

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application ) Application No. OP-0003  
of TransCanada Keystone Pipeline, )  
L.P., Calgary, Alberta, seeking )  
approval for Route Approval of the ) ORDER  
Keystone XL Pipeline Project )  
Pursuant to the Major Oil Pipeline )  
Siting Act. ) Entered: November 20, 2017

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BY THE COMMISSION:

B A C K G R O U N D

On February 16, 2017, TransCanada Keystone Pipeline, L.P., a Delaware limited partnership with its primary business address in Houston, Texas, ("Keystone" or "Applicant") filed an application with the Nebraska Public Service Commission ("Commission") seeking approval of a route for the Keystone XL Pipeline Project pursuant to the Major Oil Pipeline Siting Act<sup>1</sup> ("Siting Act" or "MOPSA"). The application contained information on three (3) proposed routes, one of which was designated as the Preferred Route, and two (2) others designated as alternative routes. Notice of the application was published in The Daily Record, Omaha, Nebraska, on February 20, 2017.

Petitions for formal and informal intervention were timely received by the Commission from various individuals and groups. On March 30, 2017, Keystone filed a Motion to Deny and Objections to Petitions of Intervention for certain petitioners.

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<sup>1</sup>Neb. Rev. Stat. §§ 57-1401 - 57-1413 (2016 Cum. Supp.).

On March 31, 2017, the Hearing Officer entered an order granting petitions for intervention ("Intervention Order").<sup>2</sup> Formal Intervention was granted to 96 landowners along the proposed route of the pipeline, all represented by a single law firm ("Landowner Intervenors").<sup>3</sup> One additional landowner appearing *pro se*, Mia Bergman, was also granted formal intervention.<sup>4</sup>

The Hearing Officer also granted formal intervention to certain other individuals and groups, but, pursuant to authority granted under the Administrative Procedures Act<sup>5</sup> ("APA") and Commission rules and regulations, limited such interventions to the specific areas of interest asserted by such individuals and groups in their respective petitions for intervention.<sup>6</sup>

The Ponca Tribe of Nebraska ("Ponca") and the Yankton Sioux Tribe of South Dakota ("YST") (collectively "Cultural Intervenors") petitioned for intervention citing cultural, spiritual, and historical interests in the land to be impacted by the proposed pipeline. Although such an interest might not survive a traditional standing analysis<sup>7</sup>, the Siting Act requires the

<sup>2</sup> See Docket No. OP-0003, *In the Matter of the Application of TransCanada Keystone Pipeline, L.P., Calgary, Alberta, seeking approval for Route Approval of the Keystone XL Pipeline Project Pursuant to the Major Oil Pipeline Siting Act, Order On Formal Intervention Petitions*, (March 31, 2017).

<sup>3</sup> Landowner Intervenors, all represented by The Domina Law Group PC LLO include: 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 Proski and Karen Proski, 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, Germaine G. Berry, Karen G. Berry, 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, 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.

<sup>4</sup> On June 12, 2017, The Domina Law Group PC, LLO filed a Notice of Appearance on behalf of Mia Bergman.

<sup>5</sup> *Neb. Rev. Stat.* § 84-901 - § 84-920 (Reissue of 2014).

<sup>6</sup> See *Neb. Rev. Stat.* § 84-912.02(3) and 291 NAC 1 § 015.01 (May 4, 1992).

<sup>7</sup> Before one is entitled to invoke a tribunal's jurisdiction, one must have standing to sue, which involves having some real interest in the cause of action; in other words, to have standing to sue, one must have some legal or equitable right, title, or

Commission to consider evidence of the social impacts of the proposed pipeline route.<sup>8</sup> Therefore, the Hearing Officer granted the Cultural Intervenors formal intervention, limited in scope to social and cultural concerns as expressed in their respective petitions.

Bold Alliance ("Bold"), the Sierra Club, Nebraska Chapter ("Sierra Club") and 36 other individuals and groups (collectively, "Natural Resources Intervenors") petitioned for intervention citing concerns for the environment and natural resources of Nebraska. Although such an interest might not survive a traditional standing analysis<sup>9</sup>, the Siting Act requires the Commission to consider evidence of the intrusion of the pipeline route on the natural resources of Nebraska, the irreversible and irretrievable commitments of land areas and connected natural resources, and the depletion of beneficial uses of natural resources.<sup>10</sup> In addition, the Siting Act requires that the Commission consider methods to minimize or mitigate potential impacts to natural resources.<sup>11</sup> Therefore, the Hearing Officer granted the Natural Resources Intervenors formal intervention, limited in scope to the environmental and resource concerns expressed in their respective petitions.

Three labor unions, the Midwest Regional Office of the Laborers International Union of America ("LiUNA"), the International Brotherhood of Electrical Workers ("IBEW") Local Union No. 265, and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO ("UA") (collectively, "Economic Intervenors"), petitioned for intervention citing their members' potential economic interest in the construction and operation of the pipeline. Although such an expectancy interest might not survive a traditional standing analysis<sup>12</sup>, the Siting Act requires the Commission to consider evidence of the economic impacts of the proposed pipeline route.<sup>13</sup> Therefore, the Hearing Officer granted

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interest in the subject matter of the controversy. *Marten v. Staab*, 249 Neb. 299 (1996); *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, (1995); *City of Ralston v. Balka*, 247 Neb. 773, (1995). See also, *Frenchman-Cambridge Irr. Dist. V. Dept. of Natural Resources*, 281 Neb. 992(2011); *In re Application A-18503, Water Division 2-D.*, 286 Neb. 611 (2013).

<sup>8</sup> *Neb. Rev. Stat.* § 57-1407(4) (d) (2016 Cum. Supp.).

<sup>9</sup> See FN 7 above.

<sup>10</sup> *Neb. Rev. Stat.* § 57-1407(4) (b) (2016 Cum. Supp.).

<sup>11</sup> *Neb. Rev. Stat.* § 57-1407(4) (c) (2016 Cum. Supp.).

<sup>12</sup> See FN 7 above.

<sup>13</sup> *Neb. Rev. Stat.* § 57-1407(4) (d) (2016 Cum. Supp.).

the Economic Intervenors formal intervention, limited in scope to the economic concerns expressed in their respective petitions.<sup>14</sup>

The Hearing Officer directed each of the Cultural Intervenors, Natural Resources Intervenors and the Economic Intervenors, (collectively, "Specific Issue Intervenors") to work together within their designated groups and collaborate on their respective presentations of evidence and cross-examination for the proceeding.<sup>15</sup> The Intervention Order also permitted each group of Specific Issue Intervenors to present the testimony of one (1) witness,<sup>16</sup> with the option to present an additional witness to address the Mainline Alternative Route proposed by the Applicant. Finally, the Hearing Officer also granted petitions seeking informal intervention from Wrexie Bardaglio and Cindy Myers.<sup>17</sup>

On April 5, 2017, the Hearing Officer entered an order adopting a case management plan ("CMP") and giving notice of the public hearing, which was scheduled to begin on Monday, August 7, 2017. In keeping with standard Commission procedure, the CMP provided that all parties would be required to submit written pre-filed direct testimony for all witnesses they intended to present at the evidentiary hearing.

A planning conference was held on April 10, 2017, with representatives of the parties and the Commission.

On April 10, 11, and 12, 2017, Motions to Reconsider the Hearing Officer's March 31, 2017, Order on Interventions were filed by Bold, Sierra Club, YST, Kimberly Craven, and Ponca, respectively. Bold's April 10, 2017, Motion for Reconsideration also contained a Motion to Continue the April 10, 2017, planning conference. On April 13, 2017, the Hearing Officer entered an order denying those motions.

On April 25, 2017, Bold and Sierra Club filed Motions for Further Reconsideration of the March 31, 2017, Order on Interventions. On April 27, 2017, the Hearing Officer entered an order denying those motions.

The Commission held public meetings in York, O'Neill, Norfolk, and Ralston, Nebraska, on May 3, June 7, June 28, and

<sup>14</sup> Neb. Rev. Stat. § 57-1407(4)(d) (2016 Cum. Supp.).

<sup>15</sup> See March 31, 2017, Hearing Officer Order, *supra*.

<sup>16</sup> Later revised to provide for two witnesses per Specific Issuer Intervenor Group. See FN 19.

<sup>17</sup> *Id.* and See Order Entering Case Management Plan, Scheduling Telephonic Planning Conference, and Notice of Hearing, (April 5, 2017).

July 26, 2017, respectively, for the purpose of receiving public input as permitted under the Siting Act.<sup>18</sup> The Commission received over 450 oral and written comments during the four (4) days of public meetings.<sup>19</sup>

On May 10, 2017, the Hearing Officer entered an order clarifying some dates within the CMP and granting each group of Specific Issue Intervenors the opportunity to provide the testimony of one additional witness in the proceeding.<sup>20</sup>

On May 22, 2017, Bold, Sierra Club, the Landowner Intervenors, and the Cultural Intervenors filed a Joint Motion requesting an extension of time for Intervenors to file the direct testimony of witnesses from May 30, 2017, to June 7, 2017. On May 23, 2017, Keystone filed a response to the Joint Motion for an extension that did not oppose the extension, but requested additional modifications of discovery and other filing dates in the CMP to correspond with the requested extension of the Intervenors. On May 24, 2017, the Hearing Officer granted the Motions and modified the filing deadlines contained within the CMP as requested.

On May 30, 2017, Landowner Intervenors filed Motions to Compel responses to certain discovery requests from Keystone.<sup>21</sup> Oral arguments on the Motions to Compel were held on June 9, 2017. On June 14, 2017, the Hearing Officer entered an order granting in part and denying in part the Motions to Compel.

On June 27, 2017, Landowner Intervenors filed a Second Amended Petition for Formal Intervention. The amendment did not seek to add petitioners to, or remove petitioners from, formal intervention in the proceeding, but only supplemented legal arguments contained within the Landowner Intervenors' initial Petition and First Amended Petition for Formal Intervention. On June 30, 2017, Keystone filed a Motion to Strike and Objections to the Landowner's Second Amended Petition. On July 6, 2017, the Hearing Officer granted Keystone's Motion to Strike.

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<sup>18</sup> Neb. Rev. Stat. § 57-1407(2) (2016 Cum. Supp.).

<sup>19</sup> The Commission also received hundreds of thousands of emails and letters from the public regarding the proceeding. All such comments received prior to end of business August 11, 2017, were made a part of the record, See Exhibits PSC-11 & PSC-12.

<sup>20</sup> See Docket No. OP-0003, *In the Matter of the Application of TransCanada Keystone Pipeline, L.P., Calgary, Alberta, seeking approval for Route Approval of the Keystone XL Pipeline Project Pursuant to the Major Oil Pipeline Siting Act, Order Granting Motion To Withdraw, and Modifying Case Management Plan And Intervention Order*, (May 10, 2017).

<sup>21</sup> Landowner Intervenors initially filed the Motion to Compel on May 22, 2017, they subsequently amended the Motion and refiled on May 30, 2017.

On July 2, 2017, the Landowner Intervenors invoked their statutory right to require that the formal rules of evidence apply to the proceeding.<sup>22</sup>

On July 6, 2017, Bold, Sierra Club, and the Cultural Intervenors filed a Joint Petition for Declaratory Ruling seeking to know the impact of a Legislative bill enacted on April 24, 2017,<sup>23</sup> and the "evidentiary weight" the Commission intended to give public comment made a part of the record pursuant to the Siting Act.<sup>24</sup> On July 12, 2017, the Hearing Officer entered an order declining to issue a declaratory order, on the grounds that the legislative bill had no effect on the proceeding, because Keystone's application was filed before the legislation took effect. The Order also stated that the Commission would determine the relative weight to be assigned to matters on the record as part of its eventual deliberative process.<sup>25</sup>

On July 12, 2017, the Commission issued a Notice of Appointment of retired Lancaster County District Judge Karen B. Flowers to act as Hearing Officer, to rule on procedural and evidentiary matters and preside at the evidentiary hearing. However, Judge Flowers was not assigned any responsibility for the issuance of an advisory opinion or other participation in the final determination of the Commission in this proceeding.

On July 24, 2017, prehearing motions regarding pre-filed direct testimony and other evidentiary matters were filed by Keystone and Landowner Intervenors. Landowner Intervenors also filed a Motion for Specific Findings of Facts. Various parties filed written Responses to the prehearing motions.

On July 24, 2017, petitions for informal intervention were timely received from, the Consumer Energy Alliance, the Port to Plains Alliance, the South Dakota Oil & Gas Association, the Association of Oil Pipe Lines, the Nebraska Chamber of Commerce & Industry, the American Petroleum Institute, the National Association of Manufacturers, and Lisa May.<sup>26</sup> Also on July 24, 2017, Landowner Intervenors filed a Motion to Strike and Disallow Late Petitions for Intervention. On July 26, 2017, the Hearing Officer entered an order granting the petitions for informal intervention and denying the Landowner Intervenors' Motion. Three (3) of the

<sup>22</sup> See *Neb. Rev. Stat.* § 84-914 and *Neb. Rev. Stat.* § 27-1101(4)(c).

<sup>23</sup> LB 263, 105<sup>th</sup> Leg., 1<sup>st</sup> Sess. (Neb. 2017).

<sup>24</sup> *Neb. Rev. Stat.* § 57-1407(2) (2016 Cum. Supp.).

<sup>25</sup> See Docket No. OP-0003, Order Denying Request for Declaratory Ruling, July 12, 2017).

<sup>26</sup> See 291 NAC 1 § 015.02A (May 4, 1992). Commission rules require that petitions for informal intervention be filed no later than fifteen (15) days before the hearing in the proceeding commences.



petitioners included a written statement, the Hearing Officer also gave the other parties to the proceeding until August 2, 2017, to file any objections to the written statements filed by the informal intervenors. No objections were received.

A Prehearing Conference was held on July 31, 2017, during which arguments were made to the Hearing Officer on all the outstanding motions. On August 2, the Hearing Officer entered an order granting in part and denying in part the Objections and Prehearing Motions.<sup>27</sup>

On August 4 and 5, 2017, Bold, Sierra Club, and the Cultural Intervenors filed motions and objections to preserve certain objections to decisions of the Hearing Officer regarding testimony. All the Motions were overruled by the Hearing Officer during the evidentiary hearing.

An evidentiary hearing on this matter was held August 7-10, 2017, at the Cornhusker Marriott Hotel in Lincoln, Nebraska.

#### E V I D E N C E

All direct testimony in this proceeding was pre-filed according to the CMP. Only those witnesses that other parties desired to cross-examine were called to testify orally at the hearing.

#### Keystone Witnesses

Keystone filed direct and/or rebuttal testimony of ten (10) witnesses, all of whom were subject to cross-examination and testified orally at the hearing.

Mr. Tony Palmer, the President of TransCanada Keystone Pipeline GP, LLC, and TransCanada Keystone, LLC, filed direct testimony in this matter. Mr. Palmer's testimony was accepted into the record as Exhibit KXL-2. Mr. Palmer testified TransCanada Keystone Pipeline GP, LLC, is the managing partner of the Applicant, and TransCanada Keystone, LLC, is the majority owner of the Applicant. Both entities together own 100% of the Applicant.<sup>28</sup> Mr. Palmer stated the general partner is responsible to oversee the development and implementation of the Keystone XL Project.<sup>29</sup>

<sup>27</sup> See Docket No. OP-0003, Order Granting In Part, Denying In Part, Objections and Motions To Strike Direct Testimony, (August 2, 2017).

<sup>28</sup> Application OP-0003 Transcript, 61:4-21, 87:4-7, and 186:20 - 187:8. (Hereinafter "Tr page number:line number").

<sup>29</sup> Exhibit KXL-2, at p. 1.

Mr. Palmer testified he is not a director or an employee of the Applicant. Mr. Palmer further testified that the Applicant would be primarily responsible for all reclamation costs associated with the Keystone XL project and in the event any other party has any responsibility, may seek compensation from that party.<sup>30</sup> Mr. Palmer further testified that neither Keystone nor any of its affiliates will apply for, or seek, any tax deductions, exemptions, credits, refunds, or rebates under the Nebraska Advantage Act in relation to the Keystone XL project.<sup>31</sup> Finally, Mr. Palmer stated that Keystone does not consider selling the route, if approved, to be an option.<sup>32</sup> Mr. Palmer further discussed the methodology utilized by Keystone to determine the Preferred Route, which was to draw the "shortest footprint" from Hardesty, Alberta, to Steele City, Nebraska, akin to the "hypotenuse on an equilateral triangle."<sup>33</sup>

Keystone next called Mr. Paul Fuhrer, a Project Manager for TransCanada Corporation. Mr. Fuhrer's direct testimony was accepted into the record as Exhibit KXL-3. Upon cross-examination, Mr. Fuhrer testified his degree was in construction management and while has been exposed to many different disciplines in his work for TransCanada he was not an engineer, geologist, hydrologist, or biologist.<sup>34</sup> Mr. Fuhrer stated the pipeline general elevation will be four feet below the surface of the land to top of pipe.<sup>35</sup> Mr. Fuhrer confirmed the Preferred Route would cross five waterbodies utilizing horizontal directional drilling ("HDD"), consisting of the Keya Paha, Niobrara, Elkhorn, Loup, and Platte Rivers. He further testified that for each HDD crossing the top of the pipe would be a minimum of 25 feet below the river bed.<sup>36</sup>

Mr. Fuhrer stated he was knowledgeable and responsible for the construction of both the pipeline and the five pumping stations along the proposed route. He testified that each pumping station would utilize approximately eight to ten acres of land.<sup>37</sup> Additionally, he testified that shut-off valves would be placed along the pipeline, with the location and frequency of valves varying based upon hydraulics of the pipeline and other factors.<sup>38</sup>

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<sup>30</sup> TR 143:14-19; Exhibit KXL-2, p. 4.

