IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TRANSCANADA KEYSTONE PIPELINE, LP and TC OIL PIPELINE OPERATIONS INC.	§	
Plaintiffs,	§	
	§	Civil Action No. _____
vs.	§	
JOHN F. KERRY, Secretary of the Department of State;	§	
LORETTA E. LYNCH, Attorney General of the United States;	§	
JEH CHARLES JOHNSON, Secretary of the Department of Homeland Security; and	§	
SALLY JEWELL, Secretary of the Department of Interior;	§	
Defendants.	§	

COMPLAINT

I. INTRODUCTION

1. This case presents the question whether the Constitution grants the President unilateral power, unsupported by any statute and contrary to the expressed wishes of Congress, to prohibit the further development of the Keystone XL Pipeline on the basis that the pipeline would cross a U.S. border and would, if permitted to proceed, undercut the President's influence in international climate change negotiations.

2. In particular, this case challenges the President's assertion of unilateral power to prevent the domestic and international commerce reflected in the development and operation of a major U.S. oil pipeline extending abroad from established domestic oil pipeline systems when (i) the Constitution expressly commits regulation of domestic and international commerce to Congress; (ii) Congress has acted to facilitate the development of such cross-border facilities generally and has passed legislation specifically authorizing the construction and operation of the Keystone XL Pipeline across the U.S.-Canada border; (iii) no previous President has ever prohibited the development of any major oil pipeline undertaking significant domestic commerce based on an assertion of unilateral power; and (iv) no previous President has ever asserted or exercised the unilateral authority to prohibit the construction of cross-border facilities supporting international commerce based on any objection to the nature of the commerce undertaken by the facility, his need to enhance his negotiating powers with foreign states, or any other basis not directly related to the particular cross-border considerations presented by the facility at issue.

3. The U.S. component of the proposed Keystone XL Pipeline would be owned, developed, and operated by plaintiffs, two Houston-based and U.S.-registered subsidiaries of TransCanada Corporation, a Canadian company (each of the three companies separately, or together, "TransCanada"). The pipeline would be one of the largest oil pipelines in the United States and would interconnect with and extend from extensive existing oil pipeline facilities in

the United States. Those existing facilities include the original Keystone I Pipeline, which was approved by the U.S. government in 2008 and built and operated by TransCanada to transport to the United States the same type of crude oil from the same region in Alberta, Canada that the Keystone XL Pipeline would transport. Those existing facilities also include subsequent extensions of the Keystone I Pipeline that are part of the larger Keystone System of oil pipelines in the United States. As with the Keystone I Pipeline, only a small portion of the Keystone XL Pipeline would extend across the U.S.-Canada border into Canada.

4. Congress unquestionably has the power, under the Constitution's foreign commerce clause and domestic commerce clause, to determine whether a pipeline of this type should be developed. In addressing oil pipeline development generally, facilitating cross-border trade in petroleum products, and authorizing the Keystone XL Pipeline directly, Congress has already exercised those powers in a manner incompatible with any assertion that the President can unilaterally prohibit development of the Keystone XL Pipeline.

5. Even had Congress not acted, the President's assertion of power far exceeds any prior Presidential practice that could, through Congressional acquiescence or otherwise, possibly support the constitutionality of his action here. Congress has enacted statutes that limit the Executive Branch's authority over certain cross-border commercial facilities and foreclose any role for unilateral Presidential action. For facilities not yet addressed by statute (including oil pipelines), certain prior Presidents have claimed and exercised limited unilateral powers to regulate those cross-border commercial facilities. Until now, those limited regulatory powers have been directly related to issues concerning the border crossing and have never been asserted to bar the development of a significant, predominantly domestic facility. No President has ever prohibited the development of a major oil pipeline, much less one supporting significant

domestic commerce. Nor has any President prohibited the development of any cross-border commercial facility on the ground that he must restrict foreign and domestic commerce to enhance his influence in foreign affairs.

6. Basic principles of constitutional law establish that the President exceeds his authority where, as here, he purports to act without statutory authority and contrary to the expressed will of Congress to resolve an issue of domestic and international commerce that the Constitution authorizes Congress to address. That conclusion is especially clear where the President's stated reason for aggrandizing his power at the expense of Congress's is that he needs heightened powers to negotiate with foreign states. That is, he claims that he needs more power here to have more power elsewhere. That novel assertion of power has unprecedented effect and nearly boundless scope: under that rationale, the President could control domestic or foreign commerce whenever that might enhance his dealings with a foreign state. The President's lawful power must arise from a statute or the Constitution. Here, it is grounded in neither.

7. Federal courts are empowered to declare that a purported exercise of Presidential power is unsupported by statutory or constitutional authority and to prevent Executive branch officials from enforcing the unconstitutional decision. Plaintiffs have been harmed by the determination that TransCanada is prohibited from constructing and operating the Keystone XL Pipeline and request a declaration that the determination is unlawful and an injunction barring Executive branch efforts to give effect to it.

II. THE PARTIES

8. Plaintiff TransCanada Keystone Pipeline, LP is a Delaware limited partnership owned by affiliates of TransCanada Corporation, a Canadian public company organized under the laws of Canada. TransCanada Keystone Pipeline, LP maintains its principal place of

business at 700 Louisiana Street, Suite 700, Houston, Texas, 77002. Its principal business is to own crude oil pipelines in support of TransCanada's businesses. TransCanada Keystone Pipeline, LP owns the Keystone I Pipeline, and it would own the U.S. facilities of the proposed Keystone XL Pipeline. TransCanada Keystone Pipeline, LP applied for a Presidential permit to enable the construction and operation of cross-border facilities for the proposed Keystone XL Pipeline. The denial of that application for a Presidential permit embodied the Presidential determination that TransCanada cannot build the Keystone XL Pipeline and gave rise to this lawsuit.

9. Plaintiff TC Oil Pipeline Operations Inc. is a Delaware corporation and is wholly-owned, indirectly, by TransCanada. Its principal business is to develop and operate the Keystone I Pipeline and the proposed Keystone XL Pipeline. TC Oil Pipeline Operations Inc. maintains its principal place of business at 700 Louisiana Street, Suite 700, Houston, Texas, 77002.

10. Defendant John F. Kerry is named in his official capacity as the Secretary of the Department of State. The Department of State is responsible for communicating and coordinating with the Canadian government with respect to issues affecting the U.S.-Canada border. Secretary Kerry is also responsible for exercising certain asserted Presidential powers over cross-border facilities that the President claims to possess and to have delegated to the Secretary.

11. Defendant Loretta E. Lynch is named in her official capacity as the Attorney General of the United States. Lynch is the chief law enforcement officer of the United States and directs litigation on behalf of the United States.

12. Defendant Jeh Charles Johnson is named in his official capacity as the Secretary of the Department of Homeland Security, the agency primarily responsible for law enforcement

at the nation's borders. Johnson has oversight responsibility for U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement, two agencies devoted to border concerns.

13. Defendant Sally Jewell is named in her official capacity as the Secretary of the Department of Interior. The Department of the Interior oversees the Bureau of Land Management, which in turn manages the public lands of the United States. Portions of the Keystone XL Pipeline, including the border crossing, would traverse federal property.

III. JURISDICTION AND VENUE

14. The Court has federal question jurisdiction under 28 U.S.C. § 1331.

15. Venue is proper in this District under 28 U.S.C. § 1391(e). Plaintiffs maintain their principal place of business in Houston, and the Keystone Pipeline System extends into this District.

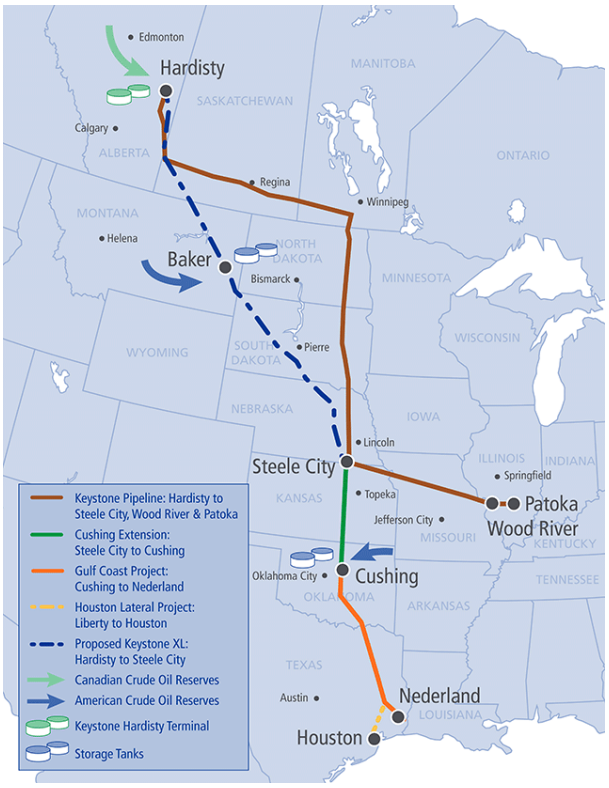
16. This Court is authorized to award the requested relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and under Article III of the United States Constitution.

IV. BACKGROUND

A. The Construction and Proposed Expansion of the Keystone Pipeline System

17. TransCanada owns 2,639 miles of interconnected petroleum pipelines in the United States ("Keystone System"). Those facilities include the Keystone Pipeline ("Keystone I Pipeline"), which commenced operation in 2010; the Cushing Extension Pipeline, an early extension of the Keystone I Pipeline to Cushing, Oklahoma, which commenced operation in 2011; the Gulf Coast Pipeline, an extension of the Keystone I Pipeline originally proposed as part of the Keystone XL Pipeline project and which commenced operation in 2014; and the Houston Lateral, a pipeline originally proposed as part of the Keystone XL Pipeline project, which extends from the Gulf Coast Pipeline to points in Harris County, Texas, and which will

commence operations in 2016. The proposed Keystone XL Pipeline would connect to the existing Keystone System, delivering oil from Hardisty, Alberta, to Steele City, Nebraska, as shown below, and would affect the operation and profitability of the Keystone System, including the Houston Lateral.



18. TransCanada commenced preparations to build the Keystone I Pipeline and Cushing Extension in 2005. The Keystone I Pipeline extends from an oil supply hub near Hardisty, Alberta to terminals in Illinois and transports crude oil produced from areas often referred to as the "oil sands."

19. In connection with those plans, plaintiff TransCanada Keystone Pipeline, LP in 2006 sought to obtain a permit from the U.S. Government to construct and operate pipeline facilities that would cross the U.S.-Canada border. Certain U.S. Presidents had previously asserted a narrow authority to require and grant such permits for certain facilities, including oil

pipelines, that cross a U.S. border. TransCanada Keystone Pipeline, LP sought the permit from the Secretary of State, who the President had "designated and empowered" to receive such permitting requests and to lead an interagency evaluation process. *See* Exec. Order. No. 13337, 69 Fed. Reg. 25,299 (Apr. 30, 2004).

20. Executive Order 13337 further delegated to the Secretary of State the asserted Presidential power to decide whether the issuance of a permit would serve the national interest and to notify other federal officials of that determination. Under that Order, the Secretary must then issue or deny the permit unless within 15 days "an official required to be consulted . . . notif[ies] the Secretary of State that he or she disagrees with the Secretary's proposed determination and requests the Secretary to refer the application to the President." *Id.* In the event of such disagreement, the Secretary of State "if necessary, shall refer the application . . . to the President for consideration and a final decision." *Id.* As with any other delegated Presidential power, the President may determine to exercise the power personally.

21. In 2008, the State Department determined that issuing a permit for TransCanada "to construct, connect, operate and maintain facilities at the border of the United States and Canada for the transport of crude oil between the United States and Canada across the international boundary at Cavalier County, North Dakota, would serve the national interest." The State Department raised no objections regarding any effect the pipeline's operation might have on greenhouse gas production, and the order reflecting the Department's national interest determination did not address the subject.

22. The Department concluded that construction and operation of the Keystone I Pipeline project served the national interest because, among other reasons, "[i]t increases the diversity of available supplies among the United States' worldwide crude oil sources," "increases

crude oil supplies from a source region that has been a stable and reliable trading partner of the United States," "does not require exposure of crude oil in high seas transport and railway routes that may be affected by heightened security and environmental concerns," and "provides additional supplies of crude oil to make up for the continued decline in imports from several other major U.S. suppliers."

23. Although the State Department's order assessed the Keystone I Pipeline and Cushing Extension, the permit specifically applied only to the limited pipeline facilities extending from the border "to and including the first mainline shut-off valve or pumping station in the United States." The Department explained that the President had asserted authority over only "facilities at the border of the United States," that no such authority existed over equivalent domestic facilities, that the President's interest arose from "the impact the proposed cross-border facility … will have upon U.S. relations with the country in question, whether Canada or Mexico," and thus no reason existed that "the permit [the Department] issues in this case should extend any further than necessary to protect that foreign relations interest." Key provisions of the order permitted the Department to "take possession" or "direct the permittee to remove the facilities," and the Department concluded that limiting the permit to "the first mainline shut-off valve or pumping station would adequately protect [the Department's] foreign relations interest in implementing [the President's Executive Orders]."

