

BEFORE THE PUBLIC SERVICE COMMISSION OF NEBRASKA

In the matter of the Application of)
Transcanada Keystone Pipeline, L.P.,) **Application No. OP-0003**
Calgary, Alberta, for route approval)
of the Keystone XL Pipeline Project) **INTERVENOR YANKTON SIOUX**
pursuant to the Major Oil Pipeline) **TRIBE’S POST HEARING REPLY**
Siting Act.) **BRIEF**

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The Yankton Sioux Tribe (“YST” or the “Tribe”) submits this Post-Hearing Reply Brief in accordance with the Nebraska Public Service Commission’s (“Commission”) Order Setting Briefing Schedule entered August 25, 2017. For the reasons that follow, approval of the route permit for the Keystone XL pipeline is not in the public interest and TransCanada Keystone Pipeline, LP’s (“TransCanada”) application must therefore be denied.

I. ARGUMENT

TransCanada failed to meet its burden of proof in this proceeding, therefore its application for route approval must be denied. Pursuant to the Major Oil Pipeline Siting Act, Neb. Rev. Stat. 57-1401, et seq. (“MOPSA”), “[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. Stat. 57-1407(4). In adopting this statute, the State of Nebraska instructed this Commission that it may *only* approve TransCanada’s application if the Commission determines, based on TransCanada’s evidence that the proposed route is in the public interest. *Id.* Because TransCanada has failed to prove that constructing the pipeline along the proposed route would serve the public interest, its application must be denied.

TransCanada’s arguments have two overarching flaws. First, many of TransCanada’s arguments rely upon diminishment of the sovereign authority of the State of Nebraska and this Commission. It is plainly contrary to the public interest of Nebraskans for the State and the Commission to compromise the State’s sovereignty for the benefit of a private company. Second, TransCanada’s arguments attempt to shift the burden of proof from itself as the applicant, where the Nebraska legislature has determined the burden lies, to the intervenors who challenge its application. By failing to offer sufficient evidence for the Commission to evaluate the impacts of

the proposed route, TransCanada has deprived the Commission of its ability to fulfill its statutory duty to determine whether the proposed route is in the public interest. For these reasons and the more specific reasons that follow, the Commission must deny TransCanada's application for route approval.

A. Preferred Route Versus Alternatives

TransCanada has erroneously placed emphasis on the alleged fact that its preferred route is the best route out of all the alternatives it has proposed. (Applicant's Post-Hearing Brief ("TC Brief") at 1)). This fact is irrelevant, and it detracts from the true issue of whether TransCanada has met its burden of proof. The standard for route approval is whether approval of the route is in the public interest, not whether the preferred route is superior to other routes. TransCanada cites the alleged "lack of evidence in support of any alternative route" as proof that the proposed route is in the public interest. (TC Brief at 2). This is nonsensical. A lack of evidence does not prove anything. Furthermore, the burden of proof is on the applicant, TransCanada, not on intervening parties opposed to the route. Neb. Rev. Stat. 57-1407(4). Finally, even if all parties conceded that the proposed route is better than the alternatively proposed routes – in fact, even if there were no alternatively proposed routes – the lack of a better route in no way proves that the proposed route is actually in the public interest. TransCanada's emphasis on alternative routes fails to meet its burden of proving that the preferred route is in the public interest and its application must be denied.

In addition, TransCanada's arguments aim to steer the Commission away from exercising its statutory authority to determine what is good for Nebraska, thereby attempting to diminish the State's sovereign authority. The State of Nebraska has vested the Commission with the power and the duty to determine whether a proposed route for a major oil pipeline would serve the public