<sup>31</sup> TR 155:6-19 and 157:22 - 158:5.

<sup>32</sup> TR 188:3-9.

<sup>33</sup> TR 182:24 - 184:6.

<sup>34</sup> TR 190:19 and 192:4-11.

<sup>35</sup> TR 202:18-23.

<sup>36</sup> TR 235:10 - 237:13.

<sup>37</sup> TR 216:20 - 217:5.

<sup>38</sup> TR 250:12-20.

Upon questioning from Commissioners, Mr. Fuhrer stated that during installation the pipeline would be bent to follow the contour of the land, including up and down hillsides.<sup>39</sup> He testified the weight of the pipeline when filled would keep it in place in more fragile soils. He further stated the Applicant will continuously monitor the entire length of the pipeline and will be responsible to provide recontouring as necessary to re-cover any portion of the pipeline that may be exposed when the land shifts due to reasons such as wind or water erosion.<sup>40</sup> Mr. Fuhrer testified he has little experience dealing with fragile soils, although he stated he has had some experience on projects in locations with small amounts of top soil.<sup>41</sup>

Dr. Ernie Goss, Professor of Economics at Creighton University and principal of the Goss Institute, testified on behalf of Keystone. Dr. Goss filed direct and rebuttal testimony in this matter, with his testimony being accepted into the record as Exhibits KXL-4 and KXL-10 respectively. Dr. Goss had prepared a report called a "socio-economic analysis" of the impacts of the Keystone XL Pipeline on the State of Nebraska and the counties through which the Preferred Route crossed. Dr. Goss's analysis was contained within his pre-filed direct testimony and his report was filed as Appendix H to Keystone's application. Dr. Goss concluded the pipeline project would constitute an economic benefit to Nebraska and the counties along the Preferred Route and contribute to both state and local Nebraska taxes.<sup>42</sup>

Upon cross-examination, Dr. Goss testified that his report was prepared initially for the Consumer Energy Alliance ("CEA") in January of 2013 and later used by Keystone in its application.<sup>43</sup> Dr. Goss testified he brought the dates and figures forward from the 2013 report to the 2017 report, but the methodologies of both reports were the same.<sup>44</sup> In the report, Dr. Goss testified he used IMPLAN software to forecast the number of jobs and economic impact of the project.<sup>45</sup> When questioned about the limitations of IMPLAN-specifically advisories regarding IMPLAN not having the ability to determine whether jobs or output are new or already existing-Dr. Goss agreed that in cases where that was an issue, it is a limitation.<sup>46</sup> Dr. Goss recalled being paid by CEA for his

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<sup>39</sup> TR 266:18 - 267:15.

<sup>40</sup> TR 269:1 - 271:22.

<sup>41</sup> TR 267:23 - 268:6.

<sup>42</sup> See Exhibit KXL-4 and Exhibit KXL-1, Appendix H, pp. 340-343.

<sup>43</sup> TR 276:8-25.

<sup>44</sup> TR 298:14 - 299:4.

<sup>45</sup> TR 291:13-17.

<sup>46</sup> TR 293:5-16.

report, but could not recall billing Keystone for the report, or how much he was compensated for the report.<sup>47</sup> Dr. Goss testified the report was not peer-reviewed, but prepared for a general, non-economist, audience.<sup>48</sup> Dr. Goss also confirmed that the pipeline would be considered a fixed asset and would depreciate out after 15 years and not be a taxable asset after that time. He did qualify that replacements such as pump stations, additions, or other maintenance on the pipeline would potentially add taxable value that would also depreciate.<sup>49</sup>

The Applicant next called Ms. Sandra Barnett, an Environmental Specialist for TransCanada Corporation, to testify on behalf of Keystone. Ms. Barnett filed direct testimony in this matter, with her testimony being accepted into the record as Exhibit KXL-5. Ms. Barnett testified she works on environmental issues for TransCanada Corporation's liquid pipeline facilities, including the Keystone XL Pipeline Project.<sup>50</sup> Ms. Barnett's pre-filed direct testimony stated she was responsible for the portions of the application that dealt with compliance with Nebraska's Oil Pipeline Reclamation Act, minimizing and mitigating potential environmental impacts and impacts to natural resources and general mitigation and reclamation plans.<sup>51</sup> Ms. Barnett testified regarding the commitment of Keystone to return the land to equivalent capability after construction, by working with the affected landowners.<sup>52</sup>

Ms. Barnett confirmed the construction right-of-way will be 110 feet wide and the post-construction permanent easement will be 50 feet wide.<sup>53</sup> Ms. Barnett further testified that Keystone will reclaim and revegetate the right-of-way to return it "as close as we can make it" to pre-construction condition.<sup>54</sup> Ms. Barnett stated that if there is a dispute between Keystone and the landowner on the post-construction condition of the land, the parties will typically consult with the Natural Resources Conservation Service ("NRCS"), a division of the U.S. Department of Agriculture, or other agency and include them in the discussion in an attempt to reach resolution.<sup>55</sup>

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<sup>47</sup> TR 299:5 - 300:6.

<sup>48</sup> TR 305:3 - 306:20.

<sup>49</sup> TR 316:7 - 317:13.

<sup>50</sup> See Exhibit KXL-4, at p. 1.

<sup>51</sup> *Id.* at pp. 2-3.

<sup>52</sup> TR 344:6 - 347:2.

<sup>53</sup> TR 349:9-19.

<sup>54</sup> TR 353:18 - 354:6.

<sup>55</sup> TR 354:21 - 355:13.

Ms. Barnett also discussed the landowner database which is kept by the Applicant to memorialize agreements and commitments made with and to landowners for post-construction remedial measures.<sup>56</sup> Ms. Barnett addressed potential temporary and long term impacts to land, soil, and water.<sup>57</sup> Ms. Barnett also answered some questions regarding the U.S. Fish and Wildlife Service Biological Opinion included in the U.S. Department of State ("DOS") Final Environmental Impact Statement ("FEIS") and when the assessments were conducted.<sup>58</sup> Upon questioning by Commissioners, Ms. Barnett stated that any plans for micro and macro nutrient application after construction will be determined after discussions with the affected landowner and the NRCS and will be dependent upon a variety of soil conditions and issues. Ms. Barnett also confirmed that the wetland delineation in Nebraska had been completed and is available.<sup>59</sup>

Mr. John Beaver, a Project Manager, Ecologist and Reclamation Specialist with Westech Environmental Services, Inc., offered testimony on behalf of Keystone. Mr. Beaver filed direct and rebuttal testimony in this matter, with his testimony being accepted into the record as Exhibits KXL-6 and KXL-11, respectively. Mr. Beaver testified that he has been the Senior Reclamation Specialist and Special-Status Species Biologist for the Keystone XL project since 2009. Mr. Beaver stated he oversaw the design of the reclamation and revegetation plan for the project in Nebraska. He testified in his direct testimony that he oversaw the formation of the noxious weed management plan and prepared assessments of the impacts of the project on the northern long-eared bat, rufa red knot, the western prairie fringed orchid, and migratory birds. He also stated that he conducted additional surveys of animals and plants that may be impacted by the pipeline.<sup>60</sup>

Mr. Beaver testified in response to questioning that when the term, "The Sandhills" is used in the application it refers to a defined ecological region identified by the Nebraska Department of Environmental Quality ("NDEQ"), as opposed to sandy soil, which can occur in many places.<sup>61</sup> Mr. Beaver confirmed that during construction, topsoil will be segregated from subsoil along the entirety of the project where trenching will be utilized. Mr. Beaver also confirmed that Keystone will be responsible for policing its contractors to ensure the Construction Mitigation and

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<sup>56</sup> TR 357:24 - 359:17.

<sup>57</sup> TR 368:3 - 377:21.

<sup>58</sup> TR 382:1 - 384:11.

<sup>59</sup> TR 387:2 - 388:11.

<sup>60</sup> See Exhibit KXL-6, at pp. 1-2.

<sup>61</sup> TR 393:3-9.

Reclamation Plan (CMRP) provision are adhered to and followed.<sup>62</sup> Mr. Beaver further testified that Keystone will monitor the condition of the right-of-way for reclamation purposes during the entire operational life of the right-of-way.<sup>63</sup> Mr. Beaver also stated in response to questioning that although the application states the Applicant will monitor the crop yield of cultivated land post-construction, no studies of pre-construction crop yield were included with the application.<sup>64</sup> Upon questions from Commissioners, Mr. Beaver testified regarding the application of fertilizers that in agricultural production, typically fertilizer will not be applied as the farmer will apply any fertilizers along with other areas being farmed when the field is put back into production. In other areas it is not usually applied as previous projects have shown it encourages the growth of nuisance species. Mr. Beaver admitted soil fertility can be affected by construction, but that those effects are minimized because the topsoil is replaced in a relatively brief time. Mr. Beaver testified that ripping will be utilized to compacted soil prior to replacing topsoil after construction. He stated regrading may be necessary if settling occurs. Mr. Beaver testified that the heat generated from the operational pipe would have no impact on native grasses and plants.<sup>65</sup>

Mr. Michael Portnoy, the President and CEO of PEI, a full service environmental consulting and engineering firm, testified at the hearing on behalf of Keystone. PEI is a subcontractor of Keystone.<sup>66</sup> Mr. Portnoy's direct and rebuttal testimony were accepted into the record as Exhibits KXL-7 and KXL-12 respectively. Mr. Portnoy testified he has academic degrees in geology, geochemistry, hydrology, and business administration. He further testified he is a licensed, professional geologist in Nebraska.<sup>67</sup> Mr. Portnoy testified his specific area of expertise is soil permeability and distance-to-ground water analysis. Mr. Portnoy stated he is the lead hydrologist and project manager for the surveys conducted in connection with the Keystone XL project in these disciplines.<sup>68</sup>

Upon cross-examination Mr. Portnoy discussed the soil permeability surveys conducted in connection with the project that

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<sup>62</sup> TR 415:7 - 416:6.

<sup>63</sup> TR 432:24 - 433:7.

<sup>64</sup> TR 436:14 - 437:1.

<sup>65</sup> TR 449:21 - 460:19.

<sup>66</sup> TR 468:24 - 469:6.

<sup>67</sup> See Exhibit KXL-7, at p. 1.

<sup>68</sup> *Id.* at p.2.

were included in the application as Exhibit G.<sup>69</sup> Mr. Portnoy testified that his role in preparing Exhibit G at the request of Keystone included gathering soil data, compiling the data collected, and providing a list of soil permeabilities along the proposed route.<sup>70</sup> Mr. Portnoy testified that in general he found a wide diversification of soil permeabilities along the route and from soil layer to soil layer in specific locations along the route.<sup>71</sup> Mr. Portnoy further clarified that his report was based entirely upon data obtained from the U.S. Department of Agriculture ("USDA"), NRCS, and the University of Nebraska's Institute of Agriculture and Natural Resources. Mr. Portnoy did not personally conduct any soil surveys in the field.<sup>72</sup>

Mr. Portnoy also discussed the portion of the report in Exhibit G to the application that dealt with the surface-to-groundwater survey.<sup>73</sup> The survey contains the registration of wells and data included in well registration, including ownership, location, the perpendicular distance from the pipeline center line to the wellhead, the type of well, depth of the well to terminus, and the static water level of the well.<sup>74</sup> Mr. Portnoy clarified that the information included with the well registration is added at the time the well is drilled and submitted by the well drillers. In response to questions from Commissioners, he stated that a well's static water level is subject to seasonal fluctuations and will vary depending on the time of year that it is measured. He stated the values in the survey represent the water table at the time of drilling, rather than being an average of the water table over a period of time.<sup>75</sup>

Dr. Jon Schmidt, Vice President of exp Energy Services, Inc., the management contractor for the Keystone XL Pipeline Project, testified on behalf of Keystone. Dr. Schmidt filed direct and rebuttal testimony in this matter, with his testimony being accepted into the record as Exhibits KXL-8 and KXL-13, respectively. Dr. Schmidt testified he is responsible for the environmental and regulatory management of the Keystone XL Project and assisted in the preparation of the application in front of the Commission.<sup>76</sup>

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<sup>69</sup> See Exhibit KXL-1, Appendix G, Soil Permeability Study and Distance-To-Groundwater Survey, Table SA-1, Figures SA-01 - SA-11.

<sup>70</sup> TR 477:13-17.

<sup>71</sup> TR 478:16-25.

<sup>72</sup> TR 484:14 - 485:17.

<sup>73</sup> See Exhibit KXL-1, Appendix G, Soil Permeability Study and Distance-To-Groundwater Survey, Figures GW-01 - GW-05 and Tables GW-1 and GW-2.

<sup>74</sup> TR 500:21 - 505:10.

<sup>75</sup> TR 524:25 - 525:18

<sup>76</sup> See Exhibit KXL-8, at pp. 1-2.

Dr. Schmidt testified he participated in the analysis of the preferred and alternative routes. Dr. Schmidt stated that the analyses done in the 2011 FEIS and the 2014 Final Supplemental Environmental Impact Statement ("FSEIS") of the Preferred Route and alternative routes were used in reaching the conclusions contained within the application regarding the routes.<sup>77</sup> Dr. Schmidt detailed, in response to cross-examination questions, the different areas considered when comparing routes, including, number of acres disturbed, federally listed threatened and endangered species, amount of highly erodible soils, ecologically sensitive areas, and the number of crossing of perennial streams, railroads and roads.<sup>78</sup> Dr. Schmidt confirmed he was not retained by Keystone to conduct an environmental analysis of a route that would co-locate the entire length the KXL Pipeline with the existing Keystone I oil pipeline. The Keystone I pipeline is another pipeline owned and operated by TransCanada that runs north to south in eastern Nebraska.<sup>79</sup>

Dr. Schmidt was also questioned regarding whooping cranes in Nebraska. Dr. Schmidt testified that approximately 250 miles of the Preferred Route was in the whooping crane range, which is a historical area a species covered, but is not necessarily synonymous with the migration corridor for the whooping crane today. Dr. Schmidt stated the analysis was conducted by the U.S. Fish and Wildlife Service and the results were included in the Biological Opinion contained in the FEIS.<sup>80</sup>

In response to questions from Commissioners, Dr. Schmidt stated that additional field work, engineering and survey work would need to be done if the Mainline Alternative Route was utilized over the Preferred Route. He elaborated that an additional 40 new landowners would need to be accommodated on the Mainline Alternative Route as well.<sup>81</sup> Dr. Schmidt further stated it appeared both the Preferred and Mainline Alternative Routes would cross the Ponca Removal Trail, the historical path used by the Ponca Tribe of Nebraska when they were forcibly removed from Nebraska in 1877, two (2) times.<sup>82</sup> However, he also testified that route changes have already been made to accommodate cultural sites.<sup>83</sup>

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<sup>77</sup> TR 530:19 - 531:13.

<sup>78</sup> TR 556:16 - 557:11.

<sup>79</sup> TR 553:17 - 554:1.

<sup>80</sup> TR 577:5 - 578:5.

<sup>81</sup> TR 625:25 - 626:24.

<sup>82</sup> TR 620:7-11.

<sup>83</sup> TR 621:19 - 622:1.



Ms. Meera Kothari, a Professional Engineer for TransCanada testified on behalf of the Applicant. Ms. Kothari's direct testimony was accepted into the record as Exhibit KXL-9. Ms. Kothari stated she is the Manager of US Liquids Projects for TransCanada Corporation and has degrees in mechanical and manufacturing engineering.<sup>84</sup> Ms. Kothari, in response to questioning on cross-examination, stated that the Mainline Alternative Route could be feasibly and beneficially used in Nebraska, but Keystone preferred the route they designated as the Preferred Route over the Mainline Alternative Route.<sup>85</sup> Ms. Kothari also testified that after the pipeline is constructed, Keystone will seek the appropriate permits and approvals for maintenance or reclamation work prior to beginning any such activities. She further stated Keystone would consult their records to determine if any cultural issues would be impacted by proposed maintenance activity. If so, she stated Keystone would make appropriate notifications and consultations prior to conducting maintenance activities anywhere along the pipeline route.<sup>86</sup>

In response to questioning by Commissioners, Ms. Kothari testified that although the major river crossing designs call for horizontal directional drilling at a minimum depth of 25 feet below riverbed, the depth of the pipeline for the rivers in Nebraska will be 35 to 60 feet. The entry and exit points would be set back from the bank of the river and with the location to begin and exit boring determined through a scour analysis based on the floodplain and other modeling. Ms. Kothari further clarified that the river crossing design requires, in compliance with federal requirements, check valves and backflow valves be located in proximity of either side of a riverbank.<sup>87</sup> Ms. Kothari added that for purposes of calculating and developing mitigation, reclamation and construction plans, 100-year flood plans were utilized.<sup>88</sup>

#### Landowner Intervenor Witnesses

Landowner Intervenors offered the pre-filed direct testimony of 61 Nebraska Landowners, all of which were accepted into the record subject to specific objections and evidentiary rulings of the Hearing Officer. As stated before, only those landowner witnesses that other parties desired to cross-examine were called to testify orally at the hearing. Ten (10) Landowner Intervenors were called to testify and were subject to cross-examination. Landowner Intervenors also offered the testimony of two (2) other

<sup>84</sup> See Exhibit KXL-9 at p. 1.

<sup>85</sup> TR 638:9-25.

<sup>86</sup> TR 663:21 - 665:6.

<sup>87</sup> TR 673:1 - 675:21.

<sup>88</sup> TR 677:13 - 678:22.

non-landowner witnesses, only one of which was subject to cross-examination at the hearing.