24. Since 2010, the Keystone I Pipeline has transported crude oil from Alberta to Nebraska, and then to facilities in Illinois and, since the Cushing Extension began to operate in 2011, to facilities in Cushing, Oklahoma. The transported oil originates from the same area and is indistinguishable from the oil that the Keystone XL Pipeline would transport from Canada to the United States.

25. In July, 2009, the State Department granted a permit authorizing another Canadian company to construct, connect, operate, and maintain facilities at the U.S.-Canadian border for the transport of crude oil from the oil sands region of Alberta into the United States. This major pipeline, proposed by a pipeline company that is a direct competitor to TransCanada, is commonly known as the "Alberta Clipper."

26. The Department, then led by Secretary Clinton, concluded that the Alberta Clipper Pipeline would serve the public interest for reasons including those leading to the Department's approval of the Keystone I Pipeline, noted above, and because "[a]pproval of this permit will also send a positive economic signal, in a difficult economic period, about the future reliability and availability of a portion of United State's [sic] energy imports, and in the immediate term, will provide construction jobs."

27. In assessing the Alberta Clipper application for a cross-border facilities permit, the State Department addressed greenhouse gas issues only to conclude that changes in greenhouse gas production was not an appropriate basis for denying a cross-border permit. Instead, the preferred approach for addressing concerns about greenhouse gas emissions was "in the context of the overall set of domestic policies that [both countries] will take to address their respective greenhouse gas emissions." As with the Keystone I Pipeline permit, the Alberta Clipper pipeline permit applied only to facilities immediately on or near the U.S. border. The Alberta Clipper pipeline commenced operation in 2010.

28. In 2008, TransCanada proposed to expand the Keystone System by building the Keystone XL Pipeline, which would facilitate the transport of up to 900,000 barrels per day of crude oil to the interior and Gulf Coast regions of the United States from Alberta and Montana.

Approximately 100,000 barrels per day of that capacity would be devoted to transporting oil originating in Montana.

29. The pipeline was to be constructed overwhelmingly within the United States. In addition to a new, 327-mile pipeline segment from Hardisty, Alberta to the U.S.-Canada border, the proposed project was comprised of three other principal sections: (i) a segment from the U.S.-Canadian border to Steele City, Nebraska, connecting with the Keystone I Pipeline (approximately 850 miles); (ii) the Gulf Coast Pipeline, extending from the existing Keystone Pipeline System at Cushing, Oklahoma to Nederland, Texas (approximately 478 miles); and (iii) the "Houston Lateral" pipeline segment extending from the Gulf Coast Pipeline beginning in Liberty County, Texas to Harris County, Texas (approximately 47 miles long).

30. In September, 2008, TransCanada applied to the State Department for a permit to construct facilities on and near the border, specifically the 1.2 mile segment from the U.S.-Canada border to the first pipeline isolation valve in Montana. In addition to detailing matters like the pipeline's planned route, the application explained that the estimated capital cost of the U.S. portion of the project would exceed $5.4 billion and that shippers of crude oil had "already committed to binding contracts totaling 300,000 [barrels per day]." These early commitments, which swiftly increased to 720,000 barrels per day, demonstrated "a material endorsement of support for the Project, its economics, proposed route, and target market, as well as the need for incremental pipeline capacity and access to Canadian crude supplies."

31. The State Department commenced an extensive, multi-year review of the environmental impacts of the entire Keystone XL Pipeline, using a process consistent with but not required by the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4321 *et seq.* This initial round of environmental analysis would produce the first three of five determinations by

the Department that granting a permit to permit construction of the Keystone XL Pipeline would have no material effect on greenhouse gas emissions.

32. First, in April 2010, the State Department issued a Draft Environmental Impact Statement ("DEIS"), which concluded, among other things:

- "the proposed Keystone XL Project would result in limited adverse environmental impacts during both construction and operation";
- "assuming constant demand for refined oil products, the incremental impact of the Project on GHG emissions would be minor";
- "since the crude oil delivered by the Project would be replacing similar crude oils from other sources, the incremental impact of these emissions would be minor"; and
- "the transport of crude oil by tanker and other means such as truck and rail would likely result in greater GHG emissions than those that would occur as a result of the proposed Project. Finally, the No Action Alternative would not meet the purpose and need of the proposed Project."

33. In October 2010, then-Secretary of State Clinton publicly stated that the State Department was "inclined" to approve a Presidential Permit for the Keystone XL Pipeline. TransCanada subsequently agreed to adopt 57 project-specific conditions for the design, construction, and operation of the Keystone XL Pipeline. These conditions were similar to the conditions the government had required of prior cross-border oil pipelines, including the Keystone I Pipeline.

34. New information prompted the State Department to prepare a Supplemental DEIS ("SDEIS"), which was issued in April 2011. The State Department again concluded that the proposed pipeline would not materially affect greenhouse gas emissions. It found that "on a global scale, emissions are not likely to change [as a result of the Pipeline]" and that "the information provided in this SDEIS does not alter the conclusions reached in the draft EIS regarding the need for and the potential impacts of the proposed Project."

35. In August 2011, the State Department issued its Final EIS ("FEIS"), concluding for a third time that the pipeline would not materially increase greenhouse gas emissions. The FEIS concluded that the proposed project is not likely to impact the amount of crude oil produced from the oil sands and that, "on a global scale, the decision whether or not to build the Project will not affect the extraction and combustion of WCSB oil sands crude on the global market."

36. Despite these findings, the State Department stated in November, 2011 that it could not make a National Interest Determination on the Keystone XL Pipeline at that time. The Department claimed that it would first have to evaluate alternative routes for the portion of the pipeline that would pass through Nebraska.

37. This more than three-year delay following the application's submission in September, 2008 far exceeded the periods the Department required to review and grant permits for the Keystone I Pipeline (less than two years) and the Alberta Clipper Pipeline (approximately two years and two months). In December 2011, Congress passed, and the President signed, the Temporary Payroll Tax Cut Continuation Act of 2011. Title V of this Act required the President, acting through the Secretary of State, within 60 days to grant a permit authorizing construction of the Keystone XL Pipeline or to report to Congress the reasons why the President did not believe construction of the pipeline would be in the national interest — leaving to Congress whether to take further action.

38. On January 18, 2012, President Obama directed the Secretary of State to deny the initial Keystone XL permit application, stating that "60 days is an insufficient period to obtain and assess the necessary information …." The State Department issued an order denying the

permit on January 31, 2012. The President and the Department made clear that they would consider a renewed permit application in due course.

39. In February 2012, TransCanada decided to extend the Keystone System by building the Gulf Coast Pipeline along a 478-mile pathway from Cushing, Oklahoma to Nederland, Texas. TransCanada advised the State Department that it was proceeding with the Gulf Coast segment on a stand-alone basis because that segment had some utility independent of the Steele City segment of the proposed Keystone XL Project that the President had directed the State Department to deny the month before.

40. In March 2012, well into a Presidential election year, President Obama stood before stacks of oil pipe segments in a pipe yard owned by TransCanada in Cushing, Oklahoma, and praised "a company called TransCanada [that] has applied to build a new pipeline to speed more oil from Cushing to state-of-the-art refineries down on the Gulf Coast." He stated that he was "directing my administration to … make this project a priority, to go ahead and get it done" and released an order to that effect the same day. He also cited concerns surrounding the originally proposed Keystone XL Pipeline route near aquifers in Nebraska, and attributed the delayed decision-making concerning the Presidential permit to the view of "our experts" that more time was needed to review the project "properly to make sure that the health and safety of the American people are protected." The Gulf Coast Pipeline was completed in January 2014. TransCanada then extended the Keystone System in 2014 by building the Houston Lateral Project, a 47-mile pipeline extension from the Gulf Coast Pipeline to the Houston refining market. However, without the Keystone XL Pipeline, both the Gulf Coast Pipeline and the Houston Lateral will remain underutilized to a significant degree. They were designed and built to accommodate the volume of crude oil that would be transported by the Keystone XL Pipeline.

Because the Keystone XL Pipeline has not yet been constructed, these southern sections of the Keystone System will transport significantly less crude oil than their full capacity would permit.

41. In May 2012, TransCanada submitted a renewed application to the State Department for a cross-border permit for the Keystone XL Pipeline. The application again proposed that the facility would cross the border near Morgan, Montana and interconnect with the Keystone I Pipeline at Steele City, Nebraska, transiting the same route originally proposed through Montana and South Dakota. The application additionally stated that TransCanada would supplement the application with an alternative route in Nebraska, once Nebraska selected the route. The permit application advised that the portion of the Keystone XL Pipeline running from the U.S.-Canada border to Steele City, Nebraska would have an estimated capital cost of $5.3 billion.

42. The Nebraska Department of Environmental Quality ("NDEQ") thereafter proceeded with its analysis of proposed routes through Nebraska, ultimately evaluating a route that would avoid environmentally sensitive areas in Nebraska. The Governor of Nebraska then approved the route.

43. In March, 2013, the State Department released a new Draft SEIS ("DSEIS"), reflecting the new route through Nebraska. The DSEIS concluded, for a fourth time, that the pipeline would produce "no substantive change in global [greenhouse gas] emissions."

44. The State Department completed its Final Supplemental Environmental Impact Statement ("SEIS") in January, 2014. The SEIS concluded, for the fifth time, that the proposed Keystone XL Pipeline would not substantially increase carbon emissions and that "approval or denial of any one crude oil transport project, including the proposed Project, is unlikely to significantly impact the rate of extraction in the oil sands or the continued demand for heavy

crude oil at refineries in the United States based on expected oil prices, oil-sands supply costs, transport costs, and supply-demand scenarios."

45. In January, 2015, the State Department resumed its broader review of the Keystone XL Pipeline and requested the views of the Departments of Defense, Energy, Justice, Interior, Commerce, Homeland Security, and Transportation, and the Environmental Protection Agency.

46. As the State Department delayed its determinations regarding the Keystone XL Pipeline, Congress began to act on measures to authorize construction of the Keystone XL Pipeline. As described below, on five separate occasions between 2011 and 2014, the House of Representatives passed bills authorizing the development of the Keystone XL Pipeline. The development of the Keystone XL Pipeline featured prominently in the Senate elections of 2014, and following those elections, the Senate voted on whether to proceed to vote on a measure to authorize the development of the pipeline. That measure secured the support of 59 Senators but failed to secure the 60 votes required to advance the bill.

47. After the 114th Congress convened in January 2015, the first bill introduced in the Senate was a measure to authorize the development of the Keystone XL Pipeline, without and despite any further action or inaction by the President. The Senate passed that bill, the Keystone Pipeline Approval Act, on January 29, 2015. The House of Representatives followed suit on February 11, 2015. The Congress thereafter forwarded the enrolled bill to the President.

48. President Obama vetoed the Keystone Pipeline Approval Act on February 24, 2015, characterizing it as an "attempt[] to circumvent longstanding and proven processes for determining whether or not building and operating a cross-border pipeline serves the national interest."

49. As of December, 2015, TransCanada had invested billions of dollars in the portion of the Keystone XL Pipeline project that would run from Western Canada to Steele City, Nebraska.

B. The President's Prohibition of the Construction and Operation of the Keystone XL Pipeline.

50. On November 6, 2015, the President announced that the Secretary of State, acting pursuant to an Executive Order delegating the President's constitutional power under Article II of the Constitution, had denied a border crossing permit for and thus prohibited the construction and operation of the Keystone XL Pipeline. The President said that he agreed with the Secretary of State's determination that the pipeline would not serve the national interest and should not be constructed. A true and correct copy of the Statement by the President on the Keystone XL Pipeline, obtained from the White House website, is attached as Exhibit A.

51. The State Department issued a Record of Decision and National Interest Determination ("Decision") explaining the reasons and legal basis for the Secretary's denial of the permit and prohibition on constructing the pipeline. A true and correct copy of the Decision, obtained from the State Department website, is attached as Exhibit B.

52. In the Decision, the Secretary confirmed that the prohibition was "based on [the President's] Constitutional powers" which had been "delegated to the Secretary of State" and that "[n]o statute established criteria for this determination" or otherwise supported the exercise of unilateral Presidential powers.

53. The Secretary also concluded that constructing the Keystone XL Pipeline would advance the national interest in three important respects. First, constructing the Keystone XL Pipeline would increase "energy security by providing additional infrastructure for the dependable supply of crude oil."

54. Second, constructing the pipeline would have "meaningful" economic benefits for the United States. The Secretary found that spending on the Keystone XL Pipeline project would support approximately 42,100 jobs over a two-year construction period; the pipeline "would also generate tax revenue for communities in the pipeline's path;" and "pipeline activity would contribute .02 percent to the national G.D.P. based on 2012 statistics."