interest. Neb. Const. art. IV-20; Neb. Rev. Stat. 57-1401, et seq. The Commission's duty is not, as TransCanada argues, to determine whether the route it prefers would be better than other alternative routes that it discusses. Instead, the Nebraska legislature clearly instructed this Commission that it is required to analyze whether or not, in light of the pipeline's impacts, the proposed route is in the public interest, and that this Commission is required to make TransCanada do the hard work of assembling and then presenting evidence proving that the route is in the public interest. Contrary to TransCanada's arguments and implications, approval of a route for the pipeline is not a foregone conclusion. By acting as though it is, TransCanada is asking the Commission to assume the core thing that TransCanada is required to prove. It attempts to deprive the Commission of its ability to make the public interest determination that the Commission has been directed by the State to make. The Commission's role and duties are dictated by the State of Nebraska as a sovereign, not by a private foreign pipeline company. The Commission cannot accept TransCanada's premise that a route will be approved, it is just a matter of which of TransCanada's proposed routes will be selected. The Commission must exercise its full authority and uphold the sovereignty of Nebraska by withholding approval of *any* route unless TransCanada has shown that the route will serve the public interest.

B. TransCanada's "Twinning" Argument Does Not Support a Finding that its Preferred Route is in the Public Interest.

TransCanada also suggests that the Commission should approve its route application because it is not preferable, viable, or beneficial to "twin" the Keystone XL pipeline with the Keystone Mainline. (TC Brief at 8). TransCanada's logic, however, is flawed.

1. TransCanada assumed the risk that it would have to seek further approval from the Department of State.

TransCanada argues that the existing Keystone Mainline and the proposed Keystone XL pipeline cannot or should not be twinned because to do so would be inconsistent with the Presidential Permit for the Keystone XL pipeline. (TC Brief at 9) The Commission can only approve a proposed pipeline route if the applicant proves that the route is in the public interest – not that an alternative route is inferior. Neb. Rev. Stat. 57-1407(4). The “inconsistency” of the Keystone Mainline with the Presidential Permit does not mean that twinning is infeasible, only that it would require an extra step with respect to the Presidential Permit. The Presidential Permit reflects a determination, by the United States, that the United States will permit, i.e. allow, the pipeline to be constructed as proposed. But, by the same token, it is this Commission, which then determines whether the State of Nebraska, exercising its separate sovereign authority, will provide this State’s approval. TransCanada’s implication that the Commission must be subservient to the Department of State in making Nebraska’s decision again attempts to diminish the Commission’s authority and the State’s sovereignty.

TransCanada has chosen put itself in a position where it may have to seek additional approval from the State Department, but such approval can still be sought. The United States’ permission of one route does not mean that the United States would reject a revised route if this Commission were to determine that a different route is required by Nebraska law. Similarly, even if the Commission approves the route that TransCanada prefers, TransCanada may still have to seek additional approval from the Commission in the event that it is later discovered that adjustments need to be made to the route. Neb. Rev. Stat. 57-1405(1). These are risks TransCanada has assumed by moving forward with the Presidential Permit without a finalized route in Nebraska, and by seeking route approval in Nebraska without fully surveying the route first. The fact that the Department of State has approved the proposed route has no bearing on the

Commission's determination of whether or not the route serves the public interest, and does not support approval of TransCanada's application.

2. TransCanada assumed the risk that it would have to seek further approval from the State of South Dakota.

Likewise, TransCanada argues that the Commission should approve TransCanada's preferred route because it "cannot change its route through South Dakota or the point at which Keystone XL exits [South Dakota] and enters Nebraska" because the South Dakota permit "is limited to a specific route and fixes a single exit point from South Dakota..." (TC Brief at 9) This is an incorrect attempt to mislead the Commission and to evade TransCanada's duty to the State of Nebraska. Again, the Commission can only approve a proposed pipeline route if the applicant proves that the route is in the public interest – not that the route is the only way to comply with an existing permit issued by another state. Neb. Rev. Stat. 57-1407(4). South Dakota, exercising its sovereignty, has issued a permit that it determined was consistent with its state's laws. This Commission must do the same. While changing the route or the entry point to Nebraska would require additional work on the part of TransCanada, nothing legally prohibits TransCanada from modifying the route in South Dakota; the company must simply return to the South Dakota Public Utilities Commission for approval to do so. (TC Brief at 9) TransCanada is willing to take risks on rerouting in Nebraska by purchasing land for pump site locations and relying on approval of those locations without surveying them first. By doing this, TransCanada runs the risk of needing additional approval from the Commission to adjust the pipeline route if cultural resource surveys result in identification of cultural resources for which avoidance is the most appropriate measure. TransCanada has yet to survey 58 miles of the route for the pipeline itself, as well as the locations of the man camps and possibly one or more of the permanent above-ground structures. (T1108; T1121-22; T1125; T1172; KXL-023 § V(B)(1)) Just as TransCanada assumed the risk of needing