Mr. Arthur Tanderup, an owner of farmland in Antelope County, testified at the hearing. Mr. Tanderup's direct testimony in this matter, subject to certain objections, was accepted into the record as Exhibit LO-148. Mr. Tanderup testified that he and his wife conduct no-till, irrigated farming raising corn, soybeans, rye, certain other cover crops, and native corn.<sup>89</sup> Mr. Tanderup testified about his concerns related to the proposed pipeline construction on his land as it relates to compaction of his soil, topsoil loss, wind and water erosion, and the source of any additional soil that will be brought in to fill the trench, during and after construction of the pipe.<sup>90</sup> Mr. Tanderup also testified he was concerned about the increased post-construction temperature of soil near the pipeline adversely affecting his crops by potentially damaging roots and causing increased insect activity.<sup>91</sup> Additionally, Mr. Tanderup discussed his irrigation and domestic wells and his concerns regarding ground water.<sup>92</sup> Mr. Tanderup also testified regarding his concerns about additional liability insurance, decreased value of the land, property tax issues, and the inconvenience of maintenance activities conducted on his land during the life of the pipeline.<sup>93</sup> Mr. Tanderup confirmed a portion of the Ponca Removal Trail crosses his land.<sup>94</sup>

Ms. Jeanne Crumly, a Holt County landowner, testified at the hearing. Ms. Crumly's direct testimony in this matter, subject to certain objections, was accepted into the record as Exhibit LO-44. Ms. Crumly testified that she and her husband conduct no-till, irrigated farming raising corn, soybeans, hay, and potatoes.<sup>95</sup> Ms. Crumly discussed her concerns about the pipeline proposed to be built across her land and its impact on the erodible and permeable soils of their farm and their irrigation systems.<sup>96</sup> Ms. Crumly also expressed concern about topsoil loss, wind and water erosion, and protecting the farm's domestic and irrigation wells.<sup>97</sup>

Landowner Intervenors also called Susan Dunavan, a York County landowner to testify. Ms. Dunavan's direct testimony in

<sup>89</sup> TR 718:7-16 and 723:7-18.

<sup>90</sup> TR 723:4-10; 725:3-25; 728:2-6; 730:8-17.

<sup>91</sup> TR 734:14 - 740:7.

<sup>92</sup> TR 744:6-25.

<sup>93</sup> TR 747:12 - 748:12

<sup>94</sup> TR 752:1-3 and 755:6-7.

<sup>95</sup> TR 765:12-20.

<sup>96</sup> TR 766:17-25 and 768:21 - 769:25.

<sup>97</sup> TR 774:9 - 776:8.

this matter, subject to certain objections, was accepted into the record as Exhibit LO-52. Ms. Dunavan testified that she and her husband own 80 acres of dryland pasture over which the Preferred Route of the pipeline would cross. Ms. Dunavan stated they are attempting to restore the land back to native prairie.<sup>98</sup> Ms. Dunavan testified that she is concerned about the increased temperature around the pipeline negatively affecting prairie plants and making the soil drier. She further expressed concern about the use of subcontractors by Keystone to construct the pipeline, the decommissioning of the pipeline, and the potential impacts on their domestic well also used to water cattle.<sup>99</sup>

Ms. Bonny Kilmurry, a Holt County landowner, offered testimony at the proceeding. Ms. Kilmurry's pre-filed direct testimony in this matter, subject to certain objections, was accepted into the record as Exhibit LO-71. Ms. Kilmurry testified she and her husband use the land, through which the pipeline is proposed to pass, to support a cow-calf operation and as pastureland and for haying. Ms. Kilmurry expressed concern about the pipeline running through the sub-irrigated meadows located on her property that have water very close to the surface of the ground and the highly erodible hills that are susceptible to blowouts and erosion.<sup>100</sup> Ms. Kilmurry also discussed her concerns with wells on the property that are near the proposed route and have a high water table.<sup>101</sup>

Ms. Diana Steskal, a Holt County landowner, offered testimony at the proceeding. Ms. Steskal's pre-filed direct testimony in this matter, subject to certain objections, was accepted into the record as Exhibit LO-145. Ms. Steskal testified that her land is worked by a tenant who conducts no-till, irrigated, farming on the land raising wheat, corn, soybeans, edible beans, and popcorn.<sup>102</sup> Ms. Steskal testified that the route of the pipeline crosses her property and expressed general concern about the natural resources of her farm, the sandy porous soil, her pivot irrigation, the pipeline remaining underground after its useful life, and the ground not freezing around the pipeline.<sup>103</sup>

Landowner Intervenors also called Mr. Robert Allpress, a Keya Paha County landowner, to testify on their behalf. Mr. Allpress's pre-filed direct testimony, subject to certain objections, was

<sup>98</sup> TR 784:9-23.

<sup>99</sup> TR 791:19 - 792:9; 794:2 - 795:21.

<sup>100</sup> TR 803:25 - 804:17 and 810:11-19.

<sup>101</sup> TR 813:22 - 816:17.

<sup>102</sup> TR 867:8-18.

<sup>103</sup> TR 870:25 - 874:22.

accepted into the record as Exhibit LO-1. Mr. Allpress testified he owns approximately 900 acres of ranch land on the eastern border of Keya Paha County through which the routes of the pipeline is proposed to run.<sup>104</sup> Mr. Allpress testified he had observed a bald eagle nest in the area of the proposed route of the pipeline near his property and has observed whooping cranes in the area. Mr. Allpress testified he is concerned many plants and animals will be endangered if the pipeline is built in that area of Keya Paha County.<sup>105</sup> Mr. Allpress expressed concern about the fragile sandy soil that is susceptible to blow-outs and slides.<sup>106</sup> In response to Commissioner questioning, Mr. Allpress described hill slides that can occur from heavy rains exposing bare dirt and roots that take years to recover.<sup>107</sup> Mr. Allpress also testified that members of both the Yankton Sioux and the Ponca Tribe have been on his property and identified culturally significant sites, including remains of encampments and a burial site.<sup>108</sup>

Mr. Andy Grier, a Holt County landowner, also offered testimony on behalf of the Landowner Intervenors. The pre-filed direct testimony of Mr. Grier, subject to certain objections, was accepted into the record as Exhibit LO-155. Mr. Grier is a member of TMAG Ranch, LLC with management decision authority. The proposed route of the KXL pipeline will cross the Holt County ranch.<sup>109</sup> Mr. Grier testified the ranch is directly bordered by the Niobrara River and expressed concerns regarding the proposed river crossing, the high bluffs that run along the river in the area where the pipeline is proposed to cross and soil erosion from land clearing that will also occur with construction. Mr. Grier further expressed concerns regarding the proximity of the pipeline to his wells that supply his house and other water needs on the ranch.<sup>110</sup>

Landowner Intervenors called Mr. Frank Morrison, an Antelope County landowner, to testify at the hearing. Mr. Morrison filed direct testimony in this matter that was accepted, subject to certain objections, into the record as Exhibit LO-100. Mr. Morrison and his wife farm, producing popcorn, edible beans and peanuts on the land that the proposed Preferred Route of the pipeline would cross.<sup>111</sup> Mr. Morrison expressed concern about the 65 irrigation wells located on his property, stating the static water level in

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<sup>104</sup> TR 879:17-23.

<sup>105</sup> TR 880:3 - 881:21.

<sup>106</sup> TR 884:14 - 885:1.

<sup>107</sup> TR 900:18 - 902:22.

<sup>108</sup> TR 888:2 - 889:14.

<sup>109</sup> See Exhibit LO-155 at pp. 1-2.

<sup>110</sup> TR 906:13 - 908:17.

<sup>111</sup> TR 916:17-21.

the wells is 15 feet below the surface of the ground.<sup>112</sup> Mr. Morrison stated water from the wells was used in processing popcorn and dry, edible beans. He stated the proposed pipeline route runs approximately a mile and a half from his processing facility, bisecting Mr. Morrison's property almost in half.<sup>113</sup>

Mr. Robert Krutz, a landowner in Antelope County, also offered testimony on behalf of Landowner Intervenors. Mr. Krutz's pre-filed direct testimony, subject to certain objections, was accepted into the record as Exhibit LO-73. The proposed route of the pipeline lies across Mr. Krutz's property where he and his wife operate a natural beef operation and raise corn and soy beans. Mr. Krutz testified that he was concerned the pipeline construction on his property could put his natural beef classification at risk.<sup>114</sup> Mr. Krutz expressed additional concerns about his water supply, potential soil erosion, and revegetating the construction site to support his cattle.<sup>115</sup>

Landowner Intervenors called Mr. Rick Hammond, a tenant farmer of land located in York County, to testify. Mr. Hammond pre-filed direct testimony in this matter that was accepted into the record, subject to certain objections, as LO-60. The proposed pipeline would cross the land that Mr. Hammond farms. Mr. Hammond testified that he raises seed corn on the land and is concerned about the impact of the pipeline construction on the productivity of his crop and was concerned that the land could not be returned to pre-construction condition.<sup>116</sup>

Dr. Michael O'Hara, a College of Business Administration professor at the University of Nebraska at Omaha, also offered testimony on behalf of Landowner Intervenors. Dr. O'Hara pre-filed direct testimony in this matter that was accepted into the record as Exhibit LO-189. Dr. O'Hara teaches in the areas of law and economics and has particular expertise in estimating damages in a litigation context, called forensic economics.<sup>117</sup> Dr. O'Hara was retained by the Landowner Intervenors to do an analysis of the economic impact of the proposed pipeline in Nebraska and to review Dr. Goss's socioeconomic report. Dr. O'Hara disagreed with the conclusions of Dr. Goss regarding sales taxes, noting that the pipeline would depreciate out after fifteen (15) years, meaning property taxes realized by counties after that time would be zero.

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<sup>112</sup> TR 913:22 - 914:4.

<sup>113</sup> TR 921:4 - 922:13.

<sup>114</sup> TR 925:4 - 926:17.

<sup>115</sup> TR 927:11 - 928:24.

<sup>116</sup> TR 948:17 - 950:23.

<sup>117</sup> TR 825:23 - 826:4.

Dr. O'Hara also discussed income and sales/use taxes and other economic consequences to Nebraska, concluding mostly negative economic impacts to Nebraska from the construction and presence of the pipeline in the State.<sup>118</sup> Dr. O'Hara testified that in his opinion the mere presence of a pipeline would decrease the value of property by approximately 15 percent.<sup>119</sup>

Dr. O'Hara stated that his analysis included a review of the "hedonic value" of the affected real estate, concluding that the pipeline would "reduce the emotional attitude of property owners towards their property."<sup>120</sup> In response to cross-examination questions, Dr. O'Hara confirmed that he did not evaluate or analyze the reports of other government agencies, including the DOS or the NDEQ regarding the economic benefits to Nebraska and the U.S. from the pipeline.<sup>121</sup> Upon questioning by Commissioners, Dr. O'Hara confirmed he did an analysis of the property taxes received from the project on a county by county basis, and estimated it was around \$100,000 per county per year.<sup>122</sup> Dr. O'Hara stated pipelines can act as both economic barriers, by steering potential development away from the pipeline since landowners can't build on top of the pipeline, and a magnet in some areas increasing employment around things like a pumping station.<sup>123</sup>

#### Cultural Intervenors Witnesses

The Cultural Intervenors offered the pre-filed direct testimony of two (2) witnesses, both of which were accepted into the record with specific objections and evidentiary rulings of the Hearing Officer. Both Cultural Intervenor witnesses were called for purposes of cross-examination at the hearing.

Mr. Jason Cooke, a member of the Yankton Sioux Tribe Business and Claims Committee, the executive body of the Yankton Sioux Tribe ("YST") testified on behalf of the Cultural Intervenors. Mr. Cooke's pre-filed direct testimony was accepted onto the record as Exhibit CUL-25. Mr. Cooke testified that the proposed route of the pipeline in Nebraska runs through territory recognized by the YST as traditional territory of the YST.<sup>124</sup> Mr. Cooke testified that his tribe's sacred cultural resources would be irreparably harmed

<sup>118</sup> Exhibit LO-189, Attachment 2.

<sup>119</sup> *Id.* and TR 829:16-18.

<sup>120</sup> TR 849:24 - 851:8.

<sup>121</sup> TR 835:2 - 836:10.

<sup>122</sup> TR 844:14 - 845:2.

<sup>123</sup> TR 857:23 - 858:11.

<sup>124</sup> See Exhibit CUL-25 at pp. 1-2.

by construction of the pipeline.<sup>125</sup> He asserted that cultural resources are disturbed by digging under a site, whether or not a cultural resource sustains physical damage.<sup>126</sup> Mr. Cooke also argued that injury to, or loss of, such resources would mean psychological and cultural harm to tribal members.<sup>127</sup>

Mr. Shannon Wright, the Tribal Historic Preservation Officer for the Ponca Tribe of Nebraska, offered testimony on behalf of the Cultural Intervenors. Mr. Wright's pre-filed direct testimony was accepted into the record as Exhibit CUL-19. Mr. Wright testified about the historical and cultural significance of the Ponca Removal Trail, observing that the Ponca Removal Trail is also important non-Tribal Nebraskans, as evidenced by official efforts to formally recognize the Trail.<sup>128</sup> Mr. Wright noted that both the Preferred Route and the Mainline Alternative Route would cross the Ponca Removal Trail and opined that construction of the proposed pipeline would damage or destroy parts of the Trail and cultural resources located along the trail.<sup>129</sup>

Mr. Wright also testified regarding the cultural sites on the Allpress land, that he had personally observed. Mr. Wright conducts cultural surveys on behalf of the Ponca Tribe and surveyed the Allpress land. Mr. Wright testified that the artifacts found on the Allpress land show that the tribes once inhabited the area and the earth lodge depressions observed indicate longer-term habitation areas. Artifacts found were stone presses, spearheads, arrowheads, and other stone tools. Mr. Wright testified that the depressions were located in an area overlooking a bluff toward a river, consistent with the standard practice of the tribes in that area.<sup>130</sup> He also expressed concern about the fact that Keystone had not completed required cultural surveys along many miles of the Preferred Route and the Mainline Alternative Route.<sup>131</sup> He stated his belief that additional cultural resources would be found if the Ponca Tribe was able to complete surveys of entire Preferred Route and Mainline Alternative Route.<sup>132</sup>

On cross-examination, Mr. Wright agreed that his concerns regarding the Ponca Removal Trail would be alleviated if the Applicant conducted the cultural surveys identified in the

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<sup>125</sup> *Id.* at p. 6.

<sup>126</sup> *Id.* at p. 2.

<sup>127</sup> *Id.* at pp. 6-8 and TR 982:4-19.

<sup>128</sup> Exhibit CUL-19 pp. 9-11.

<sup>129</sup> *Id.* at pp. 12-16.

<sup>130</sup> TR 1050:17 - 1053:10.

<sup>131</sup> Exhibit CUL-19 p. 9.

<sup>132</sup> *Id.*

Programmatic Agreement ("PA") correctly.<sup>133</sup> He also agreed that Keystone has time to complete cultural surveys prior to construction of the proposed pipeline.<sup>134</sup> Mr. Wright confirmed that the Ponca had been invited by DOS to consult on the Keystone XL Project, but no consultation had occurred since the FSEIS was released.<sup>135</sup> Mr. Wright further testified that the, is not contained on a state or federal list of historical sites, however, the Ponca Tribe has made DOS and Keystone aware of the Trail and provided information on its location.<sup>136</sup> Mr. Wright further stated that sites not included on state and federal lists of historical sites can still be important sites with spiritual meaning and in the public interest to protect.<sup>137</sup> Mr. Wright testified that nine (9) members of the Ponca Tribe died along the Trail of Tears in 1877 during the journey from Nebraska to Oklahoma. He stated that five (5) of those remains have not been discovered and it is possible that those remains might be unearthed during construction of the pipeline.<sup>138</sup>

#### Natural Resources Intervenors Witnesses

The Natural Resources Intervenors offered the pre-filed direct testimony of three (3) witnesses, all of which were accepted into the record with specific objections and evidentiary rulings of the Hearing Officer. Only one (1) Natural Resources Intervenor witness was called for purposes of cross-examination at the hearing. The deposition testimony of the remaining witnesses was offered into the record for purposes of cross-examination and re-direct examination pursuant to a stipulated agreement between the Natural Resources Intervenors and the Applicant.<sup>139</sup>

Dr. Paul Johnsgard, a University of Nebraska-Lincoln professor of biological sciences emeritus, offered testimony on behalf of the Natural Resources Intervenors. Dr. Johnsgard's testimony was accepted into the record as Exhibit NR-1, with specific objections and evidentiary rulings of the Hearing Officer.<sup>140</sup> Dr. Johnsgard testified he concentrated his research on the comparative biology of several major bird groups, with special emphasis in his research on the migratory birds of the Great

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<sup>133</sup> TR 1054:19 - 1055:3.

<sup>134</sup> TR 1055:4-7

<sup>135</sup> TR 1055:24 - 1057:6; 1084:19 - 1085:20.

<sup>136</sup> TR 1056:13-20; 1058:1-20.

<sup>137</sup> TR 1076:7-22.

<sup>138</sup> TR 1079:11 - 1081:10.

<sup>139</sup> See Exhibits KXL-61 and KXL-62.

<sup>140</sup> Natural Resources Intervenors also filed a correction to Dr. Johnsgard's direct testimony that was accepted into the record as Exhibit NR-2.