55. Third, the Secretary found that proceeding with the pipeline would advance the United States' relationship with Canada. In contrast, prohibiting construction "may lead to a cooling of U.S.-Canadian relations and could affect Canadian cooperation on Western Hemisphere issues and international security cooperation."

56. Separately, the Secretary concluded that the Keystone XL Pipeline is "unlikely to significantly impact the level of GHG-intensive extraction of oil sands crude or the continued demand for heavy crude oil at refineries in the United States." The President likewise said that the Keystone XL pipeline is "not the express lane to climate disaster." In fact, the Decision concluded that if the pipeline did not proceed, the crude oil could be transported from Alberta by rail, other pipelines, and tankers and that "annual GHG emissions (direct and indirect)" would be *greater* than if the Keystone XL Pipeline were constructed, assuming "movement of equivalent amounts of oil from Alberta to the Gulf Coast." A senior State Department official explained that "we don't believe that this project denial will affect production" of oil in Canada.

57. Despite these conclusions that the pipeline would not increase greenhouse gas emissions, the Secretary's Decision reasoned that the government must "prioritize actions that are not perceived as enabling further GHG emissions globally." And here, "the general understanding of the international community is that a decision to approve the proposed Project would precipitate the extraction and increased consumption of particularly GHG-intensive crude

oil. Such a decision would be viewed internationally as inconsistent with the broader U.S. efforts to transition to less-polluting forms of energy and would undercut the credibility and influence of the United States in urging other countries to put forward ambitious actions and implement efforts to combat climate change, including in advance of the December 2015 climate negotiations."

58. This purely symbolic role a permit denial would play abroad, in turn, provided the basis for prohibiting construction. The Secretary concluded that "a key consideration at this time is that granting a Presidential Permit for this Project would undermine U.S. climate leadership and thereby have an adverse impact on encouraging other States to combat climate change and work to achieve and implement a robust and meaningful global climate agreement." Permitting the pipeline to proceed "would undercut the credibility and influence of the United States in urging other countries … to implement efforts to combat climate change, including in advance of the December 2015 climate negotiations." In turn, "an effective global climate agreement … would have a direct and beneficial impact on the national security and other interests of the United States."

59. The President agreed with that analysis. He said that "approving this project would have undercut [America's] global leadership" on the issue of climate change. "And three weeks from now, I look forward to joining my fellow world leaders in Paris, where we've got to come together around an ambitious framework to protect the one planet that we've got while we still can."

60. Nothing in the President's statement or the Decision's rationale concerns issues presented by the fact that the pipeline would cross the border, the ostensible basis for any exercise of Presidential power and the exclusive basis for prior permit reviews. There was no

claim, for example, that Canada would deny reciprocal rights to use the pipeline, that a monopoly would extend from Canada to harm U.S. citizens, or even that relations with the bordering state required blocking the pipeline. To the contrary: the President and Secretary both acknowledged that Canada *supported* the pipeline and urged the United States government to approve its construction. Nor was there any claim that TransCanada would deny the United States government access to the facility, or fail to implement measures to mitigate safety risks or the risks of an oil spill, the traditional regulatory concerns underlying prior Presidential permitting decisions. On the contrary, the Decision states that "Keystone has agreed to incorporate additional mitigation measures in the design, construction, and operation of the proposed Project, in some instances exceeding what is normally required."

61. Rather, this novel exercise of Presidential power rests on pure symbolism and has nothing to do with the pipeline's crossing the border. The expansion of Presidential control over international trade and the domestic economy was justified only by the claim that the President needs greater Presidential powers in this instance to have greater Presidential powers elsewhere, reflected in negotiations with foreign powers. Every limitation on international trade could be said to have the same effect, and regulation of domestic economic activity could have precisely the foreign negotiating benefit that the President invokes. However, the Constitution commits such regulation of international trade and domestic economic affairs to the Congress, and not to the President. He simply has no such unilateral powers.

V. LIMITATIONS ON PRESIDENTIAL POWERS

A. The Constitutional Framework

62. The exercise of Presidential power that purports to prohibit construction of the Keystone XL Pipeline is unauthorized by statute, encroaches upon the power of the Congress to regulate domestic and foreign commerce, has been foreclosed by affirmative Congressional

action, and unlawfully exceeds the powers granted to the President under the Constitution or acquiesced in by Congress.

63. The Supreme Court's cases make clear that the federal courts are to decide whether the President has purported to exercise a power that properly belongs to the Congress or is otherwise contrary to the Constitution. *See, e.g.*, *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014) (President exceeded constitutional authority in making certain recess appointments); *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1428 (2012) (judicial duty to decide "what the law is" encompasses cases "where the question is whether Congress or the Executive is "'aggrandizing its power at the expense of another branch'") (citation omitted).

64. Thus, courts regularly consider challenges to the lawfulness of a President's action when they are undertaken through a "suit seeking to enjoin the officers who attempt to enforce the President's directive." *Franklin v. Massachusetts*, 505 U.S. 788, 828 (1992) (Scalia, J., concurring) (citing various cases). The Supreme Court has repeatedly made clear that federal courts are obligated to address claims that the President or officials exercising his powers have acted beyond their Constitutional authority and to enforce the separation of powers. *See, e.g.*, *Zivotofsky v. Clinton*, 132 S. Ct. at 1428; *Medellin v. Texas*, 522 U.S. 491, 523 (2008); *Franklin v. Massachusetts*, 505 U.S. at 801 (plurality); *Webster v. Doe*, 486 U.S. 592, 603-05 (1988); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952) (holding Presidential Executive Order unconstitutional and invalid); *Panama Ref. Co. v. Ryan*, 293 U. S. 388 (1935) (same); *see also Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690 (1949) (courts may enter injunctions against federal officers where the "order conferring power upon the officer . . . is claimed to be unconstitutional"). Indeed, the government has "acknowledge[d]" that because the scope of the President's discretion to act under law "is limited by the Constitution . . . an

independent claim of a President's violation of the Constitution would certainly be reviewable." *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1326 (D.C. Cir. 1996).

65. To decide whether a specific Presidential action has exceeded the powers of that office, courts use a three-part framework that begins with the understanding that "[t]he President's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself.'" *Medellin*, 552 U.S. at 524 (quoting *Youngstown*, 343 U.S. at 585).

66. This framework also recognizes that "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). The President's power must thus be assessed in light of Congress's extensive powers, set forth in the Domestic Commerce Clause and the Foreign Commerce Clause, over domestic and cross-border commercial facilities such as the Keystone XL Pipeline. U.S. Const. art. I, § 8, cl. 3.

67. First, when Congress has approved the President's action, "'his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.'" *Medellin*, 552 U.S. at 524 (quoting *Youngstown*, 343 U.S. at 635).

68. Second, when the President "'acts in absence of either a congressional grant or denial of authority, he can only rely *upon his independent powers.*'" *Medellin*, 552 U.S. at 524 (quoting *Youngstown*, 343 U.S. at 635) (emphasis added). In such a case, "the validity of the President's action . . . hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action." *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981). Courts then consider, on one hand, whether Congress has "enacted legislation, or even passed a resolution, indicating its displeasure with the" President's action, *id.* at 687,

and, on the other, whether Congress previously has acquiesced in a "*particular exercise* of Presidential authority." *Medellin*, 552 U.S. at 528 (emphasis added). Where a claim of executive power is "expressed in broad terms," but that same power has in practice been "exercised quite narrowly," courts will find acquiescence only where the claimed power has been both exercised by the executive and implicitly approved by the Congress. *See Kent v. Dulles*, 357 U.S. 116, 127-28 (1958); *see also Medellin*, 552 U.S. at 531 (confining claim of acquiescence to the "narrow set of circumstances" directly supported by past practice).

69. Third, when the President's action is "'incompatible with the expressed or implied will of Congress, his power is at its lowest ebb,' and [a court] can sustain his actions 'only by disabling the Congress from acting upon the subject.'" *Medellin*, 552 U.S. at 525 (quoting *Youngstown*, 343 U.S. at 637-38). In other words, only in the rare circumstances where the President's power is exclusive may "Congress … not enact a law that directly contradicts" his assertion of that power. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2095 (2015). Any "[p]residential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring).

70. This framework applies even where the President asserts that his challenged actions were motivated by foreign affairs concerns. The Supreme Court in *Medellin* set aside a Presidential Memorandum directing state courts to give effect to a decision of the International Court of Justice even though the President claimed to be exercising his authority over foreign affairs, and it set aside the President's seizure of the steel mills in *Youngstown* even though the President claimed he was acting to protect the national security. Last year, the Court again reaffirmed that "[t]he Executive is not free from the ordinary controls and checks of Congress

merely because foreign affairs are at issue." *Zivotofsky v. Kerry*, 135 S. Ct. at 2090. Rather, "whether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law," and "it is essential that the congressional role in foreign affairs be understood and respected." *Id.* Still further caution is warranted, moreover, when the President's unilateral powers turn from their usual focus "against the outside world for the security of our society," and are redirected "inward" toward domestic matters. *Youngstown*, 343 U.S. at 645 (Jackson, J., concurring). With respect to domestic affairs, the President's powers are properly "subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress." *Id.* at 645-46.

71. The asserted Presidential power to prohibit construction of the Keystone XL Pipeline exceeds the Constitution's limits because it concerns a matter committed to Congress and is contrary to the express and implied will of Congress. The dispute falls within the third *Youngstown* category, and no basis exists to argue that Congress is without power over the pipeline's construction. Even had Congress not spoken directly to the issue, the asserted Presidential power would violate the Constitution within the framework of the second *Youngstown* category because Congress has not acquiesced in the rationale for or nature of the Presidential power invoked to block the pipeline. The President's need to prohibit international and domestic trade to secure greater negotiating power with foreign states resembles no rationale any President has asserted to limit any transborder facilities in the past, the breadth of its effect is unprecedented, and the prohibition encroaches on the power committed by the Constitution to Congress to regulate foreign and domestic commerce.

B. Congress Is Empowered to Regulate the Cross-Border Trade at Issue and has Displaced any Unilateral Presidential Power to Prohibit the Keystone XL Pipeline's Development.

72. Article I, Section 8 of the Constitution provides for Congress "[t]o regulate Commerce with foreign Nations, and among the several States." The Constitution thus provides Congress with the express power to authorize, regulate, or prohibit the development of commercial transportation facilities such as the Keystone XL Pipeline, which crosses both international and interstate borders.

73. Congress could choose to exercise this power by directing or authorizing the President or other officials of the Executive Branch to regulate the construction or operation of cross-border oil transportation facilities.

74. But here, there is no claim that any statute authorizes the President or his delegates to prohibit the construction or operation of the Keystone XL Pipeline. The Decision acknowledged that "[n]o statute establishes criteria for this determination." Instead, as the Decision also acknowledges, the determination to block the pipeline is based solely on claimed Presidential powers allotted by the Constitution (and delegated by the President to the Secretary of State by Executive Order 13337).

75. The President's assertion of the unilateral power to prohibit the construction and operation of the Keystone XL Pipeline is incompatible with Congress's own exercise of its express powers. The short version of this point is that, as described in paragraph 88, Congress has expressly and directly spoken to the issue and directed that the Keystone XL Pipeline proceed without further Presidential consideration or action. The longer version, set out below, is that Congress through a variety of measures has established criteria regulating and facilitating the construction and operation of cross-border pipelines in general, and has authorized the construction of the Keystone XL Pipeline in particular.

76. First, Congress has extensively regulated interstate oil pipelines such as the Keystone XL Pipeline, including by establishing the pre-conditions for their operation and regulatory mechanisms to govern their rates and terms of service. Congress first established such regulatory mechanisms and related substantive obligations in a 1906 amendment to the Interstate Commerce Act, *see* 49 U.S.C. app. § 1 (1988), and has since established and directed the Federal Energy Regulatory Commission to administer these provisions, *see* Department of Energy Organization Act of 1977, Pub. L. 95-91, 91 Stat. 565, 584 (1977), 42 U.S.C. § 7172. Congress created additional safety requirements for oil pipelines through enactment of the Pipeline Safety Act, 49 U.S.C. § 60101 *et seq*., and created and directed the Pipeline and Hazardous Materials Safety Administration to administer and enforce those requirements.

77. Congress has also adopted a broad range of other statutes that in discrete respects govern the development of oil pipelines and other infrastructure projects with significant domestic effects. These include, for example, the Clean Water Act, the National Historic Preservation Act, and the Endangered Species Act.