to reroute the pipeline and seek additional approval in Nebraska, it also assumed the risk of needing to seek additional approval in South Dakota by solidifying the South Dakota route without first knowing the final Nebraska Route. This is the cost of doing business as a pipeline company, and it is not a factor for the Commission to consider under the statute. Neb. Rev. Stat. 57-1407(4). TransCanada is again attempting to diminish the sovereign authority of the State of Nebraska by treating the State's pipeline siting process as subservient to that of the State of South Dakota. More importantly, the fact that TransCanada's preferred route is not inconsistent with a permit from the State of South Dakota does not constitute evidence that the route that TransCanada prefers is in the public interest.

3. TransCanada's "twinning" argument does not support a finding that the proposed route is in the public interest.

TransCanada's argument that, because twinning the two pipelines is infeasible (which is incorrect), it is in the public interest to approve the preferred route, is flawed and does not support route approval. By law, a private company's financial interests cannot be protected at the expense of the public interest. Neb. Rev. Stat. 57-1402(1)(a); 57-1407(4). Moreover, the Commission cannot compromise Nebraska's sovereignty by basing its decision on whether a route through Nebraska has been approved at the federal level by the Department of State, or on whether the route is compatible with a route approved by South Dakota. The Commission's decision *must* hinge only on whether the proposed route is in the public interest. Apart from and in addition to the reasons put forth by the Landowner Intervenors, twinning the Keystone XL pipeline with the Keystone Mainline would be more protective of the public interest because it would mean routing the pipeline through lands that have already been surveyed and disturbed, reducing the likelihood of unanticipated discoveries of cultural resources.

As the Tribe explained in its Post-Hearing Brief and as numerous witnesses testified during the Public Hearing, protection of cultural resources is in the public interest. (T754, 757-58, 780-81, 817, 875-76, 890-9, 896, 931). A multitude of Nebraska resident landowners testified that, as Nebraskans, the preservation of Native American cultural resources is important to them. (*Id.*) When asked why this is important, witness Bonny Kilmurray explained: “It’s who we are. It’s our history...[L]osing history is a sad thing.” (T817) Witness Robert Allpress testified that it is “important to protect the history and the ancestors of the Native Americans who were there before us.” (T891). TransCanada, on the other hand, did not even go so far as to *allege* that protection of cultural resources is not in the public interest, let alone offer evidence to this effect. The importance of tribal cultural resources to the Nebraska public interest is undisputed.

While twinning the two pipelines would not wholly resolve the Tribe’s concerns, it would significantly diminish them because that route would pose less of a threat to the Tribe’s cultural resources. TransCanada has provided absolutely no evidence that its preferred route would provide greater protection to cultural resources than the “twinning” route. Because protection and preservation of cultural resources is in the public interest, TransCanada’s preferred pipeline route is not.

C. MOPSA Public Interest Factors

Contrary to TransCanada’s contentions, analysis of MOPSA’s public interest factors (Neb. Rev. Stat. § 57-1407(4)(a)-(h)) shows that approval of the proposed route is *not* in the public interest. The Commission can only approve a proposed route if TransCanada shows that doing so would serve the public interest, and in determining whether the route would serve the public interest, the Commission must consider the specifically enumerated factors found in MOPSA. *Id.* Within the scope to which the Tribe was restricted in this proceeding, not only has TransCanada

not met its burden, but in fact the evidence that has been submitted shows the harmful social and cultural impacts which exemplify just a few of the ways in which route approval clearly does not serve the public interest.