Plains, including whooping cranes.<sup>141</sup> Dr. Johnsgard stated whooping cranes are one of the rarest groups of birds with only approximately 400 remaining in the wild.<sup>142</sup> Dr. Johnsgard testified that his main area of concern related to the KXL pipeline project is the additional overhead electric transmission lines that will need to be constructed for operation of the pipeline. He explained that transmission lines are especially dangerous to whooping cranes as they fly about 30 to 40 feet off the ground and due to poor forward-looking vision, collide with powerlines, killing the crane.<sup>143</sup> Dr. Johnsgard further testified that the proposed route of the pipeline would be within the primary migration corridor of the whooping crane and any additional transmission lines would pose a potential threat. He stated the risk to the cranes from the transmission lines for the pipeline project is small.<sup>144</sup> Dr. Johnsgard recommended that devices be placed on the transmission lines to get the attention of the cranes to assist in avoiding collisions.<sup>145</sup>

#### Economic Intervenor Witnesses

The Economic Intervenors offered the pre-filed direct testimony of two (2) witnesses, both of which were accepted into the record. Only one (1) of the witnesses was called for purposes of cross-examination at the hearing.

Mr. David L. Barnett, an International Representative assigned to the Pipeline and Gas Distribution Department for the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO ("UA"), offered testimony on behalf of the Economic Intervenors. Mr. Barnett's testimony was accepted into the record as Exhibit ECO-1. Mr. Barnett testified about the positive economic impacts of using union labor on the Keystone XL Project.<sup>146</sup> He stated UA has worked with TransCanada on several recent projects and he estimated UA could expect 564 jobs for its members on the construction of the Keystone XL Pipeline Project.<sup>147</sup> On cross-examination, Mr. Barnett testified that there was no contract between UA and Keystone for the Keystone XL Project.<sup>148</sup>

<sup>141</sup> See Exhibit NR-1 at pp. 1-2.

<sup>142</sup> TR 998:4-10 and TR 1012:2-14.

<sup>143</sup> TR 1000:10 - 1001:8.

<sup>144</sup> TR 1001:14 - 1002:3 and TR 1028:3-8.

<sup>145</sup> TR 1014:20 - 1016:7.

<sup>146</sup> See Exhibit ECO-25 at p. 1.

<sup>147</sup> *Id.* at pp. 10-11.

<sup>148</sup> TR 1092:11-13.

Keystone Rebuttal Witnesses

Keystone pre-filed the rebuttal testimony of six (6) witnesses. Four of the six (6) also filed direct testimony, the remaining two (2) only filed rebuttal testimony in this matter. Of the six (6) rebuttal witnesses only two (2) were cross-examined at the hearing.

Ms. Erin Salisbury, one of the Environmental Project Managers for the Keystone XL Pipeline Project, offered rebuttal testimony on behalf of the Applicant. Ms. Salisbury's rebuttal testimony was accepted into the record as KXL-14. Ms. Salisbury testified she has responsibility to manage the Applicant's cultural resource efforts in Montana, South Dakota, and Nebraska. Ms. Salisbury generally testified regarding the PA for the Keystone XL Project found in the FSEIS, including the Record of Consultation and the Unanticipated Discoveries Plan.<sup>149</sup> Ms. Salisbury attached a copy of the PA to her rebuttal testimony.<sup>150</sup> Ms. Salisbury testified that every eligible cultural site encountered thus far in Nebraska had been addressed by avoidance.<sup>151</sup> Ms. Salisbury confirmed that Keystone had not completed cultural surveys along the Mainline Alternative route submitted with the application.<sup>152</sup> Ms. Salisbury also testified that Keystone proposed to conduct traditional cultural surveys of 100 percent of the route, even though such surveys are not required by federal regulations.<sup>153</sup> She further testified that the only areas that have not already been surveyed are those where the survey team had not been permitted access.<sup>154</sup> She stated field survey crews that surveyed the pipeline routes were typically composed of the three to six qualified archeologists and a tribal monitor.<sup>155</sup> Ms. Salisbury testified that although the Ponca Removal Trail was not officially recorded as an archeological resource in Nebraska, however, Keystone was able to complete a field survey, accompanied by a tribal monitor, at one location where the Preferred Route crosses the Trail.<sup>156</sup> Ms. Salisbury stated that no historic properties were identified during that survey.<sup>157</sup>

Upon cross-examination, Ms. Salisbury testified that Keystone was not a part of the consultation between the DOS and the identified tribes with historic interest along the Preferred

<sup>149</sup> See Exhibit KXL-14 at pp. 2-5.

<sup>150</sup> *Id.*, See Exhibit 1 attached to Exhibit KXL-14.

<sup>151</sup> TR 1124:12-14.

<sup>152</sup> TR 1108:7-18.

<sup>153</sup> KXL-14, p. 3: 6-50.

<sup>154</sup> *Id.* at 4:74-75.

<sup>155</sup> *Id.* at p. 4:72-74.

<sup>156</sup> *Id.* at pp. 2:31-34; 5:85-91.

<sup>157</sup> *Id.* at p. 5:91-92.

Route. She stated she was not familiar with the details of which tribes were consulted, when and how they were consulted, and which tribes had participated in any cultural surveys.<sup>158</sup> Ms. Salisbury stated that the DOS would have talked with any members of the Ponca Tribe and hired any tribal monitors, Keystone was not responsible for that and did not directly contact the Ponca Tribe.<sup>159</sup>

Mr. Rick Perkins, a Keystone XL Pipeline Project Manager in charge of logistics and services for the project, testified on behalf of Keystone. Mr. Perkin's rebuttal testimony was accepted into the record as KXL-15. Mr. Perkins's testimony dealt exclusively with workforce camps, with Mr. Perkins stating that to the extent Keystone determines workforce camps are necessary for the construction of the project, he would be responsible for the construction and oversight of those camps. Mr. Perkins testified that a contractor, Target Logistics Management, LLC, has been hired by Keystone to operate any workforce camps.<sup>160</sup> Upon cross-examination, Mr. Perkins stated that the contractor, not Keystone, would employ the pipeline workers and be responsible for conducting drug screening and testing of workers.<sup>161</sup> Mr. Perkins further stated that the Applicant intended to meet with local law enforcement, but had not yet done so in Nebraska.<sup>162</sup> Mr. Perkins testified that the Department of Transportation requires pre-employment drug testing of all pipeline workers.<sup>163</sup>

#### O P I N I O N   A N D   F I N D I N G S

In 2011, the Nebraska Legislature enacted the Major Oil Pipeline Siting Act<sup>164</sup>, giving the Commission authority to review the route of a proposed major oil pipeline and determine if the route is in the public interest. First and foremost, we must emphasize the limited scope and the narrowness of the authority given to the Commission by the Legislature in the Siting Act. The Commission is limited to a review of the proposed route only. The Commission is not to determine whether or not the pipeline project, or the pipeline itself, should be built. Neither is the Commission free to consider the energy security of the U.S., the character of the owner/operator of the pipeline, the Applicant's ownership structure, the origin and destination of the product to be shipped through the pipeline, or the legislative wisdom of eminent domain.

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<sup>158</sup> TR 1114:16 - 1115:24.

<sup>159</sup> TR 1178:4-17.

<sup>160</sup> Exhibit KXL-15 at pp. 1-2.

<sup>161</sup> TR 1186:12-23.

<sup>162</sup> TR 1187:24 - 1188:5.

<sup>163</sup> TR 1191:17-25.

<sup>164</sup> Neb. Rev. Stat. §§ 57-1401 - 57-1413 (2016 Cum. Supp.).

The Legislature already determined and stated in the Siting Act that, "The construction of major oil pipelines in Nebraska is in the public interest of Nebraska and the nation to meet the increasing need for energy."<sup>165</sup>

Additionally, the Legislature further narrowed the Commission's review of the proposed routes by expressly prohibiting the Commission from evaluating safety considerations, including the risk or impact of spills or leaks from the major oil pipeline, when making its determination on the routes.<sup>166</sup> Many inside and outside of this proceeding have urged the Commission to broaden our review to include spills and advised us that our authority under the Siting Act should not be so limited regarding safety. However, while we understand the passion and concerns surrounding this project, in an analysis of the Siting Act provisions, we can draw no other conclusion than that the Commission is not permitted to weigh such potential spills, leaks, or similar risks for any purpose in its analysis. The Legislature made the decision that safety considerations in connection with interstate pipeline projects are federally preempted and, therefore, prohibited the Commission from considering such issues in making its decision.<sup>167</sup> In the Siting Act, the Legislature has given the Commission the limited responsibility of determining whether the route of the pipeline is in the public interest.

#### Public Interest

The Commission must first consider what is meant by the "public interest". The Siting Act gives little to no direction or interpretation on what standard is to be used by the Commission to determine if the public interest requirement included in the Siting Act is satisfied by an applicant. Therefore, without clear direction, it is up to the Commission to determine what the public interest analysis should be under the Siting Act.

The responsibility for determining the public interest is not foreign to the Commission. Many Nebraska Supreme Court cases discuss the public interest standard in the context of the Commission. In *In re Application No. 30466* the Supreme Court stated, "All the powers and jurisdiction of the Public Service Commission must be found within the constitutional provision creating it. This provision should not be construed so narrowly as to defeat its purpose. Rather, it should be liberally construed to

<sup>165</sup> Neb. Rev. Stat. § 57-1403(3).

<sup>166</sup> Neb. Rev. Stat. § 57-1407(4).

<sup>167</sup> Neb. Rev. Stat. § 57-1402(2).

effectuate the purpose for which the commission was created, which is primarily to serve the public interest."<sup>168</sup> More specific to construction of "public interest", the Nebraska Supreme Court has also stated, "determination of what is consistent with public interest or public convenience and necessity, is one peculiarly for determination of the [Public Service Commission]."<sup>169</sup>

The idea of the public interest determination being unique to the Commission is repeated consistently throughout case law regarding interpretation of public interest. In *Robinson v. National Trailer Convoy, Inc.*, the Court stated, "This determination [of public interest] by the Commission is a matter peculiarly within its expertise."<sup>170</sup> In *Application of Greyhound Lines, Inc.*, "The public interest is one that is peculiarly for the determination of the commission,"<sup>171</sup> And again, "The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Public Service Commission."<sup>172</sup>

The Legislature has frequently tasked the Commission with conducting public interest determinations within specific statutory framework. When determining whether to issue certificates of authority to intrastate motor carriers, the Commission is directed to determine the public interest by considering if the proposed services are, "designed to meet the distinct need of each individual customer or a specifically designated class of customers."<sup>173</sup>

When determining whether two or more regulated motor carriers may consolidate, we are directed, "If . . . the commission finds that the transaction proposed will be consistent with the public interest and does not unduly restrict competition and that the applicant is fit, willing, and able to properly perform the proposed service, it may enter an order approving and authorizing such consolidation."<sup>174</sup>

Pursuant to the Telecommunications Regulation Act<sup>175</sup>, the Commission must weigh the public interest in making a decision on

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<sup>168</sup> *In re Application No. 30466*, 194 Neb. 55, 230 N.W.2d 190 (1975).

<sup>169</sup> *Application of E & B Rigging & Transfer Inc.*, 191 Neb. 714, 217 N.W.2d 813 (1974).

<sup>170</sup> *Robinson v. National Trailer Convoy, Inc.*, 188 Neb. 474, 197 N.W.2d 633 (1972), *In re Application of Northwestern Bell Tel. Co.*, 223 Neb. 415, 390 N.W.2d 495 (1986).

<sup>171</sup> *Application of Greyhound Lines, Inc.*, 209 Neb. 430, 308 N.W.2d 336 (1981).

<sup>172</sup> *ATS Mobile Tel., Inc. v. Nw. Bell Tel. Co.*, 213 Neb. 403, 330 N.W.2d 123 (1983).

<sup>173</sup> *Neb. Rev. Stat. § 75-311(2)*.

<sup>174</sup> *Neb. Rev. Stat. § 75-318*.

<sup>175</sup> *Neb. Rev. Stat. §§ 86-101 - 86-165*.

disputed terms of railroad/telecommunications carrier crossing agreements. We are directed to consider safety, engineering, and access requirements of the railroad carrier as such requirements are prescribed by the Federal Railroad Administration and established rail industry standards.<sup>176</sup> In Section 86-165, in determining whether to approve or reject an application to sell a telephone exchange, the Commission, "shall consider the protection of the public interest," and other factors including the adequacy of the telephone service, the reasonableness of telephone rates, the provision of public safety services, taxes paid by the company, and the company's ability to provide modern services. The Commission is even given authority to impose conditions on the approval of an application that the Commission, "deems necessary to ensure protection of the public interest pursuant to the criteria set forth in this subsection."<sup>177</sup>

In the State Natural Gas Regulation Act, the Commission is given authority to determine if proposals submitted by jurisdictional utilities or metropolitan utilities districts to enlarge or extend its service territory is in the public interest. The Commission must determine public interest by considering the economic feasibility of the extension or enlargement, the impact the enlargement will have on the existing and future natural gas ratepayers, whether the extension or enlargement contributes to the orderly development of natural gas utility infrastructure, whether the extension or enlargement will result in duplicative or redundant natural gas utility infrastructure, and whether the extension or enlargement is applied in a nondiscriminatory manner.<sup>178</sup>

It would seem reasonable based on these statutes, that any public interest analysis depends much on the context of the statutory scheme in which it resides. This is borne out by the Supreme Court. In discussing the Commission's interpretation of the public interest in *Wells Fargo Armored Serv. Corp. of Neb. v. Bankers Dispatch Corp.*, the Court held, "'Consistent with the public interest' within a statute governing contract carrier permit applications means that the proposed contract carrier service does not conflict with the legislative policy of the state in dealing with transportation by motor vehicles."<sup>179</sup> The Nebraska Supreme Court finding was consistent with a similar finding by the U.S. Supreme Court, that the words "public interest" in a

<sup>176</sup> Neb. Rev. Stat. § 86-164(2)(a).

<sup>177</sup> Neb. Rev. Stat. § 86-165(2).

<sup>178</sup> Neb. Rev. Stat. § 66-1863 and Neb. Rev. Stat. § 66-1860.

<sup>179</sup> *Wells Fargo Armored Serv. Corp. of Neb. v. Bankers Dispatch Corp.*, 186 Neb. 261, 182 N.W.2d 648 (1971).

federal regulatory statute take meaning from the purpose of the regulatory legislation.<sup>180</sup>

Therefore, it seems reasonable to conclude that a public interest determination is uniquely within the Commission's expertise making the Commission especially suited to establish the standard for the public interest review under the Siting Act. However, we must do so within the context of the statutory framework established by the Legislature and in such a way that does not conflict with the legislative policy and intent behind the Act. The Legislature specifically lays out the purposes of the Siting Act,

(1) The purposes of the Major Oil Pipeline Siting Act are to:

(a) Ensure the welfare of Nebraskans, including protection of property rights, aesthetic values, and economic interests;

(b) Consider the lawful protection of Nebraska's natural resources in determining the location of routes of major oil pipelines within Nebraska;

(c) Ensure that a major oil pipeline is not constructed within Nebraska without receiving the approval of the commission under section 57-1408;

(d) Ensure that the location of routes for major oil pipelines is in compliance with Nebraska law; and

(e) Ensure that a coordinated and efficient method for the authorization of such construction is provided.<sup>181</sup>

Therefore, keeping these stated purposes firmly in mind, the Commission turns to its evaluation of the public interest of the proposed routes. While the Siting Act places the burden on an applicant to establish a proposed route will serve the public interest, it also mandates the Commission in making such a determination, to evaluate eight specific issues, again not to include safety considerations. The eight (8) areas the Commission is directed to evaluate are:

(a) Whether the pipeline carrier has demonstrated compliance with all applicable state statutes, rules, and regulations and local ordinances;

<sup>180</sup> *Nat'l Ass'n for Advancement of Colored People v. Fed. Power Comm'n*, 425 U.S. 662, 96 S. Ct. 1806, 48 L. Ed. 2d 284 (1976).

<sup>181</sup> *Neb. Rev. Stat.* § 57-1402.

- (b) Evidence of the impact due to intrusion upon natural resources and not due to safety of the proposed route of the major oil pipeline to the natural resources of Nebraska, including evidence regarding the irreversible and irretrievable commitments of land areas and connected natural resources and the depletion of beneficial uses of the natural resources;
- (c) Evidence of methods to minimize or mitigate the potential impacts of the major oil pipeline to natural resources;
- (d) Evidence regarding the economic and social impacts of the major oil pipeline;
- (e) Whether any other utility corridor exists that could feasibly and beneficially be used for the route of the major oil pipeline; and
- (f) The impact of the major oil pipeline on the orderly development of the area around the proposed route of the major oil pipeline.
- (g) The reports of the agencies filed pursuant to subsection (3) of this section; and
- (h) The views of the governing bodies of the counties and municipalities in the area around the proposed route of the major oil pipeline.<sup>182</sup>

#### Views of the Counties and Municipalities

The Commission shall evaluate, "the views of the governing bodies of the counties and municipalities in the area around the proposed route of the major oil pipeline."<sup>183</sup> The Commission sent letters soliciting input on the proposed routes to 18 counties<sup>184</sup> and 32 cities<sup>185</sup> along both the Preferred Route and the Mainline Alternative Route. Six counties responded, with Boone, Nance,

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<sup>182</sup> *Id.*

<sup>183</sup> *Neb. Rev. Stat. § 57-1407(4) (h).*

<sup>184</sup> Letters were sent to the counties of Antelope, Boone, Boyd, Butler, Colfax, Fillmore, Holt, Jefferson, Keya Paha, Madison, Merrick, Nance, Platte, Polk, Saline, Seward, Stanton, and York.

<sup>185</sup> Letters were sent to the cities of Albion, Atkinson, Butte, Central City, Clearwater-Ewing, Columbus, Crete, David City, Elgin, Fairbury, Friend, Fullerton, Geneva, Genoa, Henderson, Madison, Neligh, Newman Grove, Norfolk, O'Neill, Orchard, Schuyler, Seward, Spencer, Springview, St. Edward, Stanton, Stromsburg, Sutton, Wisner, and York.