78. Congress has thus extensively regulated the facilities at issue and established the conditions indicating whether their construction and operation are in the national interest. Absent Congressional acquiescence in specific assertions of and rationales for Presidential powers, which this case does not implicate, such regulation by statute displaces any authority the President may have to regulate or prohibit those facilities on different grounds. Congress has adopted statutory regulations for oil pipelines that are similar in nature, but even broader in sweep, than the provisions of the Interstate Commerce Act and Postal Roads Act that the federal courts in *United States v. Western Union Telegraph Co.* found sufficient to "free" the cross-border submarine cable at issue in that case "from the executive control sought to be exercised"

by the President. 272 F. 311, 323 (S.D.N.Y 1921); *see United States. v. W. Union Tel. Co.*, 272 F. 893, 894 (2d Cir. 1921) (affirming district court and similarly finding Presidential authority over cross-border facility extending from the United States to be unconstitutional), *rev'd as moot on consent of the parties*, 260 U.S. 754 (1922).

79. Second, Congress has sought to advance international trade and investment undertaken through the construction and operation of cross-border oil pipelines, and limited the Executive Branch's ability to prevent or distort such trade and investment, by enacting legislation approving and implementing the North American Free Trade Agreements ("NAFTA") and the World Trade Organization ("WTO") Agreements. *See* North American Free Trade Agreement Implementation Act, H.R. 3450, 103d Cong., 1st Sess. (1993); Uruguay Round Agreements Act, H.R. 5110, 103d Cong., 2d Sess. (1994).

80. Like NAFTA itself, the related implementing legislation passed by Congress is designed to facilitate cross-border trade and investment between Canada and the United States – including trade in petroleum products and petroleum-related investment. NAFTA and its implementing legislation commit the United States, acting through its Executive Branch officials, to regulate cross-border trade in a manner designed to ensure consistent and non-discriminatory regulation with respect to "energy and basic petrochemical goods. *See* NAFTA Art. 603(1). Limitations on such cross-border trade are permitted only in limited circumstances.

81. In particular, the legislation provides the statutory approval that was necessary to have NAFTA Articles 1102, 1103, 1105 and 1110 go into effect. NAFTA Articles 1102 and 1103 provide that the United States shall provide national treatment and most favored nation treatment, respectively, to Canadian investors. These provisions prohibit discrimination against Canadian investors. NAFTA Article 1105 provides that the United States shall accord to the

investments of Canadian investors "treatment in accordance with international law, including fair and equitable treatment and full protection and security." This provision has been construed to prohibit regulations or prohibitions on investment that are arbitrary or inconsistent with the investor's legitimate investment expectations. Given the unprecedented basis for and nature of the denial of the Presidential Permit for construction and operation of the Keystone XL Pipeline, the denial is arbitrary and frustrated plaintiffs' legitimate investment expectations. NAFTA Article 1110 prohibits indirect expropriations of investments, which occur when a government action significantly reduces the value of an investment, without compensation. TransCanada is separately invoking rights provided to it under NAFTA and has announced its intent to file an arbitration claim against the United States, seeking damages for violations by United States officials of Articles 1102, 1103, 1105, and 1110.

82. Similarly, passage by Congress of implementing legislation, the Uruguay Round Agreements Act, was necessary to make effective an important provision of the WTO Agreements related to import restrictions: Article XI:1 of the General Agreement on Trade and Tariffs 1994 ("GATT"). That article provides: "No prohibition or restrictions other than duties, taxes, or other charges, whether made effective through quotas, import or export licences [sic] or other measures, shall be instituted or maintained by any [Member] on the importation of any product of the territory of any other [Member] …." This provision applies to the United States and other WTO Members. A prohibition of the construction and operation of the pipeline, affecting the competitive opportunities of Canadian petroleum products in the United States, amounts to a "restriction" by the United States "on the importation of any product of the territory" of Canada. The Government of Canada has not yet announced whether it will initiate a

WTO dispute settlement proceeding against the United States for violations of the WTO Agreements in connection with the Keystone XL Pipeline.

83. Through legislation implementing NAFTA and the WTO Agreements, Congress addressed and sought to facilitate the type of cross-border trade and investment that is reflected in the construction and operation of the Keystone XL Pipeline. Through that legislation, Congress committed Executive Branch officials to facilitate such trade and investment and limited their power to block or distort such cross-border trade and investment. Although limitations contained within the implementing legislation preclude those Agreements from serving as an independent basis for judicial relief in U.S. federal courts, the statutes nonetheless express Congress's views that such international trade and investment are desirable and reflect its disapproval of actions by U.S. government officials that would impede that trade and investment.

84. Third, and most fundamentally, Congress has repeatedly and directly expressed opposition to the President's attempt to unilaterally exercise power over the Keystone XL Pipeline.

85. Initially, Congress objected to the President's assertion that the pipeline's construction could proceed only with his approval and that he was empowered to withhold decision on the matter. As a result, more than three years after TransCanada had filed a permit application and in the absence of any Presidential determination, Congress on December 23, 2011 enacted Section 501 of the Temporary Payroll Tax Cut Continuation Act of 2011. Section 501 directed that "the President, acting through the Secretary of State, shall grant a permit" enabling construction of the Keystone XL Pipeline within 60 days. The statute also provided that the President need not grant the permit if he determines that the pipeline would not serve the

national interest, but it required the President to submit a report to Congress providing a justification for the President's determination. The statute also provided that if the President did not grant the permit or make a finding within 60 days that the permit would not be in the public interest, a permit containing conditions specified in the statute "shall be in effect by operation of law." Pub. L. 112-78, 125 Stat. 1289-1290 (Dec. 23, 2011).

86. Based on "the fact that the Department does not have sufficient time to obtain the information necessary to assess whether the project … is in the national interest," the State Department recommended that the President deny TransCanada's application. The President did so, stating that "[t]his announcement is not a judgment on the merits of the pipeline, but the arbitrary nature of a deadline that prevented the State Department from gathering the information necessary to approve the project and protect the American people." The State Department made clear that this action did "not preclude any subsequent permit application," and, as noted, TransCanada promptly reapplied for a Presidential permit to allow construction of the Keystone XL Pipeline.

87. Thereafter, both houses of Congress further registered their support for the Keystone XL Pipeline and their disapproval of the President's power to deny a permit for the pipeline. From 2012 to 2014, the House of Representatives passed four separate bills authorizing the development of the Keystone XL Pipeline. *See* H.R. 5682, 113th Cong., 2d Sess. § 1 (2014); American Energy Solutions for Lower Costs and More American Jobs Act, H.R. 2, 113th Cong., 2d Sess. § 103 (2014); Northern Route Approval Act, H.R. 3, 113th Cong., 1st Sess. (2013); North American Energy Access Act, H.R. 4348, 112th Cong., 2d Sess. § 201-204 (2012). For example, Section 3 of the Northern Route Approval Act provided that "[n]otwithstanding Executive Order 13337 … and any other Executive order … , no Presidential permit shall be

required for the pipeline described … " in the application for the Keystone XL Pipeline. In addition, the House of Representatives sought to strip the President of unilateral authority over oil pipelines generally by passing the North American Energy Infrastructure Act. That Act declared that "[n]o Presidential permit required under Executive Order 1337 … Executive Order No. 12038, Executive Order 10485 or any other Executive Order shall be necessary for the construction, connection, operation, or maintenance of an oil or natural gas pipeline … or any cross-border segment thereof." H.R. 3301, 113th Cong., 2d Sess. § 6 (2014). Instead the Department of State would be granted statutory authority to act. *Id.* § 3. These measures did not secure sufficient support to advance past procedural hurdles in the Senate; the Senate version of H.R. 5682 fell just one vote shy of the procedural sixty vote mark. *See* S. 2280, 113th Cong., 2d Sess. § 1 (2014).

88. When the 114th Congress convened in January 2015, the first bill introduced in the Senate was the "Keystone Pipeline Approval Act," a measure to authorize the development of Keystone XL Pipeline. That bill authorized TransCanada to "construct, connect, operate, and maintain the pipeline and cross-border facilities" described in the permit application without the need for any action by the President or any Executive branch official. S. 1, 114th Cong., 1st Sess. §§ 1, 2(a) (2015). The Senate passed the Act on January 29, 2015, and the House of Representatives passed it on February 11, 2015. The enrolled bill was presented to the President, who vetoed it, stating that it would "circumvent longstanding and proven processes for determining whether or not building and operating a cross-border pipeline serves the national interest." The President, however, did not question Congress's constitutional authority to enact the Keystone Pipeline Approval Act or object that it infringed any of his constitutional powers.

89. By these actions, Congress approved of the construction and operation of the Keystone XL Pipeline and rejected any role for the President in refusing to permit the pipeline to proceed. These are the very type of Congressional actions that the Supreme Court has used to determine whether the President has acted contrary to the "express or implied will of Congress," *Medellin*, 552 U.S. at 525, and without any implicit approval of Congress, *see Kent v. Dulles*, 357 U.S. at 128; *see, also, e.g.*, *Youngstown*, 343 U.S. at 586 (opinion of Black, J., for the court) (legislative history of relevant statutes, including rejection of a proposed amendment, demonstrated that "Congress had refused to adopt" a statute granting the claimed power to the President); *id.* at 599-601 (concurring opinion of Frankfurter, J.) (similar reliance on legislative history); *id.* at 639 & nn.6-8 (concurring opinion of Jackson, J.) (agreeing with opinions of J. Black, Frankfurter & Burton on this issue); *id.* at 657 (concurring opinion of Burton, J.) (legislative history demonstrated Congress had "reserved to itself the opportunity to authorize seizure to meet particular emergencies"). Even a resolution by Congress may indicate that Congress opposes the President's assertion of power. *Dames & Moore v. Regan*, 453 U.S. 654 at 687-88 ("Just as importantly, Congress has not disapproved of the action taken here. Though Congress has held hearings on the Iranian Agreement itself, Congress has not enacted legislation, or even passed a resolution, indicating its displeasure with the Agreement."). The Executive Branch has acknowledged that what is required is the "tacit acquiescence" of Congress, and that even congressional measures short of enacted statutes, including the statements of individual members of Congress, are relevant to that determination. *See* Foreign Cables, 22 Opp. Att'y Gen. 13, 19 (1898).

90. Congress has thus rejected the President's assertion of authority to block the construction and operation of the Keystone XL Pipeline: Both houses of Congress passed and

presented to the President a bill that expressly authorized TransCanada to construct and operate the pipeline and the cross-border facilities described in the permit application. Although Congress was unable to override the President's veto, the passage of the bill itself expresses the will of Congress. That bill and Congress's general regulation of domestic oil pipelines and efforts to facilitate cross-border commerce (including oil transport) are incompatible with the denial of a permit for the Keystone XL Pipeline, a major cross-border oil pipeline that also would engage in substantial domestic commerce and be built largely in the United States.

91. Because the denial of the permit for the Keystone XL Pipeline is "incompatible with the expressed or implied will of Congress," the President's power "is at its lowest ebb" and can be sustained "only by disabling the Congress from acting upon the subject." *Medellin*, 552 U.S. at 525 (quoting *Youngstown*, 343 U.S. at 637-38 (concurring opinion)). But Congress cannot be disabled from acting on the subject of the construction and operation of pipeline to transport crude oil from Canada for sale to and within the United States, because Article I, § 8 of the Constitution gives Congress the authority to regulate foreign and domestic commerce. No President has asserted a claim to the contrary, and neither the President nor the Secretary did so with regard to the Keystone XL Pipeline.

92. Congress's action thus precludes any unilateral Presidential power over the Keystone XL Pipeline. Indeed, this case is stronger than *Youngstown*, where the Supreme Court held that President Truman lacked authority to seize domestic steel mills, *see* 343 U.S. at 585, because Congress has regulated the commercial activity at issue more comprehensively and directly than it had in *Youngstown* and has, in contrast to the Congressional action in *Youngstown*, expressly disapproved the specific Presidential action at issue. The lack of Presidential authority here is also supported by the fact that the prohibition on construction of the

Keystone XL Pipeline directly interferes with foreign and domestic commerce, the regulation of which is textually committed to the Congress by the U.S. Constitution. *See Medellin*, 552 U.S. at 524.

C. The Unprecedented Nature of and Basis for the President's Assertion of Unilateral Power To Prohibit Development of a Cross-Border Facility.

93. Under the governing constitutional framework set out above, Congress's specific disapproval of the President's asserted power to prohibit the construction of the Keystone XL Pipeline, as well as its more general actions inconsistent with the exercise of that power, would suffice to require a declaration that the denial of the permit exceeded the President's constitutional powers and was without a lawful basis.

94. The conclusion that the prohibition of the Pipeline's construction exceeded the President's lawful authority is further confirmed and separately compelled by the unprecedented reasons provided for prohibiting construction and by the unprecedented scope of the domestic and interstate commerce affected by the decision. As described below, the prohibition of construction goes well beyond the limited authority to regulate cross-border facilities that has been exercised by prior Presidents, subject to Congress's ongoing control—as prior Presidents have acknowledged.