1. Social Impacts

Economic impacts and social impacts are not the same thing. This is why the Commission is required to consider evidence regarding *both* the economic *and* social impacts of the pipeline. Neb. Rev. Stat. 57-1407(4)(d). TransCanada failed to meet its burden of proof – or even offer evidence of any kind – regarding the social impacts of the proposed pipeline. This is just one example of TransCanada’s overarching attempt to evade its burden of proof. In an attempt to conceal this shortcoming in its case, TransCanada cites to the socioeconomic report produced by Goss & Associates and submitted as “Appendix H” to its application for route approval. (KXL-001, app. H) This report, however, speaks only to alleged *economic* impacts of the proposed pipeline. Chapter 3 of the report, beginning on page 14, purports to describe “Estimated Socioeconomic Impacts.” However, this chapter addresses only spending and economics, not social issues. In fact, the report itself states that “the task is to estimate the *economic impact* of these outlays of Keystone XL...[T]he study provides sales, earnings and job impacts in addition to estimating the impact of the initial spending on state and local tax collections.” (*Id.* at 14 (emphasis added)). The report goes on to discuss “Total Impact on Nebraska Economic Activity,” “Impacts for 12-County Region,” “Impacts by Nebraska Industry,” and “Impact on State and Local Tax Collections.” (*Id.* at 15-20) Analysis for the first three topics consists solely of data on sales, jobs, and labor income. The fourth topic is limited to taxes. Nowhere in Chapter 3 or anywhere else in the report are social impacts assessed. In fact, social impacts are not addressed in TransCanada’s application at all.

Even the three-paragraph section of the application dedicated to “evidence regarding the economic and social impacts” discusses only the *economic* impacts of the pipeline. (KXL-001, § 19.0) This section states that “[t]he socio-economic impact of the Project along the Preferred Route has been studied extensively,” referencing the Goss & Associates socioeconomic report. (*Id.*) As described above, this report is limited to economic issues and is wholly void of any social impact analysis.

Again, economic impacts and social impacts are not the same thing. Furthermore, even if economic impacts were considered social impacts, social impacts are certainly not limited to economics. It appears that TransCanada made no attempt to identify non-economic social impacts of the pipeline. For example, TransCanada’s application is completely silent on the social repercussions of man camps, which are of particular concern to the Tribe. (KXL-001; CUL-25 at 8) While TransCanada did submit some evidence of economic impacts, it failed to meet its burden of proof or even offer any evidence pertaining to social impacts in its application. (KXL-001)

Although it had the opportunity to do so through witness testimony, TransCanada failed to cure this defect at the Public Hearing. TransCanada called eight individuals to testify as direct witnesses on its behalf. In 623 pages of transcribed testimony plus approximately 25 pages of pre-filed testimony, not one of these witnesses mentioned the social impacts of the pipeline. (T60-683; KXL-002-KXL009). TransCanada did offer one witness, Rick Perkins, to rebut the Tribe’s witness Jason Cooke’s testimony regarding man camps. This testimony, however, was *rebuttal* testimony. Moreover, it did not actually address the social impacts of man camps. Mr. Perkins’ pre-filed testimony covered the layout of the camps, the fact that pipeline workers are subject to pre-employment and random drug testing, that proof of residence is required to enter the camps, the working hours of pipeline workers, TransCanada’s awareness of job creation, and

TransCanada's intention to work productively with law enforcement. (KXL-015). Not one of these topics is a social impact. Mr. Perkins did make the conclusory assertion that the "statement that the camps bring violence and drug and alcohol abuse is not true," but he failed to offer any evidence to substantiate this contention. (KXL-015). The mere conclusory statement of a party's witness that its opponent's concerns are unwarranted does not constitute evidence.

Simply put, TransCanada failed to produce any "[e]vidence regarding the...social impacts of the major oil pipeline," which the Commission is mandated under MOPSA to evaluate. Neb. Rev. Stat. 57-1407(4). Again, by failing to offer evidence the Commission is statutorily required to consider, TransCanada has made it impossible for the Commission to fulfill its duty to determine whether the proposed route is in the public interest. By failing to offer evidence the Commission is required to evaluate, TransCanada has failed to meet its burden of proof and its application must be denied.