Saline, and Seward counties expressing support for the project and Boyd and Holt counties expressing opposition to the project. Two cities responded, Seward and Steele City, both were favorable toward the project.<sup>186</sup>

#### State Agency Reports

The Commission shall evaluate, "the reports of the agencies filed pursuant to subsection (3) of this section."<sup>187</sup> The Siting Act gives the Commission the ability to request reports from the Department of Environmental Quality, the Department of Natural Resources, the Department of Revenue, the Department of Transportation, the Game and Parks Commission, the Nebraska Oil and Gas Conservation Commission, the Nebraska State Historical Society, the State Fire Marshal, and the Board of Educational Lands and Funds, for information within the respective agency's area of expertise relating the impact of the proposed pipeline. The information could include the opinions of the agency on the advisability of approving, denying, or modifying the location of the route of the pipeline. The Commission specifically requested opinions and information regarding both the Preferred Route and the Mainline Alternative Route from all nine (9) agencies listed in the statute.

All nine (9) agencies responded to the Commission and no agency expressed any concerns or opinion regarding approval, denial, or relocating of either the Preferred or Mainline Alternative Routes.<sup>188</sup>

#### Compliance with Applicable State Statutes, Rules and Regulations and Local Ordinances

The Commission shall evaluate, "whether the pipeline carrier has demonstrated compliance with all applicable state statutes, rules, and regulations and local ordinances."<sup>189</sup> In its application, Keystone stated it has complied with all currently applicable state statutes, rules and regulations, and local ordinances. The Applicant noted that at this stage of the process, some requirements are not yet applicable and it is premature to comply with certain requirements. Keystone committed to obtain all required permits and comply with all state laws, regulations, and local ordinances, and zoning requirements, when appropriate within

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<sup>186</sup> See Exhibit PSC-5.

<sup>187</sup> Neb. Rev. Stat. § 57-1407(4)(g).

<sup>188</sup> See Exhibit PSC-4.

<sup>189</sup> Neb. Rev. Stat. § 57-1407(4)(a).

the project.<sup>190</sup> It further provided a plan for compliance with the Nebraska Oil and Pipeline Reclamation Act<sup>191</sup>, as required by Commission Rules.<sup>192</sup> All the commitments of Keystone in its application were affirmed by Mr. Tony Palmer at the hearing.<sup>193</sup>

Intervenors argue Keystone failed to provide evidence of compliance with all statutes, rules, regulations, and local ordinances. Landowner Intervenors point out that Keystone has no fully executed road haul agreements with the counties.<sup>194</sup> Dr. O'Hara expressed concerns about no commitment from the Applicant to comply with private setbacks and/or covenants, as these are not necessarily a statute, rule, regulation, or local ordinance.<sup>195</sup>

To expect an applicant to list each and every law, rule, regulation, or ordinance they have, or may have to comply with during a construction project of this magnitude seems impractical. We note the inclusion in this provision of the Siting Act of the word "applicable", which is defined as, "fit, suitable, pertinent, related to, or appropriate; capable of being applied."<sup>196</sup> Arguably, some provisions of state, county and local law are unable to be complied with by the Applicant prior to construction. This seems even more the case in relation to required permits at all different levels. Indeed, it would be impossible in many cases for an applicant to determine which permits to obtain prior to knowing what route, if any, may be approved by the Commission. The Applicant has promised it will comply, absent any reason to doubt the commitments of the Applicant, the Commission is satisfied they have demonstrated compliance with applicable state and local provisions.

#### Evidence of Impact upon Natural Resources

The Commission shall evaluate, "evidence of the impact due to intrusion upon natural resources and not due to safety of the proposed route of the major oil pipeline to the natural resources of Nebraska, including evidence regarding the irreversible and irretrievable commitments of land areas and connected natural resources and the depletion of beneficial uses of the natural

<sup>190</sup> Exhibit KXL-1, §9.8, p. 35 & §12.0, p.38.

<sup>191</sup> *Neb. Rev. Stat.* §§ 76-3301 - 76-3308.

<sup>192</sup> 291 NAC 9, § 23.02A8.

<sup>193</sup> Exhibit KXL-2, at pp. 4-5; TR 162:20 - 163:3; 186:15 - 187:21.

<sup>194</sup> Exhibit LO-148 at pp. 6-9.

<sup>195</sup> TR 841:2-23.

<sup>196</sup> *Black's Law Dictionary* 65 (The Publisher's Editorial Staff ed., Abr. 6<sup>th</sup> ed., West Group 1991).

resources."<sup>197</sup> The Applicant states that it has taken significant steps to minimize intrusions on natural resources. The Preferred and Mainline Alternative Routes were both routed to avoid the Nebraska Department of Environmental Quality ("NDEQ") defined area of the Nebraska Sandhills.<sup>198</sup> During this proceeding there was significant dispute and discussion about what constitutes the "Sandhills", how they are both defined and delineated. Landowner Intervenor maintain both routes still cross fragile, sandy soils that are part of the Sandhills.<sup>199</sup> However, the geographic area defined as Sandhills by NDEQ has been avoided by both routes.

The Applicant states the Preferred Route was specifically designed after surveys and refinement from input from different agencies including NDEQ and DOS to avoid major water bodies, fragile soil areas, recreation areas, and special interest areas such as Wetland Reserve Program land and Nebraska Land Trust tracts.<sup>200</sup> The Preferred Route avoids most areas of native prairie and avoids Nebraska state-managed wildlife management areas which provide protected habitat.<sup>201</sup> The Applicant testimony emphasized most of the impacts are temporary in nature and not major. Keystone points out that a large percentage of the land crossed is agricultural in nature making impacts on vegetation short term.<sup>202</sup> TransCanada witness, Mr. Beaver, opined that the construction of the pipeline would not significantly increase the impermeability of the soil.<sup>203</sup>

The Applicant further testified that through the federal review process conducted by DOS and the U.S. Fish and Wildlife Service ("USFWS"), in consultation with the Nebraska Game and Parks Commission, the Preferred Route was designed to minimize impacts to wildlife.<sup>204</sup> Only one federally-listed species, the American burying beetle was listed by DOS and USFWS as likely to be adversely affected by the proposed project, and the effects were stated to not likely jeopardize the continued existence of the burying beetle.<sup>205</sup> The DOS Biological Assessment found other federally-listed species would not be adversely affected by the project. This includes the whooping crane.<sup>206</sup>

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<sup>197</sup> Neb. Rev. Stat. § 57-1407(4)(b).

<sup>198</sup> See Exhibit KXL-1, §3, p.19.

<sup>199</sup> TR 766:16-25; 870:21-25; 909:5-15.

<sup>200</sup> See Exhibit KXL-1, § 9.13, pp. 36-37; Exhibit KXL-20, pp.8-9, 71-72.

<sup>201</sup> See Exhibit KXL-11, p.5; Exhibit KXL-19, p. 723.

<sup>202</sup> See Exhibit KXL-1, §§ 13-18, pp. 38-63; Exhibit KXL-5, pp. 1-3; Exhibit KXL-6, pp. 1-4; Exhibit KXL-7, pp. 2-3; Exhibit KXL-8, pp. 1-4; Exhibit KXL-11 through KXL-13.

<sup>203</sup> Exhibit KXL-11, pp. 1-2.

<sup>204</sup> See Exhibit KXL-21 and KXL-22.

<sup>205</sup> See Exhibit KXL-22, p. 70; Exhibit KXL-21, pp. 170-171.

<sup>206</sup> See Exhibit KXL-21; Exhibit KXL-22.

The Landowner Intervenors focused on the negative impacts of the proposed construction to the soil, water, habitat, and the aquifer, and the difficulties in returning the land to pre-construction state. Regarding soil they point out the potential negative impacts of soil erosion, loss of topsoil, soil compaction, an increase in large rocks in the topsoil, and soil contamination from construction of the project.<sup>207</sup> Regarding water they discuss increased sedimentation in surface water, degraded aquatic habitat, changes in channel morphology and stability, decreases in river bank stability, and erosion of river banks.<sup>208</sup> Landowner Intervenors also point out there are 2,398 wells within one mile of the Preferred Route, in comparison to 105 wells within one mile along the pipeline route through South Dakota.<sup>209</sup> Landowner Intervenors also cite to Keystone's application regarding the project's impact on wetland habitats and causing changes in wetland hydrology.<sup>210</sup> In regards to the aquifer under the State of Nebraska, they state there may be a temporary draw down on the aquifer during construction.<sup>211</sup>

The Landowner Intervenors also point out that Keystone doesn't quantify what it means by "significant" when it states that it does not anticipate any significant overall effects to crops and vegetation from the heat generated by the pipeline underground during normal operations.<sup>212</sup> Additionally, Landowner Intervenors express concern over Keystone's statement that it takes upwards of fifty (50) years for new trees to mature and no trees will be able to be replanted over where the pipeline is buried.<sup>213</sup>

Natural Resources Intervenors also expressed concerns on the impacts to natural resources of the pipeline project, specifically citing to landowner testimony regarding the impact of the heat generated underground by the operation of the pipeline and the fear there will be irreparable damage to the land and soil from the heat.<sup>214</sup> Other landowner expressed concern noted by Natural Resources Intervenors about irreparable harm from the Applicant's failure to restore their land to pre-construction condition.<sup>215</sup>

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<sup>207</sup> TR 368:10 - 369:9,11.

<sup>208</sup> TR 373:6 - 374:12.

<sup>209</sup> TR 566:1-10.

<sup>210</sup> Exhibit KXL-1, p. 41.

<sup>211</sup> TR 372:13-20.

<sup>212</sup> TR 562:15 - 563:9.

<sup>213</sup> Exhibit KXL-1, p. 42.

<sup>214</sup> TR 756:21 - 757:5; 874:7-19.

<sup>215</sup> TR 788:5-22; 928:10 - 929:13.

Natural Resources Intervenors point to the testimony of Mr. Allpress, a landowner in Keya Paha County, regarding the fragile nature of his soil and the significant risks of hills slides causing damage to plants and risk to wildlife in the area, and his belief that Keystone has chosen a route with significant issues that could cause irreparable harm by building through Keya Paha County.<sup>216</sup>

Experts for the Natural Resources Intervenors testified that due to the soil characteristics along the route, in their opinion, the proposed pipeline construction will decrease soil permeability and increase soil compaction post construction, and present very real challenges in restoring the soil, causing a decrease in agricultural productivity both during construction and after.<sup>217</sup> They further testified that placing a pipe in the ground with a shallow aquifer could alter flow paths of groundwater and irreversibly and irreparable impact local springs and subsurface flows.<sup>218</sup> Finally, Natural Resources Intervenors spent significant time discussing the impact of the additional powerlines necessary to supply the operation of the pipeline to the endangered whooping cranes. The migratory path of the whooping cranes passes through Nebraska and besides researchers and conservationists, thousands of people visit Nebraska each year to view the migrating Sandhill cranes and catch a glimpse of the rare whooping cranes.<sup>219</sup> While they admit the impact will be small on the whooping cranes, they maintain one bird killed on such a small population is a high price to pay.<sup>220</sup>

The Commission is very cognizant of the fact that opening a trench that entirely bisects the State of Nebraska from North to South to insert a 36-inch pipe will have impacts to the natural resources of the state, including soil, water, and wildlife. It is impossible to complete such a project without impacts. There is no utopian option where we reap the benefits of an infrastructure project without some effects. We are tasked with weighing those impacts against the potential benefits. We do not take lightly the concerns of the landowners, other Nebraskans, and our fellow Commissioners. We share many of the concerns expressed regarding the soils in Keya Paha, Holt, Boyd, and Antelope Counties. However, we also are very cognizant of the benefits to Nebraska, especially to the counties along the route. With economic concerns abounding, tax revenues from a project such as this can help ease burdened landowners, counties, school districts, and subdivisions by

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<sup>216</sup> TR 883:19 - 885:1.

<sup>217</sup> Exhibit NR-3, pp. 5-6, 8, 13.

<sup>218</sup> Exhibit NR-4, p. 9.

<sup>219</sup> Exhibit No. NR-1, p.10.

<sup>220</sup> TR 1001:14 - 1002:3 and TR 1028:3-8.

raising the potential of future property tax relief via expansion of the local tax base. Regardless of the infrastructure project proposed, weighing the concerns with the benefits is a difficult analysis.

#### Evidence of Methods to Minimize or Mitigate Potential Impacts

The Commission shall evaluate, "evidence of methods to minimize or mitigate the potential impacts of the major oil pipeline to natural resources."<sup>221</sup> The Commission heard significant amounts of testimony regarding Keystone's Construction Mitigation and Reclamation Plan<sup>222</sup> ("CMRP"). Keystone testified the CMRP measures are based upon best practices within the pipeline construction industry.<sup>223</sup> The CMRP contains plans that outline multiple procedures developed by the Applicant in consultation with NRCS and University of Nebraska experts.<sup>224</sup> The plans include procedures for soil protection, water-crossing methods, vegetation reclamation, and aquatic resources protection to lessen the impacts on natural resources and return the land disturbed to pre-construction conditions as close as reasonably possible.<sup>225</sup> The Applicant also provided Construction Reclamation ("Con/Rec") Units for the Keystone XL Project and a Noxious Weed Management Plan that are intended to work in conjunction with the CMRP. Keystone also committed to developing and implementing a Construction Spill Prevention, Control, and Countermeasure Plan, which will be finalized when construction contractors are engaged for the project.<sup>226</sup> The CMRP also contains provisions for daily monitoring by an Environmental Inspector to review the construction for compliance with federal, state, and local requirements. Pursuant to the plan, inspectors will have the authority to stop the work on the pipeline if appropriate.<sup>227</sup>

The Applicant testimony also addressed additional measures to mitigate and reclaim the areas along the construction including deep ripping to relieve compaction from construction traffic, and placing the pipeline so it crosses surface water in the direction of the flow of groundwater to minimize impacts on groundwater flows.<sup>228</sup>

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<sup>221</sup> Neb. Rev. Stat. § 57-1407(4)(c).

<sup>222</sup> Exhibit KXL-1, Appendix D.

<sup>223</sup> Exhibit KXL-11, p. 3.

<sup>224</sup> TR 465:22 - 467:6.

<sup>225</sup> See Exhibit KXL-1, § 8, pp. 22-30 and Appendix D.

<sup>226</sup> See Exhibit KXL-24 through KXL-26, KXL-5, pp. 2-3 and KXL-1, § 9.11, p.36.

<sup>227</sup> Exhibit KXL-1, Appendix D, § 2.2, p.96.

<sup>228</sup> Exhibit KXL-11, pp. 1-3; Exhibit KXL-12, pp. 2-3.

Landowner Intervenor noted that the CMRP offered by Keystone has not been updated since 2012.<sup>229</sup> Further, they emphasized that while Keystone offered its plan for mitigation and reclamation, it can deviate from the plan at its own discretion.<sup>230</sup> Further, Landowner Intervenor argue that many of the statements offered by Keystone in the application are not defined or measured. For example, there is no definition of "to the extent possible" when describing mitigation and reclamation processes, and no specificity on how and who would determine if reclamation had occurred to the extent possible after construction.<sup>231</sup>

Keystone admitted under cross-examination that they did not study the soil on the property owned by the Landowner Intervenor and it is more challenging to control erosion in fine, sandy soils.<sup>232</sup> Landowner Intervenor testified that the soil in Keya Paha, Holt & Antelope counties is often sandy and fine soil.<sup>233</sup>

The success or failure of mitigation and reclamation efforts can often be in the eye of the beholder and enter into a realm where reasonable mind may differ on the best course, the successfulness of the process, and whether further steps may or may not be in order. It appears the procedures put forth by the Applicant conform to industry standards and are reasonable. However, we also are very aware that there are unique challenges in many areas of Nebraska. Therefore, we find that the Natural Resources Conservation Service (NRCS), is an excellent resource for the Applicant and landowners, and in the event a dispute arises regarding reclamation and mitigation efforts in connection with the Keystone XL Pipeline Project, that NRCS be consulted and their advice followed. Therefore, while we stop short of ordering consultation and compliance with NRCS opinion and advice, we strongly urge that NRCS be consulted regarding reclamation and mitigation disputes and their advised course of action be undertaken by the Applicant and affected landowner, as circumstances may dictate.

#### Evidence Regarding Economic and Social Impacts

The Commission shall evaluate, "evidence regarding the economic and social impacts of the major oil pipeline."<sup>234</sup> Both economic and social impacts were discussed extensively by all parties to the proceeding. We will discuss each area distinctly

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<sup>229</sup> TR 403:15 - 404:25.

<sup>230</sup> TR 401:5-24.

<sup>231</sup> TR 418:18 - 420:23.

<sup>232</sup> TR 350:20-25.

<sup>233</sup> TR 766:16-25; 870:21-25; and 909:5-15.

<sup>234</sup> Neb. Rev. Stat. § 57-1407(4)(d).

below, however, we are aware there is overlap between the two areas.