95. The limited scope of the President's authority is reflected in the first, limited claim of unilateral Presidential power to address cross-border commercial facilities for discrete reasons, which would guide and set the boundaries on the Presidential power in the decades that followed. In 1875, President Grant informed Congress that he had approved a French company's request to land communications cables in the U.S. The approval was based on and subject to a limited set of conditions: his review was designed to ensure only that U.S. citizens received reciprocal rights and that the company proposing to build the facility would not be able to

monopolize related services or exclude the U.S. government from access to the facility. President Grant emphasized that his approach was also subject to "such limitations and conditions as Congress may impose" and that he had acted only "[i]n the absence of legislation by Congress." He further committed to adhere to the principles he had outlined "unless Congress otherwise direct[s]." 22 Op. Att'y Gen. at 16, 18.

96. Applying these principles, the Executive Branch declined to object to the landing of foreign cables in 1877, 1879, and 1884, observing in the first instance that the power to impose the limited conditions asserted by President Grant had "met the approval of Congress . . . indicated by the tacit acquiescence of the Congress, and by the expressed approval of individual members of that body . . . ." 22 Op. Att'y Gen. at 19.

97. At times during the next decade, the Executive Branch denied that the President possessed even this limited unilateral power over cross-border facilities. In 1892, a French company sought to land a cable in Virginia and secured authorization from the government of that state. The company then argued that it should be able to proceed because the President lacked authority to either grant or refuse permission to land. Secretary of State Gresham agreed that because "[t]here is no Federal legislation conferring authority upon the President to grant such permission, and in the absence of such legislation, Executive action … would have no binding force." 22 Op. Att'y Gen. at 23. Similarly, in 1895, Secretary of State and former Attorney General Olney confirmed, in addressing a cable landing request, that "in the absence of Federal legislation conferring authority upon the Executive to grant permission, this Department has no power to act in the matter." 22 Op. Att'y Gen at 24.

98. The Executive Branch reversed its position again in 1898 and claimed that it had the limited powers advanced by President Grant with respect to cables proposed to enter the

United States from abroad. Reviewing President Grant's statement of limited authority and subsequent practice, Acting Attorney General Richards concluded that "the President has the power, in the absence of legislative enactment, to control the landing of foreign submarine cables" and defended the potential limitations outlined by President Grant. He also acknowledged that any Executive action is "subject to subsequent Congressional action." 22 Op. Att'y Gen. at 27. The Richards opinion reflected the most extensive Executive Branch defense of the limited exercise of Presidential power and served as the basis for various approvals of cross-border facilities in the following decades. *See, e.g.*, Granting of License for the Constr. Of a Gas Pipe Line, 38 Op. Att'y Gen. 163 (1935); Diversion of Water from Niagara River, 30 Op. Att'y Gen. 217 (1913); Wireless Telegraph-Int'l Agreement, 24 Op. Att'y Gen. 100 (1902); Cuba Cables, 22 Op. Att'y Gen. 408 (1899).

99. Many subsequent Presidents wrote a similar acknowledgment of Congress's pre-eminent role directly into the permits they granted to other cross-border commercial facilities. For example, when President Wilson issued a permit for a pipeline running under the Detroit River between the U.S. and Canada in 1919, he made clear that the permit was subject to any action "by the Congress of the United States confirming, revoking, or modifying in whole or in part the conditions and terms upon which this consent is granted." Similar language respecting the power of Congress to control commercial cross-border facilities was included in permits granted by Presidents McKinley, Roosevelt, and Taft.

100. In 1920, the Executive Branch unsuccessfully sought to expand its previously asserted power to a different context: an effort by a company to *extend* its existing, U.S.-based facilities outside the United States. Western Union Telegraph Company had planned to extend, from Florida, a submarine cable that would connect off-shore with facilities operated by a British

Western Union affiliate. The U.S. government contended that the extension would be inconsistent with the anti-monopoly and reciprocity conditions outlined by President Grant because the British affiliate operated under a monopoly franchise in a foreign country. The government sought an injunction in federal district court against Western Union's construction of an extension of U.S.-based facilities.

101. The district judge, the renowned Augustus Hand, held that the President lacked the power to prohibit Western Union's construction and operation of the cross-border cable. He reasoned, initially, that it was "most questionable" whether the President had any such power with respect to any cross-border cable, *United States v. Western Union Telegraph Co.*, 272 F. at 315, observing:

> The implications of the power contended for by the government are very great. If the President has the right, without any legislative sanction, to prevent the landing of cables, why has he not a right to prevent the importation of opium on the ground that it is a deleterious drug, or the importation of silk or steel because importation may tend to reduce wages in this country and injure the national welfare . . . [or] in the absence of an act of Congress, have the right to refuse to admit foreigners to our shores, and to deport those aliens whose presence he regards as a public menace?

102. Judge Hand ultimately reserved judgment on whether the President might have power to stop a purely foreign network from entering the United States, *id.* at 318-19, but held that the President did not have any such power to stop the extension of a domestic network that Congress had regulated through the Interstate Commerce Act and Postal Roads Acts, and thus "free[d] . . . from the executive control sought to be exercised." *Id.* at 323.

103. The Second Circuit affirmed, concluding that the underlying power over cross-border facilities "is in Congress," that "no practice has been established" that would provide the

President with such powers, and that the Postal Roads Act likely also supported Western Union's actions. *United States v. W. Union Tel. Co.*, 272 F. at 893.

104. Congress responded by passing a statute that conferred legislative authority guiding such Presidential determinations and confirming that the President would not have the power to act unilaterally, *see* Act of May 27, 1921, ch. 12, 42 Stat. 8 (codified at 47 U.S.C. §§ 34-39), leading the parties by stipulation to reverse the injunction order and dismiss the *Western Union* case as moot, *see* 260 U.S. 754 (1922). This statute, the Kellogg Act, comprised the first of a series of enactments by which Congress barred the President from acting unilaterally and instead conferred limited, express authority to regulate cross-border commercial facilities. The Kellogg Act authorized the President to condition licenses on terms related only to the "landing or operation" of the cables, and to deny licenses only after a hearing and only to promote U.S. security or ensure reciprocal rights of U.S. citizens and companies abroad. 47 U.S.C. §§ 34, 35.

105. Through subsequent statutes, Congress further disavowed and reduced the scope for unilateral Presidential action over cross-border commercial facilities. Those statutes also established specific statutory frameworks addressing cross-border facilities for electrical transmission facilities, natural gas pipelines, and international bridges. *See* Federal Water Power Act, 41 Stat. 1063 (1920) (codified as amended at 16 U.S.C. § 824(e)); Natural Gas Act, 52 Stat. 822 (1938) (codified as amended at 15 U.S.C. § 717b(a), (c)); International Bridge Act of 1972, 86 Stat. 731 (1972) (codified at 33 U.S.C. § 535). In two of those three instances, Congress vested the approval power in an administrative agency, the Federal Power Commission ("FPC"), rather than in the President himself. Like its successors that today exercise that statutory power (the Federal Energy Regulatory Commission and the Department of Energy), the FPC was

principally responsible for domestic facilities and services and not for the implementation of foreign policy. In each case, Congress made clear that the Executive Branch action was to conform to and be based on statutory authority.

106. President Roosevelt and President Eisenhower thereafter established procedures governing how the Executive Branch would exercise powers over the cross-border facilities authorized by the Federal Power Act, the Natural Gas Act, and the Kellogg Act. *See* Exec. Order No. 10530, 19 Fed. Reg. 2709 (May 10, 1954) (cable connections addressed by the Kellogg Act); Exec. Order No. 10485, 18 Fed. Reg. 5397 (Sept. 9, 1953) (natural gas and electricity transmission facilities); Exec. Order No. 8202, 4 Fed. Reg. 3243 (July 15, 1939). Executive Orders 10530 and 10485 remain in effect, as subsequently modified.

107. In 1968, President Johnson issued Executive Order 11423 to address cross-border facilities that Congress had not yet authorized the Executive Branch to address, including oil pipelines. The order designated the Secretary of State as the appropriate recipient for applications for facilities used for "the exportation of petroleum [and] petroleum products," "the exportation or importation of water or sewage," and other cross-border purposes. *See* 33 Fed. Reg. 11741 § 1(a) (Aug. 20, 1968). The order further required the Secretary to request the views of a range of other officials, and generally empowered the Secretary of State to grant a permit upon determination that "issuance of a permit to the applicant would serve the national interest." *Id.* § 1(d). This order also created a process for direct Presidential review in the event of a disagreement between departments about whether to grant or deny the permit. *Id.* § 1(f).

108. Upon information and belief, the President has never prohibited the development of any major cross-border oil pipeline facility for which a permit was sought pursuant to Executive Order 11423, has not prohibited such a facility comprised principally of domestic

components, has not prohibited such a facility that would also undertake significant domestic commerce, and has not prohibited the development of a cross-border oil pipeline facility based on an objection to the nature of the cross-border commerce it would facilitate.

109. In 2004, President George W. Bush issued Executive Order 13337 to address and "expedite reviews of permits as necessary to accelerate the completion of energy production and transmission projects, and to provide a systematic method for evaluating and permitting the construction and maintenance of certain border crossings." *See* 69 Fed. Reg. 25299 (May 5, 2004). Like Executive Order 11423, Executive Order 13337 designates the Secretary of State to receive all cross-border facility applications addressed by the order and to coordinate a process of interagency consultation that may culminate, in the event of disagreements, in a referral to the President for decision. Executive Order 13337 remains in effect. As described above, Secretary Kerry purported to exercise Presidential powers delegated pursuant to Executive Order 13337 when he asserted that TransCanada could not construct the Keystone XL Pipeline.

110. As described above, permit applications granted for cross-border oil pipelines have been limited in scope to the facilities immediately adjacent to the U.S.-Canadian border. *See supra* para. 23. This limited applicability to the immediate cross-border facilities reflects the Executive Branch's previously expressed view that the President's interest in the permitting process arises from "the impact the proposed cross-border facility … will have upon U.S. relations with the country in question, whether Canada or Mexico" and is consistent with the longstanding limits on the assertions of unilateral power in this area — focused on discrete, border-related considerations.

111. District court decisions noting the President's power to grant permits for cross-border oil pipelines have pointed to this tradition of the exercise of limited powers and the (then-

existing) absence of any objection by Congress. *See Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1162 (D. Minn. 2010); *Natural Res. Def. Council, Inc. v. Dep't of State*, 658 F. Supp. 2d 105, 109 (D.D.C. 2009); *see also Sisseton-Wahpeton Oyate v. Dep't of State*, 659 F. Supp. 2d 1071, 1081 (D.S.D. 2009). But none of these decisions affirmed the denial of a permit, much less one undertaken over the objection of Congress and based on a novel rationale well beyond the traditional criteria or scope of Presidential action.

112. Upon information and belief, the permit applications submitted by TransCanada for the Keystone XL Pipeline are the only applications for a major infrastructure project addressed pursuant to Executive Order 13337 that any President has ever denied. No previous President has prohibited the development of major cross-border facilities for which a permit was sought pursuant to Executive Order 13337, prohibited the development of such a major cross-border facility comprised principally of domestic components, prohibited such a facility that would undertake significant domestic commerce, or prohibited the development of such a major cross-border facility based on an objection to the nature of the cross-border commerce it would facilitate.

113. Upon information and belief, the actions of the Executive Branch at issue in this case and those rejected by the federal courts in the *Western Union* case mark the only times in U.S. history that a President has attempted to prohibit the expansion abroad of a major U.S.-based commercial facility based upon an assertion of unilateral Presidential power. Even for the unsuccessful actions at issue in the *Western Union* case (and unlike the action at issue in this case), the Executive Branch's actions did not have the effect of prohibiting the development of a major domestic infrastructure project, did not impede significant domestic commerce, were not based on any criteria other than the limited grounds for action set forth by President Grant, and

did not purport to prohibit the construction of the cross-border facility based upon an objection to the nature of the commerce it would facilitate.

114. There is thus no tradition of Presidents using unilateral powers to prohibit the construction of such major cross-border facilities, and especially none related to predominantly domestic facilities designed to undertake significant domestic commerce. Even had Congress not specifically disapproved of any adverse assertion of unilateral Presidential action with respect to the Keystone XL Pipeline, no basis exists to claim that Congress has acquiesced in the prohibition of the pipeline here under *any* asserted rationale. That is so because Congressional acquiescence can be found only in the acceptance and implicit endorsement of the President's actual exercise of unilateral powers, not his reservation of rights to seek to exercise broader powers in the future. *See, e.g.*, *Kent v. Dulles*, 357 U.S. at 128; *see also Medellin*, 552 U.S. at 531 (confining claim of acquiescence to the "narrow set of circumstances" directly supported by past practice).

115. The particular rationale for prohibiting construction of the Keystone XL Pipeline makes even clearer that the President has exceeded his constitutional authority. Neither the need for the United States to be perceived in the international community as making efforts "to transition to less-polluting forms of energy" nor the need to enhance the President's negotiating power in Paris reflects any traditional concern related to the border crossing. Nor does it reflect the border-related considerations set forth by President Grant and employed in subsequent Administrations. The President did not prohibit the construction of the Keystone XL Pipeline because the Canadian government denied U.S. companies the reciprocal right to build connections to pipelines in Canada, or even to ensure better relations with Canada. Nor did he

prohibit the pipeline because TransCanada would have monopoly power in the United Sates or would deny the U.S. government access to the facility.