2. Cultural Impacts

TransCanada similarly failed to meet its burden of proof with respect to impacts on cultural resources, once again depriving the Commission of its ability to determine whether the proposed route is in the public interest. The Commission is required to consider cultural impacts, as a subset of social impacts, in determining whether the proposed route serves the public interest. Neb. Rev. Stat. 57-1407(4). The only place in TransCanada's application where cultural resources are even mentioned is on page 11 of the Construction Mitigation and Reclamation Plan ("CMRP"). (KXL-001, app. D). The CMRP contains four paragraphs describing the steps TransCanada allegedly plans to take to minimize the destruction of cultural resources, and gives no mention to the actual impacts of pipeline construction on cultural resources. (*Id.*) Plans and precautionary measures are not the same as impacts. Furthermore, the CMRP states that the company "*intends* to avoid cultural

resources *to the extent practicable...*” (*Id.*) If anything, this hollow statement calls the security of cultural resources along the proposed route further into question rather than supporting a finding that the route is in the public interest.

As with social impacts, TransCanada had the opportunity to cure its deficiency with respect to cultural impacts through witness testimony. However, once again, TransCanada failed to produce a direct witness to do so. Instead, TransCanada merely offered the conclusory assertion of Erin Salisbury in response to the Social and Cultural Interest Petitioners’ witnesses. Ms. Salisbury’s testimony contains no evidence that, from a cultural impact perspective, the pipeline is in the public interest. (T1105-82; KXL-014).

Ms. Salisbury’s testimony begins with discussion of the Amended Programmatic Agreement (“APA”), offered as exhibit KXL-023. (KXL-014). While Ms. Salisbury and TransCanada failed to identify the relevance of the APA to the proceeding, TransCanada appears to rely on this document as evidence to support its position with respect to cultural impacts. The APA, however, does not identify or discuss the cultural impacts of the pipeline. Instead, it is an agreement among federal agencies, state historic preservation officers, state agencies, and TransCanada regarding compliance with Section 106 of the National Historic Preservation Act (“NHPA”), 54 U.S.C. § 306108 (“Section 106”). Section 106 imposes a duty on *federal agencies* to take into account the effect of a federal undertaking on any historic property prior to approving the expenditure of federal funds or the issuance of a license for that undertaking. All the APA evidences is the fact that there is a plan in place for the Department of State, as the lead federal agency for approval of the Presidential Permit for the pipeline, to comply with Section 106. This ongoing proceeding is a Nebraska State proceeding. A federal agency’s compliance with federal law is beyond the purview of the Commission, and more importantly, it does not in any way

describe the actual cultural impacts of the pipeline which the Commission must consider or prove that the pipeline is in the public interest. TransCanada's reliance on the APA again illustrates the company's intent to diminish Nebraska's sovereignty by deferring to an outside agency, the State Department, and the standard for Presidential Permit approval rather than upholding Nebraska's public interest standard.

The APA does not support a claim that the pipeline would not have negative cultural impacts. In fact, it actually shows that the pipeline likely *will* cause cultural harm, which is *not* in the public interest. For one thing, it highlights the fact that the lands to be impacted by pipeline construction have not yet been fully surveyed and the process for identification of cultural and historic resources has not yet been completed. (T1108; T1121-22; T1125; T1172; KXL-023 § V(B)(1)). It further highlights the fact that cultural and historic resources are likely to be encountered and may be adversely impacted during the construction process notwithstanding the fact that lands have been surveyed. (KXL-023 § V(F)(5)). These two facts demonstrate that the cultural impacts are not, and cannot be, known at this time. How can the Commission consider cultural impacts if those impacts are not yet known?

The Tribe's position, that pipeline construction will have negative cultural effects contrary to the public interest, is supported by the fact that not one Native American tribe signed onto the APA. (T1119; KXL-023 Section 3 ("Signatory Parties")) This is precisely because the APA fails to protect tribes from the harmful cultural impacts of the pipeline.