### Economic Impact

Keystone offered evidence of the socio-economic impacts of the project. Keystone cited positive tax effects, estimating the tax benefits would exceed \$200 million during construction and the first 15 years of operation of the pipeline.<sup>235</sup> Keystone also cited to the findings of both NDEQ and DOS that there would be significant, positive tax effects for Nebraska and the U.S.<sup>236</sup> Additionally, Keystone confirmed through Tony Palmer, that it would not make any claims for deductions, exemptions, credits, refunds, or rebates under the Nebraska Advantage Act in connection with the Keystone XL project.<sup>237</sup>

Keystone also provided testimony that concluded the project would increase employment in Nebraska, estimating 727.6 jobs supported per year from 2018 to 2034, resulting in \$.7 billion in labor income during the same period.<sup>238</sup> The DOS also found that the entire project, not just in Nebraska, would support around 42,100 jobs and contribute approximately \$34 billion to the U.S. Gross Domestic Product.<sup>239</sup>

Keystone highlighted the finding in the FSEIS that the operation of the project was not expected to have an impact on residential or agricultural property values and the findings of NDEQ, of hundreds of millions of dollars of new economic activity, millions of dollars in annual property tax revenue, and hundreds of jobs for Nebraskans.<sup>240</sup>

The Landowner Intervenor expert disputed the findings and numbers provided by Keystone. Dr. O'Hara estimated that fewer than ten (10) jobs would be created by the project and Landowner Intervenor included evidence that as of May 19, 2017, Keystone had created 34 permanent jobs and one temporary job.<sup>241</sup> Dr. O'Hara pointed out Keystone would only pay property taxes for fifteen (15) year and zero property taxes after 2034. Dr. O'Hara testified that in his opinion net decreases in property taxes over the lifetime of the pipeline and losses of state income tax revenues

<sup>235</sup> Exhibit KXL-1, Appendix H, Table 3.8, p. 358.

<sup>236</sup> Exhibit KXL-19, pp. 25-26 and KXL-20, pp.8-9, 26-27.

<sup>237</sup> TR 157:22 - 158:5.

<sup>238</sup> Exhibit KXL-1, Appendix H.

<sup>239</sup> Exhibit KXL-19, p. 25.

<sup>240</sup> Id. at p. 26 and Exhibit KXL-20, pp. 8-9, 26-27.

<sup>241</sup> Exhibit LO-244, pp. 9-10.



would offset any temporary sales tax increases. He estimated counties would have other increased operating expenses due to the project and the pipeline would potentially limit future economic development. He additionally estimated a 15% decrease in land value with the pipeline on the property.<sup>242</sup> Landowner Intervenors noted that Keystone did not rebut their assertions that their land would suffer from decreased productivity and pointed out that Keystone had not conducted any studies on topsoil and the effects of replacement on productivity and crop yields along the route.<sup>243</sup>

The Economic Intervenors testified that UA has approximately 1,500 Nebraska members, LiUNA has around 600 Nebraska members, and IBEW represents around 371 members in Nebraska.<sup>244</sup> The Economic Intervenors testified that the socio-economic well-being of their members depends on projects like the Keystone XL project. They went on to testify that the Keystone XL Project will create benefits for union members as well as Nebraska localities and residents. Economic Intervenor witness David Barnett estimated the Project would create about \$30 million in wages and \$20 million in fringe benefit contributions in Nebraska, employing approximately 564 UA members.<sup>245</sup> Witness Gerhard testified that the project would create approximately 100 jobs for LiUNA members and approximately 80 jobs for IBEW members for the pumping stations alone. All employed members would receive wages and contributions to retirement and health care benefits for themselves and their families.<sup>246</sup> Economic Intervenors testified that construction jobs like those created by the Keystone XL Project are vital to Nebraska families who depend on construction jobs for their livelihood.<sup>247</sup>

Mr. Gerhard further estimated that while some of the created jobs are for the period of construction, other permanent jobs would also be created for IBEW members as a result of transmission/distribution demands for the operation of the pipeline.<sup>248</sup> Mr. Gerhard testified the jobs will be permanent in nature due to the increase in electrical capacity and demand requiring more service to transmission lines and additional generation stations.<sup>249</sup> Finally, Mr. Gerhard discussed the increased economic activity brought into the State of Nebraska due to increased demand for food, lodging, recreation, and other daily

<sup>242</sup> Exhibit LO-189, pp. 22-35.

<sup>243</sup> TR 344:6-21; 949:22 - 950:25; 766:16 - 768:2; 810:9-22; 402:25 - 403:14.

<sup>244</sup> Exhibit ECO-1, pp. 1-2; Exhibit ECO-2, p. 1.

<sup>245</sup> Exhibit ECO-1, pp. 11-12.

<sup>246</sup> Exhibit ECO-2, p. 5.

<sup>247</sup> *Id* at p. 6.

<sup>248</sup> *Id*.

<sup>249</sup> *Id*.

needs of workers on the pipeline, spurring local business and creating positive economic activity and tax revenue.<sup>250</sup>

While much of the economic testimony was conflicting, what wasn't disputed was that Nebraska will accrue economic benefit from the Keystone XL Project. The exact nature of those benefits and how to quantify those benefits was strongly disputed. It is clear Nebraska will reap some level of benefit from the investment and activity that is associated with the pipeline construction and operation. The counties where the pipeline is situated will benefit from increased property tax revenues. This is especially true as the Applicant has committed to not utilize the tax benefits it may be entitled to under the Nebraska Advantage Act. We find the Applicant shall comply with its commitment to not use the Nebraska Advantage Act in any form in connection with the Keystone XL Project. Finally, the fact that the property tax revenues may only be for a certain number of years, and there may be other costs offsetting the revenues somewhat, does not eliminate the economic benefits that will be realized by Nebraska families, communities, counties, and the state as a whole from the pipeline project.

#### Social Impact

The discussion in the proceeding regarding social impacts of the proposed pipeline project focused primarily on two (2) areas, the preservation of cultural resources and impacts from the temporary construction camp that may be established in Holt County.

The public interest with respect to the preservation of cultural resources<sup>251</sup> along the pipeline route is a matter of federal law, and governed by the National Historic Preservation Act ("NHPA").<sup>252</sup> The DOS is the lead federal agency for review of the proposed pipeline and tribal consultation under NHPA.<sup>253</sup> Pursuant to Section 106 of NHPA, the DOS, the Nebraska State Historical Preservation Officer, Keystone, and various other state and federal agencies entered into an amended PA in December, 2013.<sup>254</sup>

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<sup>250</sup> *Id.* at pp. 6-7.

<sup>251</sup> NDEQ defined cultural resources as, "physical evidence of culturally and historically valued aspects of the human and natural environment on the landscape." KXL-020, p. 28.

<sup>252</sup> 56 U.S.C. 300101 *et seq.*

<sup>253</sup> KXL-019, p. 271.

<sup>254</sup> KXL-014, pp. 7-160 and See Exhibit PSC-6, Nebraska State Historical Society Letter, March 5, 2017.

Among other things, the PA requires Keystone to avoid, whenever feasible, adverse effects on known cultural resources.<sup>255</sup> Adverse effects that cannot be avoided must be minimized and mitigated.<sup>256</sup> In the event of an unanticipated discovery of cultural resources, all construction activities in the vicinity of the discovery must cease.<sup>257</sup> Construction may only resume after such resources are evaluated and are protected to the extent required by the PA and NHPA.<sup>258</sup> The PA also includes a Tribal Monitoring Plan, the objective of which is to minimize the potential for adverse effects from the Project activities on previously unidentified historic properties.<sup>259</sup> The Tribal Monitoring Plan calls for tribal monitors with experience in the identification of cultural resources to monitor construction along the pipeline route.<sup>260</sup> Under the PA, tribal monitors are to be selected by the individual tribes, with construction activities in a given location observed by tribal monitors who are representatives of tribes claiming historical use of that land.<sup>261</sup>

The Cultural Intervenors provided testimony highlighting both YST and Ponca concerns regarding sacred cultural resources that would be irreparably harmed by construction of the pipeline and the resulting psychological and cultural harm to tribal members.<sup>262</sup> Mr. Wright testified specifically about the Ponca concerns about the project impacts to the Ponca Removal Trail.<sup>263</sup> Mr. Wright also testified that his concerns about cultural surveys would be alleviated if such surveys were conducted properly under the PA.<sup>264</sup> He also agreed that Keystone has time to complete cultural surveys prior to construction of the proposed pipeline.<sup>265</sup>

The DOS invited a total of 84 Indian tribes to consult on the proposed pipeline project on a government-to-government basis, pursuant to Section 106 of NHPA.<sup>266</sup> Both the Ponca Tribe of Nebraska and the Yankton Sioux Tribe of South Dakota are listed in the PA as consulting parties.<sup>267</sup> The record shows numerous contacts between the Ponca and the DOS, including numerous telephone calls, letters, emails and six consultation meetings, prior to execution

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<sup>255</sup> KXL-023, p 13, 16-19

<sup>256</sup> KXL-023, p. 12, 52.

<sup>257</sup> KXL-023, p 13, 16-19.

<sup>258</sup> KXL-023, p. 18.

<sup>259</sup> KXL-023, p. 92.

<sup>260</sup> KXL-023, p. 16-17, 92, 97-104.

<sup>261</sup> *Id.*

<sup>262</sup> Exhibit CUL-25 pp. 6-8.

<sup>263</sup> Exhibit CUL-19 pp. 9-10.

<sup>264</sup> TR 1054:23-1055:3.

<sup>265</sup> TR 1055:4-7

<sup>266</sup> KXL-014, p. 118.

<sup>267</sup> KXL-014, p. 120-21.

of the PA.<sup>268</sup> Likewise, the record shows the YST also participated in six consultation meetings, with a greater number of letters, telephone calls and emails.<sup>269</sup> However, the record is unclear on the Cultural Intervenors' participation in the consultative process after the execution of the amended PA by various parties in December 2013.<sup>270</sup>

The Applicant's CMRP contains an express commitment by Keystone to comply with any PA in order to minimize the impact on cultural sites along the route and address any unanticipated cultural discoveries during construction.<sup>271</sup> The application states that Keystone intends to avoid historical properties or culturally significant sites by rerouting the pipeline "to the extent practicable."<sup>272</sup> Moreover, the CMRP states that if an unanticipated discovery of cultural resources occurs, all construction activities will be halted within a 100-foot radius of the discovery.<sup>273</sup> The site will be protected and work will not resume until all mitigation measures are complete under the PA and approval is received from the relevant agencies.<sup>274</sup> Moreover, the record reflects that Keystone has already made changes to the Preferred Route in order to accommodate cultural sites and that every eligible cultural site encountered thus far in Nebraska has been addressed by avoidance.<sup>275</sup>

Taken as a whole, the record demonstrates Keystone has complied with federal law and made alterations of the route to accommodate culturally important sites and it is reasonable to expect that Keystone will continue to do so. Further, DOS will continue to require compliance with the PA and NHPA. Therefore, we think it fair to conclude that the Applicant's compliance with the PA and NHPA will help to assure that the route of the pipeline will be in the public interest.

The Cultural Intervenors also expressed concern regarding the potential negative social impacts from the temporary construction camp that may be established in Holt County. Mr. Cooke testified that a pipeline construction camp in proximity to the YST reservation and casino in South Dakota would raise the threat of harm to tribal members due to violence or other criminal

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<sup>268</sup> KXL-023, p. 145.

<sup>269</sup> *Id.* at p. 149.

<sup>270</sup> TR 1056:13 - 1057:25; 1084:19 - 1085:20.

<sup>271</sup> KXL-1, Appendix D, p. 105.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> TR 1124:12-14; TR 621:19 - 622:1.

activity.<sup>276</sup> However, the information in the record regarding construction camps states that Keystone would require camp residents to comply with a written code of conduct, the violation of which would potentially result in expulsion.<sup>277</sup> The construction camps will be fenced, with a guardhouse manned 24 hours a day, seven (7) days a week, an additional roving security guard, supplemented by off-duty law enforcement personnel, and video surveillance.<sup>278</sup> Only authorized personnel will be granted access to the work camp and no visitors will be allowed.<sup>279</sup> All construction camps would be permitted, constructed, and operated consistent with applicable county, state, and federal regulations.<sup>280</sup>

In addition, information included in the record states that the social ills that impact communities due to an influx of large numbers of workers are generally associated with "boom towns, longer-term operations such as oil drilling operations where a largely male workforce may be residing for months or years."<sup>281</sup> Construction camps on the Keystone project would be temporary, expected to exist for approximately six to eight months, and located away from communities.<sup>282</sup>

Based on the foregoing, we do not believe that a temporary construction camp in a location with insufficient lodging to accommodate the number of workers necessary to build the pipeline would be contrary to the public interest.

#### Impact of the Pipeline on Orderly Development of the Area

The Commission is directed to evaluate, "the impact of the major oil pipeline on the orderly development of the area around the proposed route of the major oil pipeline."<sup>283</sup> The Applicant states the land along the routes is primarily agricultural and located in rural areas, and the land will remain agricultural after construction is complete. The presence of the pipeline after construction is completed, will not interfere with normal agricultural operations.<sup>284</sup> Landowner Intervenors raised concerns regarding the impact of the pipeline on irrigation and drain tiles after construction. The Applicant responded that Keystone's CMRP

<sup>276</sup> Exhibit CUL-25 pp. 8-10.

<sup>277</sup> KXL-19 p. 1321.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at pp. 2205-2206.

<sup>280</sup> *Id.* at p. 343.

<sup>281</sup> *Id.* at p. 2205.

<sup>282</sup> *Id.*

<sup>283</sup> *Neb. Rev. Stat. § 57-1407(4)(f)*.

<sup>284</sup> Exhibit KXL-1, §21, pp. 69-70; Exhibit KXL-3, pp. 2-3.

addresses the mitigation measures that will be utilized to address impacts on irrigations systems. The CMRP, Keystone points out, also includes specific plans for repair of underground drainage tiles and methods to resolve with the landowner any repair costs.<sup>285</sup>

Landowner Intervenor argue that Keystone did not conduct a study on the impact of the pipeline on development. They argue electricity demands for the pipeline pumping stations could affect irrigators in the area, but offered no evidence in this regard.<sup>286</sup> Dr. O'Hara testified that the presence of the pipeline could act as a physical barrier and steer potential development away from the location of the pipeline, as no building can occur over the buried pipeline.<sup>287</sup>

The land along the proposed route is primarily agricultural in use, and will most likely remain primarily agricultural after any construction is completed. Any future development, such as erecting buildings or other structures, would need to avoid the direct pipeline path. However, similar restrictions on development occur in areas near other infrastructure, i.e., roads, bridges, dams, power lines, etc. The impact on development of the area along the location of the pipeline seems minimal.

#### Existence of Other Utility Corridors

The Commission is also directed to evaluate, "whether any other utility corridor exists that could feasibly and beneficially be used for the route of the major oil pipeline."<sup>288</sup> The term "utility corridor" is not defined in the Siting Act, nor could we find the term used elsewhere in Nebraska statutes. For purposes of a plain meaning analysis, corridor is defined as, "a passageway",<sup>289</sup> and utility is defined as, "equipment or piece of equipment to provide service to the public".<sup>290</sup> So it seems reasonable that the plain meaning of a utility corridor is a passageway for facilities providing public services. It does not appear the Siting Act limits other utility corridors to those containing crude oil pipelines. The Applicant discussed consideration of other utility corridors that included a Nebraska Public Power District high voltage electric transmission line in Knox and Antelope counties and the

<sup>285</sup> Exhibit KXL-24, §§ 4.1, 5, 5.3.

<sup>286</sup> See Landowner Intervenor's Closing Argument, p.7.

<sup>287</sup> TR 857:16 - 858:5.

<sup>288</sup> Neb. Rev. Stat. § 57-1407(4)(e).

<sup>289</sup> Webster's Seventh New Collegiate Dictionary at 187.

<sup>290</sup> *Id* at 978.

Cowboy Trail,<sup>291</sup> a former railroad line, in Rock, Holt, and Antelope counties. The Applicant discarded these routes for various reasons laid out in the application, with which we agree.<sup>292</sup>

The Applicant's proposed Mainline Alternative Route would run near the existing Keystone I pipeline for approximately 95 miles and by the Applicant's own statement, "was developed to maximize the length of co-location with the existing Keystone Mainline pipeline", otherwise referred to as Keystone I, in eastern Nebraska.<sup>293</sup> While it does not 100% co-locate the Keystone I line, the Alternative Mainline Route does utilize an existing utility corridor, the Keystone I Pipeline, for approximately two-thirds of the route through Nebraska. Therefore, the opportunity to utilize at least a portion of an alternative utility corridor does exist.

However, the most frequently discussed alternative utility corridor in this proceeding was one utilizing a route co-locating the entire existing Keystone I Mainline oil pipeline in eastern Nebraska.<sup>294</sup> Such a route would require the entry point from South Dakota be in Cedar County, or over 100 miles east from the current entry point in Keya Paha County. Some in the proceeding dubbed this complete parallel route the "I-90 Route", as it would in theory route the Keystone XL Pipeline further east in South Dakota along Interstate 90 and then parallel Keystone I south through Nebraska. During the DOS Environmental Impact review, the I-90 Route was reviewed for comparison purposes to the route preferred by Keystone.<sup>295</sup>

In 2010, a year before the passage of the Siting Act in Nebraska, South Dakota issued a construction permit to Keystone which allows for the crossing between Nebraska and South Dakota to occur in Keya Paha County.<sup>296</sup> This is the point of entry into Nebraska used by Keystone for all three (3) routes proposed in this proceeding. Many, including our dissenting colleagues, advocate for us to not approve any of the proposed routes before us in this application and instead urge the Applicant to move the entry point out of Keya Paha County. They suggest the idea of co-locating the entire Keystone XL Pipeline with the Keystone I line

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<sup>291</sup> The Cowboy Trail is a former railroad line that was gifted to the State of Nebraska pursuant to the National Trails System Act, 16 USC §§ 1241-1251.

<sup>292</sup> Exhibit KXL-1, §20.2, pp. 65-66.

<sup>293</sup> Exhibit KXL-1, §20.3, pp. 66-67.

<sup>294</sup> See Exhibit KXL-1, §20, pp. 64-70, TR 182:5 - 183:6; TR 545:8-12; TR 546:7-10; Exhibit NR-4, pp. 8-9.

<sup>295</sup> Exhibit KXL-19, pp. 1965-2008.