116. In contrast, and without precedent, the President's asserted basis for prohibiting the pipeline's construction and operation is wholly incidental to the fact that the Keystone XL Pipeline would cross an international border. The asserted concerns about the international community's perception of U.S. efforts to transition to less greenhouse gas-intensive forms of energy, and the enhancement of the President's negotiating position, would apply equally to blocking construction of a wholly domestic oil or natural gas pipeline, or to blocking the import of heavy petroleum products. For example, those concerns would apply as well to prohibiting construction of the Gulf Coast Pipeline, which facilitates the transport of crude oil (some of it originating in Alberta) from Oklahoma to refineries on the Gulf Coast. Likewise, the same interests would be served by barring U.S. persons from facilitating the development of pipeline facilities or oil reserves that lie entirely outside the United States. Indeed, any restriction by the President upon international trade would inherently strengthen the President's negotiating position with affected foreign nations. But the President's rationale invoked here would not justify the lawfulness any of those actions undertaken without a statutory basis. Any power to prohibit such activities unquestionably would rest in the Congress, not the President acting without statutory authority. The President cannot justify his expansion of powers at Congress's expense by asserting simply that he needs to enhance other Presidential powers exercised elsewhere.

117. The President's asserted basis for prohibiting the pipeline's construction also rests on an objection to the nature of the commerce the pipeline is intended to facilitate – indeed, it rests on *foreigners*' mistaken objections to that commerce. Such determinations lie at the core of

the Congressional power over domestic and foreign commerce and have never served as a basis for the President to exercise unilateral powers to prohibit or impose permit conditions on other cross-border pipelines.

118. The assertion of unilateral power in this case also significantly departs from prior practice because the proposed Keystone XL Pipeline would expand an existing, extensive domestic U.S. pipeline system that is already regulated by U.S. law. Indeed, the existing Keystone Pipeline System already crosses the Canadian border and already transports oil products from Alberta into the United States that are indistinguishable from those the Keystone XL Pipeline would transport. The President's action thus implicates the two concerns that led federal judges to reject the Executive Branch's efforts to block the cross-border facility in the *Western Union* case: the President's actions are least defensible when they limit the extension abroad of domestic facilities and when they affect facilities already regulated by acts of Congress. *See* 272 F. at 894; 272 F. at 323.

119. As a further departure from prior practice, the President's action prohibits development of a large domestic infrastructure project that would undertake extensive domestic commerce. The Keystone XL Pipeline would be comprised predominantly of facilities extending from the U.S. border to existing facilities at Steele City, Nebraska, and their construction and operation necessarily depend on the ability of the pipeline to cross the border. The State Department found that during construction over a two-year period, spending on the Keystone XL Pipeline project would support approximately 42,100 jobs. The Department further found that the project would generate tax revenue for communities in the pipeline's path and would contribute .02 percent to the national G.D.P. based on 2012 statistics.

120. The prohibition of the Keystone XL Pipeline's construction and operation impairs substantial domestic commerce as well as foreign commerce. The Keystone XL Pipeline would transport significant volumes of oil from the Bakken formation in Montana to destinations in the Midwest and Gulf Coast Region. The permit denial also impairs the operation and financial returns of closely related, previously approved, and otherwise regulated domestic facilities, including portions of the existing Keystone I Pipeline and the Gulf Coast Pipeline and Houston Lateral.

121. The prohibition of an extensive domestic infrastructure project based on a perception in the international community that the project would precipitate the extraction and increased consumption of particularly greenhouse gas-intensive crude oil points to a further reason that the President lacks authority to deny the permit. Absent express statutory authority, the President simply does not have the power to regulate such domestic facilities based on asserted harms arising from greenhouse gas emissions, as the Supreme Court has recently confirmed in addressing the powers of the Environmental Protection Agency, acting under the direction of the President. *See Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2439-47 (2014).

122. In short, both the nature and the basis for the assertion of unilateral Presidential power to prohibit construction of the Keystone XL Pipeline depart markedly from any established practice to which Congress could have acquiesced. Thus, even if the prohibition on construction of the Keystone XL Pipeline were not incompatible with the express and implied will of Congress, the denial of the permit would be beyond any constitutional authority that the President has or could delegate to the Secretary of State.

VI. HARM TO TRANSCANADA

123. Defendants' actions giving effect to the denial of the permit authorizing TransCanada to build, own, or operate the portion of the Keystone XL Pipeline that crosses the U.S.-Canada border would prevent the construction and the operation of the portion of the Keystone Pipeline XL Pipeline extending from Hardisty, Alberta to Steele City, Nebraska.

124. If TransCanada is precluded from constructing and operating the Keystone XL Pipeline from Hardisty, Alberta to Steele City, Nebraska, it will be unable to provide oil transport services demanded by shippers and their customers for oil from Alberta and Montana destined to points in the United States, will lose the value of the capital expenditures made and expenses incurred in preparing to build that portion of the Keystone XL Pipeline, and will be unable to profit from providing those services. TransCanada has expended billions of dollars in preparation for constructing the portion of the Keystone XL Pipeline extending from Hardisty, Alberta to Steele City, Nebraska.

125. Portions of the originally proposed Keystone XL Pipeline, including the Gulf Coast Pipeline and the Houston Lateral, have been completed or are nearing completion and are or soon will be in operation. Those facilities were designed and constructed to provide services to shippers including those that sought to transport oil from Hardisty, Alberta and the Bakken formation in Montana to destinations near Gulf Coast refineries in the United States. If TransCanada is precluded from completing and operating the portion of the Keystone XL Pipeline from Hardisty, Alberta to Steele City, Nebraska, it will be unable to provide the anticipated levels of service over the Gulf Coast Pipeline and the Houston Lateral. As a result, the revenues it will secure from operating the Gulf Coast Pipeline and the Houston Lateral will be significantly reduced, and TransCanada will be unable to recover a significant portion of the expenses associated with constructing and operating those facilities.

VII. CLAIMS FOR RELIEF

Count One

Unlawful Executive Action

126. Plaintiffs incorporate by reference the allegations of the preceding paragraphs.

127. The decision to prohibit TransCanada from extending the Keystone System into Canada, and efforts to give effect to that denial, are not authorized by any Act of Congress.

128. The decision to prohibit TransCanada from extending the Keystone System into Canada is contrary to the express will of the United States Congress, as reflected in statutes generally regulating and facilitating the development of oil pipelines, in statutes and Congressional action supporting and addressing the cross-border commerce facilitated by the Keystone XL Pipeline, and, through the Keystone XL Pipeline Approval Act, the direct authorization by both Houses of Congress of the pipeline's construction and operation.

129. Even apart from Congressional measures disapproving of any Presidential actions to halt the construction of the Keystone XL Pipeline, the prohibition of construction of the Keystone XL Pipeline, and efforts to give effect to that prohibition, markedly exceed every prior exercise of unilateral Presidential authority to prohibit domestic and foreign commerce transacted through a cross-border commercial facility. No President has successfully relied on unilateral powers to prohibit the extension of a major domestic oil pipeline or other significant domestic facilities beyond U.S. territory; no President has invoked unilateral powers to prohibit construction of a major domestic infrastructure project supporting significant domestic commerce; and no President has sought to prohibit development of such a major cross-border facility on grounds unrelated to the particular effect the facility may have of impairing commerce in the United States, to U.S. citizens' ability to obtain reciprocal privileges to construct or operate pipelines in other countries, or to the government's ability to use the facility.

130. The determination that TransCanada may not construct or operate the Keystone XL Pipeline, and efforts to give effect to that determination, are null and void because they exceed the powers vested in the President and Executive Branch by law and by Article II of the United States Constitution.

131. The determination that TransCanada may not construct or operate the Keystone XL Pipeline, and efforts to give effect to that determination, are null and void because they infringe upon the powers that Article I of the United States Constitution provides to the United States Congress.

132. Any action taken by Defendants, or any other officer or employee of the United States, to implement, enforce, or give effect to the determination that TransCanada may not construct or operate the Keystone XL Pipeline would be unlawful. Their own conduct, no less than that of the President, "must stem either from an act of Congress or from the Constitution itself." *Youngstown*, 343 U.S. at 585.

133. In such a circumstance, where an officer's "power has been conferred in form but the grant is lacking in substance because of its constitutional invalidity," courts are authorized to order declaratory and injunctive relief to halt the officer from acting unlawfully. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690 (1949).

134. Defendants' actions to implement, enforce, or give effect to the determination that TransCanada cannot construct and operate the Keystone XL Pipeline would harm plaintiffs TransCanada Keystone Pipeline, LP and TC Oil Pipeline Operations Inc.

VIII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for an order and judgment:

1. Declaring that Defendants are without legal authority to prohibit TransCanada from extending the Keystone System into Canada through

the construction and operation of the Keystone XL Pipeline or to otherwise impede the development and operation of the Keystone XL Pipeline other than through the lawful exercise of statutory authority;

2. Declaring that the Decision purporting to prohibit TransCanada from extending the Keystone System into Canada through the construction and operation of the Keystone XL Pipeline is without lawful effect;

3. Declaring that Defendants have no lawful basis to take any action to enforce, implement or otherwise put into effect the Decision purporting to prohibit TransCanada from extending the Keystone System into Canada through the construction and operation of the Keystone XL Pipeline; and

4. Enjoining Defendants from taking any action to enforce, implement, or otherwise put into effect the Decision purporting to prohibit TransCanada from extending the Keystone System into Canada through the construction and operation of the Keystone XL Pipeline; and

5. Granting such other and further relief, not including damages, as this Court deems just and proper.

Dated: January 6, 2016

By: s/ Penny P. Reid

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EXHIBIT A

the WHITE HOUSE

Briefing Room

Your Weekly Address

Speeches & Remarks

Press Briefings

Statements & Releases

White House Schedule

Presidential Actions

- Executive Orders
- Presidential Memoranda
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Legislation

- Pending Legislation
- Signed Legislation
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Nominations & Appointments

Disclosures

The White House
Office of the Press Secretary

For Immediate Release November 06, 2015

Statement by the President on the Keystone XL Pipeline

Roosevelt Room

11:58 A.M. EST

THE PRESIDENT: Good morning, everybody. Several years ago, the State Department began a review process for the proposed construction of a pipeline that would carry Canadian crude oil through our heartland to ports in the Gulf of Mexico and out into the world market.

This morning, Secretary Kerry informed me that, after extensive public outreach and consultation with other Cabinet agencies, the State Department has decided that the Keystone XL Pipeline would not serve the national interest of the United States. I agree with that decision.

This morning, I also had the opportunity to speak with Prime Minister Trudeau of Canada. And while he expressed his disappointment, given Canada's position on this issue, we both agreed that our close friendship on a whole range of issues, including energy and climate change, should provide the basis for even closer coordination between our countries going forward. And in the coming weeks, senior members of my team will be engaging with theirs in order to help deepen that cooperation.

Now, for years, the Keystone Pipeline has occupied what I, frankly, consider an overinflated role in our political discourse. It became a symbol too often used as a campaign cudgel by both parties rather than a serious policy matter. And all of this obscured the fact that this pipeline would neither be a silver bullet for the economy, as was promised by some, nor the express lane to climate disaster proclaimed by others.

To illustrate this, let me briefly comment on some of the reasons why the State Department rejected this pipeline.

First: The pipeline would not make a meaningful long-term contribution to our economy. So if Congress is serious about wanting to create jobs, this was not the way to do it. If they want to do it, what we should be doing is passing a bipartisan infrastructure plan that, in the short term, could create more than 30 times as many jobs per year as the pipeline would, and in the long run would benefit our economy and our workers for decades to come.

Our businesses created 268,000 new jobs last month. They've created 13.5 million new jobs over the past 68 straight months -- the longest streak on record. The unemployment rate fell to 5 percent. This Congress should pass a serious infrastructure plan, and keep those jobs coming. That would make a difference. The pipeline would not have made a serious impact on those numbers and on the American people's prospects for the future.

Second: The pipeline would not lower gas prices for American consumers. In fact, gas prices have already been falling -- steadily. The national average gas price is down about 77 cents over a year ago. It's down a dollar over two years ago. It's down $1.27 over three years ago. Today, in 41 states, drivers can find at least one gas station selling gas for less than two bucks a gallon. So while our politics have been consumed by a debate over whether or not this pipeline would create jobs and lower gas prices, we've gone ahead and created jobs and lowered gas prices.

Third: Shipping dirtier crude oil into our country would not increase America's energy security. What has increased America's energy security is our strategy over the past several years to reduce our reliance on dirty fossil fuels from unstable parts of the world. Three years ago, I set a goal to cut our oil imports in half by 2020. Between producing more oil here at home, and using less oil throughout our economy, we met that goal last year -- five years early. In fact, for the first time in two decades, the United States of America now produces more oil than we buy from other countries.

