated he did not perform site-specific analysis because the Applicant (TransCanada) had not performed such an analysis and the burden was on TransCanada to perform such analysis. KXL-062, p. 31-33

V. ALTERNATIVE ROUTE ISSUES

TransCanada tries to divert attention from the elements of their burden of proof by claiming no one presented evidence showing that any other proposed route was superior. In fact, Bold and Sierra Club used TransCanada's own data to show that other routes had far less impact on natural resources.

TransCanada claims the Preferred Route will cross fewer ecologically sensitive areas, streams, and miles of cropland. Applicant's Brief, p. 4. This is inaccurate. See Table 2-1 p. 9. As previously noted, there would be 84.6 more miles of whooping crane migration area impacted by the Preferred Route than the Mainline Alternative. *Id.* Overall, the Mainline Alternative would impact significantly fewer total miles of habitat for federal- and state-listed endangered and threatened species. See Table 2-1, p. 9.

Portnoy's attempted rebuttal fails to address the increased number of intersections of the preferred route with stream flowline segments compared to the mainline alternative, which Trungale testified increases the potential adverse impacts of the preferred route. NR-4 p. 10, 21:26; p. 11, 1-4. Further, Portnoy agreed that there was no comparison of depth to groundwater or soil permeability of the preferred route and mainline alternative route. KXL-007, p. 20, 8:20.

In addition, Hayes and Trungale provided unambiguous and un rebutted testimony that the Keystone 1 route was preferable despite TransCanada's failure to provide data on this route.

VI. ADDITIONAL REASONS THE APPLICATION SHOULD BE DENIED

TransCanada relies on a variety of federal and state reports related to its Application. Almost all the reports are at least five years old, dating from 2012. The reports from the Nebraska Department of Environmental Quality are especially suspect, since they were developed pursuant to LB 1161, a 2012 law that has been ruled unconstitutional by the Lancaster

County District Court and a four-judge majority of the Nebraska Supreme Court. Although this law continues to be on the books via a legal technicality, the fact that TransCanada chose not to use it again in its application process speaks volumes about its legal validity.

TransCanada's reliance on the Trump administration's approval is misplaced, since the 326-page amendment to their application in this process raises the question whether their federal application is still valid. The Presidential Permit states: "The construction, operation, and maintenance of the US facilities shall be in all material respects as described in the permittee's Application for a Presidential Permit under EO 13337, filed on May 4, 2012, and resubmitted on January 26, 2017." See Presidential Permit dated March 23, 2017, p. 2.

TransCanada also relies on federal agencies such as the US Fish and Wildlife Service and electric power providers to evade its responsibilities to protect endangered species. The current federal administration has proposed major cutbacks in funding for agencies involved protecting natural resources including the USFWS. Any reliance on federal agencies to protect the public interest of Nebraska in endangered species is misplaced. In any event, passing the buck to others, as TransCanada has done repeatedly throughout this process, fails to meet its obligation to protect Nebraska's natural resources.

VII. CONCLUSION

TransCanada fails to meet its burden of proof and fails to provide competent and relevant evidence that its application is in the public interest. Therefore, the Nebraska Public Service Commission should deny its application for approval of a route pursuant to the Major Oil Pipeline Siting Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to 291 Neb. Admin Code § 015.0 (b), and the hearing officer's ruling on service, the above Trial Brief was served upon all parties or their respective attorneys of record using the service list provided by the Commission electronically on this 15th day of September 2017.

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