<sup>296</sup> See Docket No. HP09-001, *In the Matter of the Application By TransCanada Keystone Pipeline, LP for a permit under the South Dakota Energy Conversion and Transmission Facilities Act to construct the Keystone XL Project*, Amended Final Decision and Order; Notice of Entry, (June 29, 2010).

in Nebraska. We have serious concerns about dismissing the decision of our South Dakota neighbors. We are well aware that South Dakota's process is different from the routing approval process utilized by the Nebraska Legislature in the Siting Act. However, to disregard the decision of South Dakota that was made before Nebraska had even enacted the Siting Act, is at best awkward and at least highly questionable. While we understand that our primary focus is clearly the interests of Nebraska, we do not believe it to be in Nebraska's best interest to demand an approach that would result in direct conflict with our northern neighbor. Nebraska shares common goals and interests with other states in the union and we cannot frivolously dismiss the national aspect of this project before us and the decisions of our counterparts in neighboring states.

Ultimately, regardless of the amount of time the I-90 Route was discussed, the discussion is speculative. A route completely paralleling the Keystone I pipeline is not before us in this proceeding. Further, even if we rejected the three (3) routes in front of us, we have no evidence to even make a recommendation that the Applicant pursue the I-90 Route, as we are unable with this evidentiary record to determine whether the I-90 Route is either a feasible or beneficial alternative to what is proposed by the Applicant. Finally, we are unconvinced that this Commission is endowed with the authority under the Siting Act to approve a route that requires the entry point, previously reviewed by other state and federal regulatory bodies, to be moved. The idea of the I-90 Route may sound good in theory, but we do not have the authority to approve it.

#### Proposed Routes

What we do have in front of us is information on three (3) routes from the Applicant, the Preferred Route, the Sandhills Alternative Route and the Mainline Alternative Route. The Applicant selected the route that it preferred, but also included two other alternative routes. All three (3) routes enter Nebraska in Keya Paha County and end at Steele City in Jefferson County.<sup>297</sup>

The Sandhills Alternative Route is the most westerly of the three (3) routes. The Sandhills Alternative Route was the original proposed route of the Keystone XL Pipeline through Nebraska. The route was subsequently modified in consultation with NDEQ after concerns regarding the Sandhills region were raised by Nebraskans.<sup>298</sup> The Sandhills Alternative Route would require 254.9

<sup>297</sup> Exhibit KXL-1, §2, pp. 8-14.

<sup>298</sup> Exhibit KXL-20.



miles of pipe to be built in Nebraska. This route was previously rejected by the State of Nebraska and therefore we also reject this alternative.

The Preferred Route is the route previously reviewed by NDEQ and approved by the Governor. The Preferred Route is located to the east of the Sandhills Alternative Route, having been moved to the east to avoid the NDEQ-identified region of the Sandhills.<sup>299</sup> Based on the NDEQ Final Evaluation Report and the subsequent Governor approval of the Preferred Route, Keystone incorporated the Preferred Route into its 2012 Presidential Permit application.<sup>300</sup> The Preferred Route would extend 275.2 miles from its entry in Keya Paha County to its exit from Nebraska in Steele City. However, Keystone admitted the route was determined by simply drawing a direct line from Hardesty, Alberta, to Steele City, Nebraska, constituting the shortest route between the origin and the destination of the pipeline.<sup>301</sup> However, when concerns were expressed by Nebraskans about a particularly fragile ecological area, the NDEQ-defined Sandhills, the route was moved from the original shortest route, adding approximately 20 miles to the pipeline's length and diverting it away from the Sandhills. But, ultimately, the Preferred Route fails to take advantage of any opportunity to co-locate with the existing utility corridor represented by Keystone I, and therefore we are unable to conclude that the Preferred Route is in the public interest.

The Mainline Alternative Route follows the same route as the Preferred Route for the portion in Northern Nebraska before it diverts further east through Madison County to meet up with the Keystone I Pipeline in Stanton County. It then turns south, co-locating with Keystone I for the remainder of the route to Steele City. With the Alternative Mainline Route, the Keystone XL pipeline would co-locate near the Keystone I Mainline Route for approximately 100 miles for a total route length of 280.5 miles long, which is only 5 miles longer than the Preferred Route. TransCanada's engineer, Ms. Kothari, was clear that the Alternative Mainline Route was a viable and beneficial route, it just wasn't the route Keystone preferred.<sup>302</sup> Further, as noted above, the Mainline Alternative Route was developed by the Applicant to maximize the length of co-location with the existing Keystone I Pipeline.<sup>303</sup> Additionally, in response to the Commission's request, NDEQ completed an analysis of the Mainline

<sup>299</sup> Exhibit KXL-1, Appendix B.

<sup>300</sup> *Id.* at §3, pp. 19-20.

<sup>301</sup> TR 182:24 - 183:6; TR 679:11 - 680:6.

<sup>302</sup> TR 638:8-22.

<sup>303</sup> Exhibit KXL-1, §20.3, pp. 66-67.

Alternative Route, finding the route would have minimal environmental impacts in Nebraska. NDEQ's findings were supported by the mitigation commitments and reclamation procedures included in Keystone's application.<sup>304</sup>

We see many benefits to maximizing the co-location of the Keystone XL Pipeline with Keystone I. It is in the public interest for the pipelines to be in closer proximity to each other, so as to maximize monitoring resources and increase the efficiency of response times. This would also assist emergency responders and others that may be called upon to assist with any issues that may arise with either pipeline.

Additionally, the Alternative Mainline Route impacts fewer miles of the ranges of threatened and endangered species, including the interior least tern, whooping crane, piping plover, Massasauga rattlesnake, river otter, and small white lady's slipper. We particularly note the Alternative Mainline Route would impact 84.6 fewer miles of whooping crane migratory path as compared to the Preferred Route.<sup>305</sup> Other benefits of the Alternative Mainline Route include, but are not limited to, one fewer river crossing, fewer wells within 500 feet of the pipeline, fewer acres of pivot irrigated crop land crossed, fewer crossing of intermittent and perennial streams and rivers, fewer miles of pipeline placed in areas with shallow groundwater, and fewer state highways and natural gas facilities to be crossed.<sup>306</sup>

Keystone cites the additional five (5) miles in length and one (1) additional pumping station as negatives against the Mainline Alternative Route. However, we feel the benefits of maximizing co-location opportunities and utilizing the existing utility corridor that is the Keystone I Mainline Route, outweighs these concerns. The additional twenty (20) miles added to the Preferred Route weighed against avoiding the Sandhills region made the additional miles a beneficial tradeoff. We see a similar situation here, the benefits of the Alternative Mainline Alternative Route outweigh the additional five (5) miles added to the length of the pipeline and a pumping station.

### Conclusion

After careful evaluation and consideration of all the evidence adduced, and the careful weighing of all the issues, factors, and aspects of the proposed routes of the Keystone XL

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<sup>304</sup> See Exhibit PSC-4, Keystone XL Analysis, Report to the Nebraska Public Service Commission, July 2017.

<sup>305</sup> Exhibit KXL-1, Table 2-1, p. 15.

<sup>306</sup> *Id.* at pp. 16-18.

Pipeline, we find that the Alternative Mainline Route is in the public interest and shall be approved.

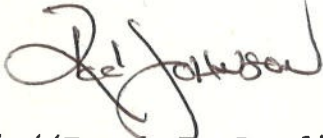
O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that findings and conclusions contained above, be, and are hereby, adopted.

ENTERED AND MADE EFFECTIVE at Lincoln, Nebraska, this 20<sup>th</sup> day of November, 2017.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

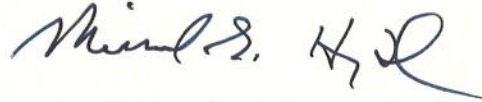


//s//Frank E. Landis  
//s//Tim Schram



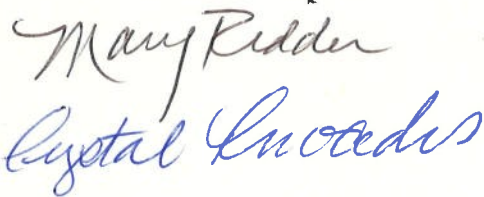
Chairman

ATTEST:



Executive Director

COMMISSIONERS DISSENTING:



Commissioner Johnson, concurring:

Although I join the Majority in concluding that the Mainline Alternative Route of the proposed Keystone XL pipeline is in the public interest, I also write separately to emphasize additional matters of critical importance. Keystone has made quite a few promises to Nebraskans, both in their application and during the course of this proceeding. There should be no doubt that this Commission and the citizens of this State expect TransCanada to keep those promises, and we will be watching to make sure that they do so.

Of greatest importance is Keystone's promise to fully restore the land that will be impacted by construction of the pipeline. Landowner testimony made clear that a successful reclamation process, particularly in Keya Paha, Boyd, and Holt counties, will not be a matter of simply scattering some seed and walking away. Several landowners provided compelling testimony about their own efforts to reestablish vegetation in fragile sandy soils after blowouts, hill slides, or other injuries to the land. The upshot of this testimony is that successful restoration can be a very difficult process, requiring a great deal of time, care, and attention. TransCanada's project manager testified the company has made a "commitment" to properly restore the land so that, "there is no impact."<sup>1</sup> The company must honor that commitment.

The project manager also testified that during construction the pipe will, "be bent to follow the contour of the ground."<sup>2</sup> In future years, however, the shifting Sandhills terrain will be significantly altered by wind, rain and the passage of time. Therefore, even with a minimum initial cover of four feet, parts of the pipeline may become exposed, either slowly due to erosion or suddenly due to blowouts and hill slides. In the event that the pipeline becomes exposed to the elements, Keystone must immediately respond to re-bury the pipe to the required depth and restore the affected land. Keystone's project manager promised that the company will, "continuously monitor this pipeline for its entire length. So any point where you see any erosion or we see any erosion, . . . we can mitigate that and then reseed it, **whatever it requires.**"<sup>3</sup> The company must keep that promise.

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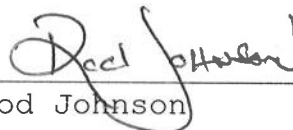
<sup>1</sup> TR 205:16-25.

<sup>2</sup> TR 267:10-11.

<sup>3</sup> TR 271:2 (Emphasis added.)

Keystone's project manager further promised that the company would be accountable for production losses and other costs resulting from pipeline maintenance and damage to the land throughout the useful life of the pipeline. He stated, "even if it's years after construction, then that's our responsibility."<sup>4</sup> The company must abide by that responsibility.

Finally, I fully understand that MOPSA forbids this Commission from considering issues related to pipeline safety. Nonetheless, it is obvious that safety issues are of prime concern to the public regarding to this pipeline. Safety was the number one issue raised at the Commission's four public meetings and in the many thousands of written comments we have received during this process. TransCanada and project advocates have often said that the Keystone XL pipeline will be the safest in history. Nebraskans are counting on that promise, too.



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Rod Johnson  
Commissioner, District 4

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<sup>4</sup> TR 271:19-22.

Commissioner Rhoades, dissenting:

I respectfully dissent. Under the Major Oil Pipeline Siting Act ("MOPSA"), the burden of proof of public good resides with the Applicant.<sup>1</sup> In this case, the Applicant did not meet its burden in many areas, and the Majority should not have approved the Mainline Alternative Route.

Moreover, the Commission failed to protect the due process rights of groups affected by this proceeding. In particular, I am concerned that approval of the Mainline Alternative Route violates the due process rights of the landowners along that route where it deviates from the Preferred Route. These landowners will now have their land taken by the Applicant and they may not even be aware that they were in the path of the approved route, as landowners along the Alternate Mainline Route were never notified by Keystone or the Commission.

The Applicant was required under MOPSA and Rules and Regulations of the Commission to publish notice of the application in a local paper of general circulation for each county along the routes and provide proof of publication to the Commission.<sup>2</sup> No such documentation was received by the Commission and no evidence was presented that would indicate that the additional forty landowners the Applicant said would be impacted along the Mainline Alternative Route are aware they are in the path of the route approved by the Majority.<sup>3</sup> This would violate their due process rights in this proceeding and again demonstrates a failure of the Applicant to meet the requirements of MOPSA and meet the burden of proof.

In addition, I want it noted that I disagreed vigorously with some of the decisions made by the Hearing Officer in this proceeding. Particularly the decisions regarding the limitations placed on the participation of some of the Formal Intervenors. Commission Rule 015.01C states, "A formal intervenor shall be entitled to participate in the proceeding to the extent of his/her express interest in the matter. Such participation shall include, without limitation, presentation of evidence and argument, cross-examination of witnesses and submission of rebuttal evidence."<sup>4</sup>

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<sup>1</sup> Neb. Rev. Stat. § 57-1407(4).

<sup>2</sup> Neb. Rev. Stat. § 57-1405(3) and 291 NAC 9 § 023.02B2.

<sup>3</sup> TR 625:25 - 626:24.

<sup>4</sup> 291 NAC 1 § 015.01C.

While Commission rules do permit consolidation of intervenors, the rules and regulations are clear that this is only to be done if it does not harm the intervenors ability to put forward their case.<sup>5</sup> Forcing the consolidation of the Yankton Sioux Tribe and the Ponca Tribe of Nebraska—who have different language, history, culture, religion and tradition—was inappropriate and in my view a violation of their due process rights. One would not conclude that Germans and Italians are both European and therefore have the same concerns, and such a conclusion should not have been drawn for the Yankton Sioux and Ponca Tribes. Further, the decision to limit the Tribes and environmental groups to one witness each was also inappropriate and a violation of their due process rights. Commission rules clearly state these Intervenor should have had the ability to fully present their case.<sup>6</sup> The Natural Resources and Cultural Intervenor should have had the same standing to fully present their position as the Applicant and Landowners. These decisions were solely those of Hearing Officer Schram and I urged my fellow Commissioners to reconsider the decisions made by the Hearing Officer, to no avail. The Commission failed to consider the rights of the Intervenor in refusing to correct the Hearing Officer.

With regard to the merits of the Commission's decision to select the Mainline Alternative Route, the Applicant provided no evidence to support a finding that this route is in the public interest. The application provides only one page of substantive information about the Mainline Alternative Route and the Applicant concludes the Route will:

1. Result in greater total number of acres disturbed due to increase in route length;
2. Increase the crossing of the ranges of federally listed and endangered species;
3. Increase the crossing of highly erodible soils;
4. Increase the crossing of ecological unusually sensitive areas; and
5. Increase the number of crossing of perennial streams, railroads and total road crossings.
6. Will result in the need for an additional pumping station.<sup>7</sup>

It is clear that the Applicant discarded the Mainline Alternative Route and never intended it to be considered. The focus

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<sup>5</sup> Neb. Rev. Stat. § 84-912.02.

<sup>6</sup> 291 NAC 1 § 015.01C.

<sup>7</sup> Exhibit KXL-1, p.14.

of the federal and state reports was on the Preferred Route. The studies on the impacts of the pipeline conducted by federal and state agencies were done on the Preferred Route and drew no conclusions on the Mainline Alternative Route, even though state agencies were asked to review both the Preferred and Mainline Alternative Routes.

MOPSA requires the location of routes for the major oil pipelines be in compliance with Nebraska law. However, the application lacks sufficient substance to prove that the Applicant has complied with all applicable state statutes, rules, and regulations and local ordinances.<sup>8</sup> No outline, affidavit, or certification was submitted providing proof the Applicant made an effort to ensure it was in compliance.

The Applicant and the Intervenors presented evidence that the pipeline project will cause intrusion upon natural resources during construction, including irreversible and irretrievable commitments of land areas and connected natural resources.<sup>9</sup> Also, Nebraska Department of Environmental Quality ("NDEQ") found in its 2013 Final Report that there would be impacts, including disturbance of topography, loss of access to underlying mineral resources, disturbance of paleontological resources, and potential damage to the pipeline attributable to geological hazards like flooding and landslides.<sup>10</sup> The NDEQ Final Report found a high risk of landslides in the fragile sandy soils of the northern counties. As the Preferred and Mainline Alternative Routes both would enter in Keya Paha County and run through the same northern counties before diverging, the concerns expressed regarding the impacts on these soils is not mitigated by approving the Mainline Alternative Route.<sup>11</sup>

I would also note here that NDEQ in preparing its Final Report stated that the Final Environmental Impact Statement ("FEIS") analyzed a different route than the reroute, which is now called the Preferred Route. Therefore, the FEIS resource impact analysis is not applicable to the Preferred Route or the Mainline Alternative Route. NDEQ also requested additional information from Keystone in several areas, but the requests were dismissed with Keystone stating there was no material difference from the FEIS

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<sup>8</sup> See *Neb. Rev. Stat.* § 57-1402(1)(a).

<sup>9</sup> See *Neb. Rev. Stat.* § 57-1407(4)(b).

<sup>10</sup> Exhibit KXL-20, p.19.

<sup>11</sup> *Id.* at pp. 19-20.



analyzed route and the Preferred Route.<sup>12</sup> Since the Applicant refused to provide this evidence, it failed to fulfill its burden of proof. We know the Mainline Alternative Route contains areas of more highly erodible soils which were not previously reviewed, located in Madison County and north and south of the Platte River Crossing.<sup>13</sup> The NDEQ report also concludes the Mainline Alternative Route directly intersects with the Ogallala Group and crosses the aquifer in Madison, Saline, and Jefferson Counties.<sup>14</sup> The Mainline Alternative Route also increases the number of stream crossings from 25 (along the Preferred Route) to 34.<sup>15</sup> NDEQ also states, given the Mainline Alternative Route is longer and requires an additional pumping station, it will require additional energy inputs and that additional production and consumption will cause additional emissions. While Nebraska is currently in statewide attainment status for the National Ambient Air Quality Standards ("NAAQS"), additional modeling may be required depending on the size of engines required for Keystone's power needs.<sup>16</sup> Finally, NDEQ's determination that the Mainline Alternative Route would have minimal permanent environmental impacts in Nebraska was based on a review of the mitigation commitments and reclamation procedures identified in the application. This determination is consistent with the 2013 NDEQ Report analysis and the U.S. Department of State's ("DOS") 2014 Final Supplemental Environmental Impact Statement ("FSEIS").<sup>17</sup> Accepting NDEQ's 2017 conclusions is problematic because the conclusions relied on two previous reports, neither of which evaluated the Mainline Alternative Route.