Now, the truth is, the United States will continue to rely on oil and gas as we transition -- as we must transition -- to a clean energy economy. That transition will take some time. But it's also going more quickly than many anticipated. Think about it. Since I took office, we've doubled the distance our cars will go on a gallon of gas by 2025; tripled the power we generate from the wind; multiplied the power we generate from the sun 20 times over. Our biggest and most successful businesses are going all-in on clean energy. And thanks in part to the investments we've made, there are already parts of America where clean power from the wind or the sun is finally cheaper than dirtier, conventional power.

The point is the old rules said we couldn't promote economic growth and

protect our environment at the same time. The old rules said we couldn't transition to clean energy without squeezing businesses and consumers. But this is America, and we have come up with new ways and new technologies to break down the old rules, so that today, homegrown American energy is booming, energy prices are falling, and over the past decade, even as our economy has continued to grow, America has cut our total carbon pollution more than any other country on Earth.

Today, the United States of America is leading on climate change with our investments in clean energy and energy efficiency. America is leading on climate change with new rules on power plants that will protect our air so that our kids can breathe. America is leading on climate change by working with other big emitters like China to encourage and announce new commitments to reduce harmful greenhouse gas emissions. In part because of that American leadership, more than 150 nations representing nearly 90 percent of global emissions have put forward plans to cut pollution.

America is now a global leader when it comes to taking serious action to fight climate change. And frankly, approving this project would have undercut that global leadership. And that's the biggest risk we face -- not acting.

Today, we're continuing to lead by example. Because ultimately, if we're going to prevent large parts of this Earth from becoming not only inhospitable but uninhabitable in our lifetimes, we're going to have to keep some fossil fuels in the ground rather than burn them and release more dangerous pollution into the sky.

As long as I'm President of the United States, America is going to hold ourselves to the same high standards to which we hold the rest of the world. And three weeks from now, I look forward to joining my fellow world leaders in Paris, where we've got to come together around an ambitious framework to protect the one planet that we've got while we still can.

If we want to prevent the worst effects of climate change before it's too late, the time to act is now. Not later. Not someday. Right here, right now. And I'm optimistic about what we can accomplish together. I'm

optimistic because our own country proves, every day -- one step at a time -- that not only do we have the power to combat this threat, we can do it while creating new jobs, while growing our economy, while saving money, while helping consumers, and most of all, leaving our kids a cleaner, safer planet at the same time.

That's what our own ingenuity and action can do. That's what we can accomplish. And America is prepared to show the rest of the world the way forward.

Thank you very much.

END
12:08 P.M. EST

EXHIBIT B

DEPARTMENT OF STATE
RECORD OF DECISION AND NATIONAL INTEREST DETERMINATION

TransCanada Keystone Pipeline, L.P. Application for Presidential Permit

Contents:

1.0 Summary

On May 4, 2012, TransCanada Keystone Pipeline, L.P. (Keystone) submitted an application to the U.S. Department of State (Department) for a Presidential Permit that would authorize construction, connection, operation, and maintenance of pipeline facilities at the United States-Canada border in Phillips County, Montana, to import crude oil from Canada into the United States. The proposed project, called Keystone XL (the proposed Project), would consist of approximately 1,204 miles of new, 36-inch-diameter pipeline extending from Hardisty, Alberta, to Steele City, Nebraska. The proposed Project would have the capacity to deliver up to 830,000 barrels per day (bpd) of crude oil. It would predominantly transport crude oil from the Western Canadian Sedimentary Basin (WCSB), but would also transport quantities of crude oil from Montana and North Dakota via a proposed pipeline and associated facilities known as the Bakken Marketlink.

Keystone is a limited partnership organized under Delaware law with a primary business address in Houston, Texas. Its affiliate, TransCanada Pipelines Ltd., would operate the proposed Project. TransCanada Pipelines Ltd. is a limited company organized under the laws of Canada with its headquarters located in Calgary, Alberta, Canada. Both Keystone and TransCanada Pipelines Ltd. are owned by affiliates of TransCanada Corporation, a Canadian company with stock publicly traded on the Toronto and New York stock exchanges.

Executive Order 13337 (April 30, 2004) delegates to the Secretary of State the President's authority to receive applications for permits for the construction, connection, operation, or maintenance of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels (except for natural gas) at the borders of the United States and to issue or deny such Presidential Permits upon a national interest determination. The determination is Presidential in nature, and therefore the requirements of the National Environmental Policy Act of 1969 (NEPA), the National Historic Preservation Act of 1966 (NHPA), and the Endangered Species Act (ESA) are inapplicable. Nevertheless, the Department's review of the Presidential Permit application for the proposed Project has, as a matter of policy, been conducted in a manner consistent with NEPA. A Final Supplemental Environmental Impact Statement (Supplemental EIS) was released on January 31, 2014. In the Supplemental EIS, the Department evaluated the potential construction and operational impacts of the proposed Project and alternative impacts that may occur without the proposed Project on a wide range of environmental and cultural resources. Similarly, as a matter of policy, the Department conducted reviews of the proposed Project consistent with Section 106 of the NHPA, as amended, and with Section 7 of the ESA. The Department solicited public comment and conducted a broad range of consultations with state, local, tribal, and foreign governments and other federal agencies as it considered Keystone's application.

Under authority delegated by the President of the United States, and following an evaluation of the proposed Project, the Secretary of State has determined that issuing a Presidential Permit to Keystone to construct, connect, operate, and maintain at the border of the United States pipeline facilities for the transport of crude oil from Canada to the

United States as described in the Presidential Permit application for the proposed Project would not serve the national interest. Accordingly, the request for a Presidential Permit is denied.

2.0 Legal Authority

The President of the United States has authority to require permits for transboundary infrastructure projects, based upon his Constitutional powers. In Executive Order 13337, acting pursuant to the Constitution and laws of the United States, including Section 301 of Title 3 of the United States Code, the President delegated to the Secretary of State the authority to receive applications and make determinations regarding approval or denial of a Presidential Permit for certain types of border facilities, including those for cross-border petroleum pipelines, based on the Secretary's finding as to whether issuance of a permit would serve the national interest. Because the proposed Project seeks to build new petroleum facilities that cross the international border, the authority to make a determination for the issuance of a Presidential Permit for the border facilities has been delegated to the Secretary of State by the President. Once the Secretary makes a proposed determination on behalf of the President pursuant to Executive Order 13337, any of the Cabinet-level officials of the eight agencies named by the President in the Executive Order may indicate disagreement with it and request that the Secretary refer the application to the President. The Secretary's determination on behalf of the President stands and the Presidential Permit is issued or denied consistent with that decision if none of the Cabinet-level officials chooses to refer the application to the President.

As noted above, when reviewing an application for a Presidential Permit, the Secretary is required by the Executive Order to determine if issuance of the permit would serve the national interest. The determination is made pursuant to the President's Constitutional authority. No statute establishes criteria for this determination. The President or his delegate may take into account factors he or she deems germane to the national interest. With regard to the proposed Project, the Secretary has considered a range of factors, including but not limited to foreign policy; energy security; environmental, cultural, and economic impacts; and compliance with applicable law and policy. The determination is Presidential in nature and therefore the requirements of NEPA, the ESA, and the NHPA are inapplicable. Nevertheless, as a matter of policy and in order to inform the Secretary's determination regarding the national interest, the Department has reviewed the potential impacts of the action on the environment and cultural resources in a manner consistent, where appropriate, with these statutes. The purpose of preparing an environmental impact statement and undertaking the other statutory processes noted above was to produce a comprehensive review to inform decisionmakers and the relevant Executive Branch agencies about the potential environmental impacts of the proposed Project.

3.0 Agency and Tribal Involvement and Public Comment

The Department conducted extensive public outreach and consultation during several stages of its consideration of Keystone's Presidential Permit application in order to solicit

input on issues to be considered. The Department also conducted government-to-government consultation with Indian tribes regarding historic properties in a manner consistent with the NHPA, and consulted with relevant agencies consistent with the ESA and other statutes as appropriate. Finally, the Department sought views of other federal agencies as required by Executive Order 13337. The public notice, outreach, and consultation efforts during consideration of Keystone's application are further detailed below. The Department has taken all comments and relevant information into account in making the national interest determination. As directed by the President, the Department also has considered the input from agencies listed in Executive Order 13337.

3.1 Public Notice: Upon receipt of Keystone's application, the Department published in the Federal Register a Notice of Receipt of the Keystone XL Pipeline Application (77 FR 27533, May 10, 2012). At that time, the Department also established a website that it updated with information and significant documents throughout its review of the Presidential Permit application (*see* http://www.keystonepipeline-xl.state.gov/).

3.2 Public Comment Periods: On June 15, 2012, the Department published a notice in the Federal Register informing the public that it intended to prepare a Supplemental Environmental Impact Statement (77 FR 36032). The notice also announced plans for developing the scope of the environmental review and content of the Supplemental EIS, and invited public participation in that process, including soliciting public comments. The Department received over 400,000 comments during the scoping period (including letters, cards, emails, and telephone calls), which were considered and reflected as appropriate in developing the scope of the Supplemental EIS. The Department also published all comments received during this and all other public comment periods in the review, consistent with its commitment to conduct an objective, rigorous, and transparent review process.

In March 2013, the Department released a Draft Supplemental EIS, which was posted on the Department's website for the project. The Department distributed copies to public libraries along the pipeline route and to interested Indian tribes, federal and state agencies, elected and appointed officials, media organizations, non-governmental organizations (NGOs), private landowners, and other interested parties. On March 27, 2013, the Department published a notice in the Federal Register inviting the public to comment on the document (78 FR 18665). The Department then held a public meeting on April 18, 2013, in Grand Island, Nebraska, to receive further views from the public and other interested parties. In total, the Department received more than 1.5 million submissions during the public comment period for the Draft Supplemental EIS. These submissions came from members of the public, federal, state, and local representatives, government agencies, Indian tribes, NGOs, and other interested groups and stakeholders. All comments were considered as part of the Supplemental EIS; Volumes V and VI of the Supplemental EIS address the comments that were received.

On February 5, 2014, five days after releasing the Final Supplemental EIS, the Department published a notice in the Federal Register inviting members of the public to comment within 30 days on any factors they deemed relevant to the national interest

determination (79 FR 6984). Executive Order 13337 allows for such a public comment process, but does not require the Department to solicit public input. The response during the 30-day public comment period was unprecedented. The Department received more than 3 million submissions.

All comments were reviewed by subject matter experts from several Department bureaus who were knowledgeable about the proposed Project and involved in drafting sections of this Record of Decision and National Interest Determination, as well as by the third-party contractor engaged to assist the Department with tasks relating to the review of the permit application. The contractor, with guidance from Department experts, sorted the comments into six overarching issue areas discussed in the comments—environmental impacts (including climate change), cultural resources impacts, socioeconomic impacts, energy security, foreign policy considerations, and compliance with relevant federal and state laws and regulations. For each of these issue areas, the contractor identified a number of themes that captured the ideas or points raised by public comments. The Department's subject matter experts directly reviewed all of the issues and information raised in the public comments. The Department determined that the comments largely addressed issues that were also raised during preparation of the Supplemental EIS.

3.3 Tribal Consultation: The Department directly contacted 84 Indian tribes within the United States that could have an interest in the resources potentially affected by the proposed Project. Of the 84 Indian tribes, 67 notified the Department that they would like to consult on the proposed Project or were undecided. The Department conducted extensive government-to-government consultations with those 67 Indian tribes on the environmental, cultural, and other potential impacts of the proposed Project. In addition to communications by phone, email, and letter, Department officials held tribal meetings in October 2012 (three meetings), May 2013 (one meeting), and July 2013 (teleconference). The face-to-face meetings were held in four locations: Billings, Montana; Pierre, South Dakota; Rapid City, South Dakota; and Lincoln, Nebraska.

In addition to the government-to-government consultations, the Department engaged in discussions consistent with Section 106 of the NHPA with Indian tribes, Tribal Historic Preservation Officers, State Historical Preservation Officers, and the Advisory Council on Historical Preservation. The topics of these discussions included cultural resources, in general, as well as cultural resources surveys, Traditional Cultural Properties surveys, effects on cultural resources, and potential mitigation. Additionally, Indian tribes were provided cultural resources survey reports for the proposed Project and were invited both to conduct Traditional Cultural Property surveys funded by Keystone and to help develop and participate in the Tribal Monitoring Plan.

3.4 Consultation with Federal and State Agencies: Ten federal entities agreed to assist the Department as Cooperating Agencies during preparation of the Supplemental EIS: the U.S. Army Corps of Engineers, the Farm Service Agency, the Natural Resource Conservation Service, the Rural Utilities Service, the Department of Energy, the Bureau of Land Management, the National Park Service, the U.S. Fish and Wildlife Service (FWS), the Pipeline and Hazardous Materials Safety Administration's Office of Pipeline

Safety (PHMSA), and the U.S. Environmental Protection Agency (EPA). These agencies had significant input into the drafting of the Draft and Final Supplemental Environmental Impact Statements.