The remainder of Ms. Salisbury's testimony addresses the identification of *historic properties* (not cultural resources), impacts on *identified historic properties*, two specific cultural resources identified in Shannon Wright's testimony, and the location of the Nemaha Reserve. (KXL-014 at 3-6) Ms. Salisbury's testimony contains no discussion specific to *cultural or*

archaeological properties. The term “historic properties” is not defined in Ms. Salisbury’s testimony. Even if we assume, *arguendo*, that the term “historic properties” is given the same meaning for purposes of her testimony that it is given under the NHPA, her testimony is still silent as to identification of and impacts on unidentified cultural resources and cultural resources that are ineligible for inclusion on the National Register of Historic Places (“NRHP”). The NRHP can include properties of traditional religious and cultural importance to a tribe. 54 U.S.C. § 302706. However, in order to be eligible for the NRHP, a property must meet certain criteria contained in 36 C.F.R. § 60.4. A cultural resource may be deemed ineligible for the NRHP but still retain great cultural importance. (T1076; T1117) Neither Ms. Salisbury’s testimony regarding historic properties nor the APA applies to such culturally important properties. This means that any protections afforded by the APA to properties on the NRHP are not provided for cultural resources that, while of extreme importance to the Tribe, do not meet NRHP criteria. (T1075-76)

Furthermore, the Commission cannot find the proposed route to be in the public interest because neither TransCanada’s application (including the APA) nor Ms. Salisbury’s testimony addresses the cultural impacts the pipeline would have by virtue of the harm it will cause to flora and fauna of cultural significance to the Tribe. In making its decision on route approval, the Commission is required to consider these cultural, *ergo* social, impacts. Neb. Rev. Stat. 57-1407(4). Both the bald eagle and the whooping crane, which is endangered, inhabit the region that would be disturbed by pipeline construction. (LO-1 at 30; T886). Of importance to the Commission’s public interest determination, both the bald eagle and the whooping crane hold cultural significance to the Tribe and other Native Americans. (T886; T1135). Because of that significance, impacts on those species necessarily result in cultural, social impacts. However, these cultural impacts remain unaddressed. Without evidence of the cultural impacts the pipeline

would have by virtue of its impacts on the bald eagle, the whooping crane, and other animal and plant species of significance to the Tribe, the Commission lacks sufficient information to determine whether the proposed pipeline route is in the public interest. Again, by failing to offer sufficient evidence for the Commission to evaluate the impacts of the proposed route, TransCanada has deprived the Commission of its ability to fulfill its statutory duty to determine whether the proposed route is in the public interest. Without the ability to make this determination, the Commission cannot approve the proposed route.

II. CONCLUSION

The Commission must deny TransCanada's request for route approval. Not only has TransCanada attempted to evade its burden of proof, thereby depriving the Commission of its ability to make a public interest determination pursuant to MOPSA, but it has essentially asked the Commission to set aside Nebraska's statutory requirements for pipeline approval and instead make its decision based on laws, standards, and permits issued by outside jurisdictions, diminishing Nebraska's sovereignty. Certainly a minimization of the State's sovereign authority is not in the public interest. More importantly, the Commission cannot know what *is* in the public interest because TransCanada has failed to submit the evidence required for such a determination. There is not even a need for the Commission to consider the opposing intervenors' evidence because the burden of proof rests on TransCanada, and TransCanada has failed to offer any evidence of social or cultural impacts to meet that burden of proof and tip the scales in its favor. For these and the foregoing reasons, the proposed Keystone XL pipeline route is not in the public interest and the Commission must therefore deny TransCanada's application for approval of the proposed route.

Dated this 25th day of September, 2017.

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By:



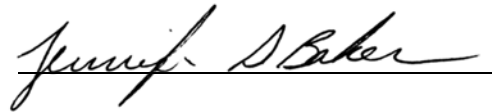
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing *Post-Hearing Reply Brief of the Yankton Sioux Tribe* was filed with the Nebraska Public Service Commission at psc.kxfilings@nebraska.gov and served by email transmission on this 25th day of September, 2017, upon the following:

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