Further, because the easements Keystone is seeking with landowners are granted in perpetuity, there is no way for the Commission to conclude that there will not be irreversible and irretrievable commitments of land area and connected natural resources and depletion of beneficial uses. All human-made infrastructure degrades and fails over time. No infrastructure ever designed has lasted for eternity and there is no reason to believe this pipeline will be an exception. Additionally, the Applicant will not provide any specific Material Safety Data Sheet ("MSDS") data until there is an actual spill. Therefore, it is impossible to prepare beforehand for environmental impacts and it

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<sup>12</sup> *Id.* at p. 1511.

<sup>13</sup> Exhibit PSC-4, See Nebraska Dept. of Environmental Quality Keystone XL Analysis, Report to the Nebraska Public Service Commission (July 2017) at p. 6.

<sup>14</sup> *Id.* at pp. 7-9.

<sup>15</sup> *Id.* at p. 10.

<sup>16</sup> *Id.* at p. 11.

<sup>17</sup> See Exhibit PSC-4, Letter from NDEQ, April 20, 2017.

will expose first responders, with limited resources, to unknown chemical compounds they may not have the necessary equipment to contain.<sup>18</sup> The Applicant is required under MOPSA to disclose the contents of the chemicals and product to be transported in the pipeline.<sup>19</sup> They have not fulfilled this obligation according to responses received by NDEQ and therefore again have not met their burden of proof. I am aware the risks and impacts of spills are not to be weighed in the Commission's decision, the information was reviewed by NDEQ, as mandated in MOPSA, and is a part of the record, and therefore worth noting as a potential impact from this pipeline.

No evidence was presented to substantiate that the Applicant will minimize or mitigate potential impacts on natural resources.<sup>20</sup> The Preferred and Mainline Alternative Routes still run through several miles of fragile sandy soil that is difficult to restore and will substantially interfere with regular farming activities of the impacted landowners.<sup>21</sup>

The Applicant also provided insufficient evidence to substantiate any positive economic or social impacts for Nebraska from the project.<sup>22</sup> No project labor agreements or contracts have been entered into by Keystone or TransCanada with any Nebraska labor union or contractor. There was no evidence provided that any jobs created by the construction of this project would be given to Nebraska residents.<sup>23</sup> Additionally, the Applicant didn't provide any evidence that construction of this pipeline would not adversely impact common carriers currently transporting similar products.<sup>24</sup> No information was provided to prove that there will not be a loss of railroad revenue or jobs resulting from the construction of this pipeline. In other areas of Commission jurisdiction, we consider the impact on other carriers offering similar service when making a determination if a specific application is in the public interest. I feel it should be a part of our public interest analysis in this proceeding as well.<sup>25</sup> The short-term increases in property taxes collected will not offset the losses to the overall

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<sup>18</sup> Exhibit KXL-20 at p. 1765.

<sup>19</sup> Neb. Rev. Stat. § 57-1405(2)(e) and 291 NAC 9 § 023.02A5.

<sup>20</sup> See Neb. Rev. Stat. § 57-1407(4)(c).

<sup>21</sup> TR 766:16-25; 870:21-25; 909:5-15 and Exhibit NR-3, pp. 5-6, 8, 13.

<sup>22</sup> See Neb. Rev. Stat. § 57-1407(4)(d).

<sup>23</sup> TR 1092:11-13.

<sup>24</sup> TR 333:2-13.

<sup>25</sup> See *Robinson v. National Trailer Convoy, Inc.*, 188 Neb. 474, 197 N.W.2d 633 (1972), *In re Application of Northwestern Bell Tel. Co.*, 223 Neb. 415, 390 N.W.2d 495 (1986), *Application of Greyhound Lines, Inc.*, 209 Neb. 430, 308 N.W.2d 336 (1981).

value of the land through which the major oil pipeline runs.<sup>26</sup> Further, the limitations in the orderly development and operations on the affected land will result in a loss of land value from the limitations.<sup>27</sup>

The Nebraska Department of Revenue ("NDR") also weighed in on the project, stating in its letter to the Commission that it is difficult to gauge the impact of the project on property taxes collected by counties because the distributed value will be taxed based on the local levy rate for each subdivision and depreciation for personal property will depend on the year the assets are placed into service.<sup>28</sup> NDR goes on to say sales and use taxes would be collected during construction, but what those liabilities will be is unknown and cannot be determined accurately by NDR. With regard to income taxes, there may be some increased tax revenue from workers coming from outside of Nebraska to work on the pipeline construction, because they would be new taxpayers.<sup>29</sup> Presumably, if the jobs were given to Nebraskans, income taxes would remain flat because those Nebraskans are already paying income taxes. NDR was silent on the potential lost income taxes of those currently working in Nebraska's rail industry who may be harmed if construction proceeds. NDR admits the tax liability related to the income of migrant workers is unknown and cannot be determined. Finally, NDR notes that the Applicant is a qualified business under the Nebraska Advantage Act and would be eligible for tax incentives available under the Advantage Act. The tax incentives could include a refund of sales taxes paid and investment and employment credits against income tax. However, it is unknown and unknowable at this time whether TransCanada will apply for benefits for which it is qualified.<sup>30</sup> While the Applicant denies any intention to apply for Nebraska Advantage Act credits, once again the people of Nebraska are being asked to take this on faith without any legal basis for enforcement should the Applicant change its mind. In the event Keystone does apply for said credits, the construction is likely to have a negative economic impact on the state because the gains in tax revenue would be negated by the refunds and credits given to the Applicant.

The Applicant admitted it had not spoken with the Nebraska Native American Tribes.<sup>31</sup> The Applicant only reported DOS had

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<sup>26</sup> Exhibit LO-189, pp. 22-35.

<sup>27</sup> TR 849:24 - 852:15.

<sup>28</sup> See Exhibit PSC-4, Letter from Nebraska Department of Revenue, March 2, 2017.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> TR 1178:4-24.

worked with the Southern Ponca Tribe, who reside in Oklahoma.<sup>32</sup> This is the equivalent of asking a distant relative for permission to do major construction in your backyard. This is as inadequate as it is unreasonable. Additionally, no evidence was presented by the Applicant to negate allegations that work camps established by Keystone to house construction workers will not create a strain on local resources as it relates to fire, police, sanitation, demands for power, and public safety. Furthermore, there was no evidence presented by the Applicant indicating where the work camps would be located and therefore no conclusions can be drawn about the impact they will have on the local economy or resources.

The FEIS notes that the Nebraska portion of the pipeline route could impact the Oregon, California, and Mormon Pioneer National Historic Trails, as well as the Pony Express National Historic Trail.<sup>33</sup> Once again, the Majority has no information from the Applicant about any potential impacts to these historic trails in Nebraska in relation to the Mainline Alternative Route, but it proceeded to approve the route for the Keystone XL Pipeline.

Another utility corridor exists that could feasibly and beneficially be used for the route.<sup>34</sup> The Applicant did not prove that twinning or co-locating the Keystone XL Pipeline with the Keystone I Pipeline in eastern Nebraska was not feasible and beneficial. Rather, Keystone stated it was not their preference to use that corridor.<sup>35</sup> The Applicant did not refute the landowners' argument that using the existing Keystone I corridor would avoid fragile soils, reduce impacts to endangered species, and avoid widespread controversy and opposition to the project.<sup>36</sup>

The application clearly states that the pipeline will impact orderly development of the area around the proposed route of the major oil pipeline.<sup>37</sup> The soils will be difficult to restore and the easements will be maintained in perpetuity. That will place a substantial burden on the landowners who will not be able to build a fence, shed, irrigation pivot, plant a tree, modify grading, and any other number of activities usually granted to property owners along the pipeline route. All development will be prohibited in the easement for infinity, therefore, it will certainly impact orderly development of the land adjacent to the easement.

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<sup>32</sup> TR 1114:16 - 1115:24.

<sup>33</sup> Exhibit KXL-20, p. 1762.

<sup>34</sup> See *Neb. Rev. Stat.* § 57-1402(e).

<sup>35</sup> TR 638:9-25.

<sup>36</sup> TR 541:8 - 553:15.

<sup>37</sup> See *Neb. Rev. Stat.* § 57-1402(f).

Many of the same concerns and issues that I have just raised are also true of the Mainline Alternative Route approved by the Majority. Approving the Mainline Alternative Route did not alleviate or reduce the concerns in any of the areas I discussed above. There was insufficient information provided in this proceeding to substantiate that the Mainline Alternative Route is preferable or in the public interest. The 2013 NDEQ Report reviewed the Preferred Route and did not contain an analysis of the Mainline Alternative Route.<sup>38</sup> While several state agencies were asked by the Commission to provide evaluations of both routes, The Board of Educational Lands and Funds, Department of Natural Resources, Department of Revenue, Department of Roads, Department of Transportation, State Fire Marshall, and The Oil and Gas Commission explicitly or implicitly state that they have reviewed the proposed or Preferred Route with no mention of a review of the Mainline Alternative Route. Nebraska Game and Parks and The State Historical Society sent letters outlining the process for approval, but never directly offered an opinion about approving or disapproving any route. Indeed, all the agencies cited previous reviews of the original Sandhills route and the Preferred Route (as negotiated by the Legislature) but none of them addressed the Mainline Alternative Route.<sup>39</sup> This is likely because the Applicant emphasized it had discarded the Mainline Alternative Route and it was not to be considered.

For all the forgoing reasons, I would not have approved any of the proposed routes contained within Keystone's application and therefore, I dissent.



Crystal Rhoades  
Commissioner, District 2

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<sup>38</sup> See Exhibit KXL-20.

<sup>39</sup> See Exhibit PSC-4.

Commissioner Ridder, dissenting:

I respectfully dissent. The Major Oil Pipeline Siting Act ("MOPSA") directs the Commission to determine if an application for a route through our state is in the public interest. MOPSA also states that the Applicant has the burden of establishing that the proposed route is in the public interest. The Applicant failed to meet this burden in at least three of the eight areas which the Commission was charged with evaluating under Section 57-1407.

#### Impact on Natural Resources and Mitigation Efforts

The Nebraska Department of Environmental Quality ("NDEQ") press release dated December 29, 2011 states that the NDEQ "announced the areas that it considers to be "Nebraska Sandhills" and did so as "relating to the development of an alternative route that avoids the Nebraska Sandhills".<sup>1</sup>

The Final Supplemental Environmental Impact Statement (FSEIS) also states in its Executive Summary, "The proposed route differs from the route analyzed in the 2011 Final Environmental Impact Statement in that it would avoid the environmentally sensitive Nebraska Department of Environmental Quality (NDEQ)-identified Sand Hills Region".<sup>2</sup>

The Applicant addressed what would be done during and following construction to try to mitigate issues caused by their route passing through various soils, yet the unrebutted testimony by landowners is that the route actually does pass through porous, fragile, erodible, sandy soil types which were to be avoided due to several factors, including erosion, long-term difficulty in reestablishing pasture grasses, and when saturated, slide-prone hills.

Several Intervenor Landowners stated during the public hearing that the proposed route is in sandy, fragile soil. Bob Allpress testified, "When we have periods of high rain, the water permeates down to the clay base and provides a liquefying source for the hills to rest on. Just take a piece of the hill here, and it will just break off. And it will slide 50, 60, 100 feet down the hill, depending on how high the hill is."<sup>3</sup> And again, "It takes

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<sup>1</sup> Exhibit KXL-1, Appendix B.

<sup>2</sup> Exhibit KXL-19, ¶ 2.

<sup>3</sup> TR 901:4-11.

years to recover. Some of those are still bare dirt after 5 to 10 years."<sup>4</sup>

Mr. Robert Krutz discussed a heavy rain event in 2012 which produced a flood of water washing through a cut, or draw, on his property, producing a washout. This occurred in the area through which the pipeline is proposed to cross. In response to a question about revegetating the washed out area, Mr. Krutz stated, "No. I mean, with the sandy soil, there's no ... there's no vegetation. Maybe a sparse of a ... well, there's been some leafy spurge come up, which is a noxious weed. But there is very little. And I'd say very little weeds. There's no grass or nothing there, no."<sup>5</sup>

The concerns expressed by these landowners speak to a natural resource intrusion which Nebraska landowners have learned time and again must not occur. The act of reclaiming or repairing damage to these soil types and their accompanying pasture grasses is not nearly as simple a matter as reseeding, nor does reclamation succeed in a matter of a few years. Such an intrusion, over the course of many miles, will deplete the beneficial use of these natural resources.

A table included in the application, which was later amended in the Applicant's rebuttal testimony, states that the Preferred Route would pass through 47.1 miles of highly wind erodible soils, approximately 17% of the route, and 57.4 miles of highly water erodible soils which is around 20.9% of the 275.2 mile Preferred Route.<sup>6</sup> Commission Exhibit PSC-6 included USDA NRCS Soil maps which indicate that 33.9% of the Preferred Route passes through highly erodible soils.<sup>7</sup>

The FSEIS lists highly wind erodible miles as 48.1 and highly water erodible miles as 178 along the Preferred Route.<sup>8</sup> Continuing, the FSEIS states, "In northern Nebraska, the proposed Project route from approximately [mile post] 619 to [mile post] 707 in Boyd, Holt, and Antelope counties would enter an area where the soils tend to be highly susceptible to erosion by wind and often exhibit characteristics of the NDEQ-identified Sand Hills Region."<sup>9</sup> Mile post 619 to mile post 707 is 88 miles.

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<sup>4</sup> TR 902:16-18.

<sup>5</sup> TR 928:12-19.

<sup>6</sup> Exhibit KXL-1, Table 2.1, p. 9.

<sup>7</sup> Exhibit PSC-6, See Soils Characterization Along Keystone XL Routes.

<sup>8</sup> Exhibit KXL-19, p. 592.

<sup>9</sup> *Id.* at p. 593.

All of the testimony and the exhibits referred to above, unrebutted, indicate that neither the Preferred Route nor the Mainline Alternate Route is in the public interest because neither route achieves the avoidance of a sensitive Nebraska region containing porous, fragile, highly erodible, sandy soils. Thus both routes impact the beneficial uses of Nebraska's natural resources, and the Applicant failed to meet its burden to prove it is in the public interest.

#### Alternative Utility Corridor

The Applicant admits it considered the I-90 Route that was reviewed in the FEIS and FSEIS, however the I-90 Route was not offered to the Commission as an alternative. The I-90 Route was considered, according to the FSEIS, for comparison purposes to the Preferred Route, however, contrary to the claims of the Applicant, it was never discarded by the Department of State (DOS) in the FSEIS.<sup>10</sup> Instead, the DOS never took a position or expressed any opinion on the I-90 Route. In fact, when the final recommendations were made in the FSEIS, DOS made no mention of the I-90 Route, but stated there were only two options before the decision-maker, approving or denying the proposed pipeline project. The actual routes, Preferred or I-90, were not approved or rejected by the DOS.<sup>11</sup>

In every single major area of comparison reviewed in the FSEIS, the I-90 Route had either very similar or fewer potential environmental impacts than the Preferred Route. The critical areas examined in the FSEIS included: Geology, Soils, Groundwater, Surface Water, Wetlands, Terrestrial Vegetation, Wildlife, Fisheries, Threatened and Endangered Species, Land Use, Recreation, and Visual Resources, Socioeconomics, Cultural Resources, Air Quality and Noise, and Climate Change.<sup>12</sup>

Ultimately, in this proceeding, the Applicant simply dismissed the I-90 Route stating, "it is not possible because the Mainline's point of entry into Nebraska is situated over 100 miles to the east of, and for practical purposes too far removed from, the existing fixed starting point of the Project".<sup>13</sup>

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<sup>10</sup> See Applicant's Post-Hearing Brief, filed September 15, 2017, at p. 9.

<sup>11</sup> Exhibit KXL-19, p. 2008.

<sup>12</sup> Exhibit KXL-19.

<sup>13</sup> Exhibit KXL-1, § 20.1.



While the Applicant considers the exit point from South Dakota a "fixed starting point" in Nebraska, that is a phrase coined by the Applicant. The entry point is actually not fixed in Nebraska but is located there as a result of a construction permit issued to the Applicant by South Dakota. The proceedings in Nebraska and South Dakota are very different regardless of what each may trigger. The Commission's duty is to find whether a proposed route through Nebraska is in the public interest.

There is an existing Keystone Pipeline running through Nebraska which is an existing utility corridor and which was approved by all necessary federal and state agencies prior to its construction. That utility corridor continues north out of Nebraska and, according to the FSEIS, would follow other existing utility corridors as it joins I-90.<sup>14</sup>

Yes, the I-90 Route would be longer than the proposed route, adding an additional 52 miles to an already 927 mile project, and yes, the I-90 Route was not offered to the Commission as an alternative. The I-90 Route, however, is a viable utility corridor that would avoid the Nebraska Sandhills soils, which all three (3) alternatives routes offered by the Applicant, the Proposed, Sandhills, and Mainline Alternative Routes, would not.

An existing utility corridor that is both feasible and beneficial does exist but was discarded as a route because the Applicant chose a 52-mile shortcut through Nebraska's Sandhills. I believe that none of the three (3) routes offered to us by the Applicant are in the public interest of Nebraska, and therefore, for the reasons outlined above, I must dissent.



Mary Ridder  
District 5

<sup>14</sup> Exhibit KXL-19, pp. 1965-1966.