Consistent with Section 7 of the ESA, the Department consulted with the FWS and submitted a Biological Assessment on the proposed Project. The FWS issued a Biological Opinion in 2012 that is available as an attachment to the Supplemental EIS. Prior to issuance of this Record of Decision and National Interest Determination, consultations with the FWS were reinitiated regarding the rufa red knot (*Calidris canutus rufa*), designated a threatened species effective January 12, 2015, and the northern long-eared bat (*Myotis septentrionalis*), designated a threatened species effective May 4, 2015. The Department and FWS have concluded consultations with regard to the rufa red knot, but are still consulting on the northern long-eared bat.

Executive Order 13337 requires that the Secretary request the views of eight specified U.S. federal agencies with regard to the permit application. Accordingly, the Department requested the views of the Department of Defense, the Department of Justice, the Department of the Interior, the Department of Commerce, the Department of Transportation, the Department of Energy, the Department of Homeland Security, and the Environmental Protection Agency. The Department of Justice and the Department of Commerce informed the Department that they did not plan to provide any views with regard to the permit application. The other six agencies provided their views in writing; those views have been released in conjunction with this document.

The Department has also monitored other federal and state permitting and licensing processes, including, for example, litigation and the recent application to the Nebraska Public Service Commission concerning the proposed Project's route through that state.

3.5 Information Provided by Keystone: The Department had robust communication with Keystone throughout the review of the application for the proposed Project. Keystone responded to multiple requests for information and provided supplemental views and information on its own initiative, including through letters on February 24, 2015, and June 29, 2015. The Department has taken all information provided by Keystone into account in making the national interest determination.

4.0 Project Background

4.1 Keystone XL Project: The proposed Project would consist of approximately 1,204 miles of new, 36-inch-diameter pipeline extending from Hardisty, Alberta, to Steele City, Nebraska. Approximately 875 miles of the pipeline would be located in the United States. The pipeline would cross the international border between Saskatchewan, Canada and the United States near the town of Morgan, Montana, in Phillips County. The pipeline would have the capacity to deliver up to 830,000 bpd of crude oil. Annual quantities would likely vary based on market conditions and other factors.

Bakken crude would enter the pipeline within the United States through the proposed Bakken Marketlink Project—a five-mile pipeline with pumps, meters, and storage tanks that would connect to the Keystone XL pipeline near Baker, Montana. The facilities would supply up to 100,000 bpd of Bakken crude oil to the proposed Keystone XL pipeline.

At its southern terminus, the proposed Project would connect to the existing Keystone Cushing Extension pipeline, which extends from Steele City, Nebraska, to Cushing, Oklahoma. The Keystone Cushing Extension in turn connects to Keystone's Gulf Coast pipeline, which extends south to Nederland, Texas, in order to serve Gulf Coast refineries.

In addition to the pipeline and Bakken Marketlink facilities, the proposed Project would include ancillary facilities. Eighteen pumping stations would be located along the Keystone XL pipeline, and two pumping stations would be added to the Keystone Cushing Extension. Keystone further anticipates new pumping capacity on the Keystone Cushing Extension in Kansas. The pipeline would be located in a 50-foot-wide permanent right of way (ROW). The temporary construction ROW would be wider—110 feet—and access roads, construction camps, and related facilities would be needed during construction.

According to the application submitted by Keystone, the primary purpose of the proposed Project would be to transport crude oil from the border with Canada to delivery points in the United States (primarily to the Gulf Coast area). The proposed Project is meant to supply U.S. refineries with crude oil of the kind found in the WCSB (often called heavy crude oil). The proposed Project would also provide transportation for the kind of crude oil found within the Bakken formation of North Dakota and Montana (often called light crude oil).

Most recent U.S. production growth has been from tight oil formations—unlocked through technical innovations like hydraulic fracturing and horizontal drilling—that typically yield light, sweet crude. As a result, U.S. crude production growth has tended to displace imports from other countries also producing light, sweet crude—predominately in Africa. Oil sands bitumen consists of heavy, sour, viscous crude oil that is produced and marketed differently than most domestic unconventional crudes. Many U.S. refineries, particularly in the Midwest and Gulf Coast, are optimized to process heavy crudes like those from the oil sands.

As the Supplemental EIS explains, North American production growth coupled with constraints on transporting landlocked crude oil to market have kept prices of that crude low. This has heightened the attractiveness of the proposed Project to many in industry, and Keystone has stated that the pipeline capacity is already fully subscribed.

The Department notes that the ultimate disposition of crude oil that would be transported by the proposed Project, as well as any refined products produced from that crude oil, would be determined by market demand and applicable law. In the absence of heavy

crude oil from Canada, U.S. refineries, particularly in the Gulf Coast, will continue to rely on comparable foreign heavy crudes.

4.2 Prior Permit Application: Keystone's first application for the Keystone XL pipeline was submitted to the Department on September 19, 2008. A Final EIS was published on August 26, 2011. The route proposed in 2008 included the same U.S.-Canadian border crossing as the currently proposed Project, but a different pipeline route in the United States. That route traversed a substantial portion of the Sand Hills Region of Nebraska, as identified by the Nebraska Department of Environmental Quality (NDEQ). Moreover, the 2011 Final EIS route went from Montana to Steele City, Nebraska, and then from Cushing, Oklahoma, to the Gulf Coast area.

In November 2011, the Department determined that additional information was needed to fully evaluate the application—in particular, information about alternative routes within Nebraska that would avoid the NDEQ-identified Sand Hills Region. In late December 2011, Congress enacted a provision of the Temporary Payroll Tax Cut Continuation Act that sought to require the President to make a decision on the Presidential Permit for the 2008 application within 60 days. That deadline did not allow sufficient time for the Department to prepare a rigorous, transparent, and objective review of an alternative route through Nebraska. Accordingly, the Presidential Permit was denied.

In February 2012, Keystone informed the Department that it considered the Gulf Coast portion of the originally proposed pipeline project (from Cushing, Oklahoma, to the Gulf Coast area) to have independent economic utility, and indicated that Keystone intended to proceed with construction of the Gulf Coast pipeline as a separate project, called the Gulf Coast Project. The Gulf Coast Project did not require a Presidential Permit because it does not cross an international border. Construction on the Gulf Coast Project is now complete.

On May 4, 2012, Keystone filed a new Presidential Permit application for the Keystone XL Project. The proposed Project has a new route and a new stated purpose and need. The new proposed route differs from the 2011 Final EIS Route in two significant ways: 1) it would avoid the environmentally sensitive NDEQ-identified Sand Hills Region and 2) it would terminate at Steele City, Nebraska. From Steele City, existing pipelines would transport the crude oil to the Gulf Coast area. The proposed Project no longer includes a southern segment.

In addition to the NDEQ-identified Sand Hills Region, the proposed Project route would avoid other areas in Nebraska (including portions of Keya Paha County) that have been identified by the NDEQ as having soil and topographic characteristics similar to the Sand Hills Region. The proposed Project route would also avoid or move further away from water wellhead protection areas for the towns of Clarks and Western, Nebraska.

5.0 Issues Considered in the Final Supplemental Environmental Impact Statement

This Record of Decision and National Interest Determination is informed by the Supplemental EIS prepared by the Department and published in January 2014, which identified and analyzed a broad range of potential impacts of the proposed Project.

The Supplemental EIS presents information and analysis on a range of potential impacts of the proposed Project. It also describes the tribal consultations undertaken as part of the Supplemental EIS process. The Supplemental EIS also considers reasonable alternative pipeline routes and No Action Alternative scenarios.

Key topics in the Supplemental EIS, particularly those receiving significant public interest, are described below.

5.1 Greenhouse Gases and Climate Change Impacts: Greenhouse gases and the potential climate change impacts associated with the proposed Project were key areas of interest highlighted by the comments received by the Department. The Supplemental EIS evaluates the relationship between the proposed Project with respect to GHG emissions and climate change from the following perspectives:

- The GHG emissions associated with the construction and operation of the proposed Project and its connected actions;

- The indirect lifecycle (wells-to-wheels) GHG emissions associated with the WCSB crude oil that would be transported by the proposed Project as compared to the GHG emissions of the crudes it may displace; and

- How the GHG emissions associated with the proposed Project cumulatively contribute to climate change.

GHG Emissions Associated with Construction and Operation

The proposed Project would emit approximately 0.24 million metric tons of carbon dioxide (CO2) equivalents (MMTCO2e) per year during the construction period. These emissions would be emitted directly through fuel use in construction vehicles and equipment as well as land clearing activities, including open burning, and indirectly from electricity usage. To operate and maintain the pipeline, approximately 1.44 MMTCO2e would be emitted per year, largely attributable to electricity use for pump station power, fuel for vehicles and aircraft for maintenance and inspections, and fugitive methane emissions at connections. The 1.44 MMTCO2e emissions would be equivalent to GHG emissions from approximately 300,000 passenger vehicles operating for 1 year, or 71,928 homes using electricity for 1 year.

GHG Emissions Associated with the Indirect Lifecycle of WCSB Crudes

To enable a more comprehensive understanding of the potential indirect GHG impact of the proposed Project, it is important to consider the wider GHG emissions associated with the crude oil that would be transported by the proposed Project. A lifecycle analysis is a technique used to evaluate the environmental aspects and impacts (in this case GHGs) that are associated with a product, process, or service from raw materials acquisition

through production, use, and end-of-life (wells-to-wheels). This approach evaluates the GHG implications of the WCSB crudes that would be transported by the proposed Project compared to other crude oils that would likely be replaced or displaced by those WCSB crudes in U.S. refineries (hereinafter, reference crudes).

The Supplemental EIS analysis considers wells-to-wheels GHG emissions, including extraction, processing, transportation, refining, and refined product use (such as combustion of gasoline in cars) of WCSB crudes compared to other reference crudes, including heavy slates. The lifecycle analysis also considers the implications associated with other generated products during the lifecycle stages (so-called co-products) such as petroleum coke. The largest single source of GHG emissions in the lifecycle analysis is the finished-fuel combustion of refined petroleum fuel products, which is consistent for different crude oils.

WCSB crudes are generally more GHG intensive than other crudes they would replace or displace in U.S. refineries, and emit an estimated 17 percent more GHGs on a lifecycle basis than the average barrel of crude oil refined in the United States. As the EPA notes in its letter of February 2, 2015 to the Secretary, "oil sands crude is substantially more carbon intensive than reference crudes and its use will significantly contribute to carbon pollution."

The total lifecycle emissions associated with production, refining, and combustion of 830,000 bpd of oil sands crude oil transported through the proposed Project is approximately 147 to 168 MMTCO2e per year. The annual lifecycle GHG emissions from 830,000 bpd of the four reference crudes examined in the Supplemental EIS are estimated to be 124 to 159 MMTCO2e. The range of incremental GHG emissions for crude oil that would be transported by the proposed Project is estimated to be 1.3 to 27.4 MMTCO2e annually. The estimated range of potential emissions is large because there are many variables, such as which reference crude is used for the comparison and which study is used for the comparison. Nevertheless, at the high end, the Supplemental EIS states that 27.4 MMTCO2e per year is equivalent to the annual GHG emissions from 5.7 million passenger vehicles or 7.8 coal-fired power plants.

These estimates characterize the potential increase in emissions attributable to the proposed Project if one assumes that approval or denial of the proposed Project would directly result in a change in production of 830,000 bpd of oil sands crudes in Canada. That is because the above estimates represent the total incremental emissions associated with production and consumption of 830,000 bpd of oil sands crude above and beyond the current baseline compared to the reference crudes. However, the actual increase in GHG emissions attributable to the proposed Project depends on whether or how much approval and use of the pipeline would cause an increase in oil sands production.

5.2 Market Analysis

Proposed Project's Impact on Oil Sands Production

The Supplemental EIS utilizes analysis of evolving market conditions, transportation costs, oil-sands supply costs, and varying supply-demand scenarios to inform conclusions about the proposed Project's potential impact on oil sands production. The analysis concluded at the time it was published in January 2014 that approval or denial of any one crude oil transport project, including the proposed Project, would be unlikely to significantly impact the rate of extraction in the oil sands, or the continued demand for heavy crude oil at refineries in the United States. However, the Supplemental EIS balances this position by emphasizing that uncertainty underlies a number of key variables critical to projecting Canadian production growth – which is reinforced by analysis of lower oil prices.

Generally, the dominant drivers of oil sands development remain more global than any single infrastructure project. Oil sands production and investment could slow or accelerate depending on oil price trends, regulations, and technological developments, but the potential effects of those factors on the industry's rate of expansion need not be conflated with the more limited effects of individual pipelines. Under most market conditions, alternative transportation infrastructure would allow growing oil sands production to reach markets irrespective of the proposed Project. However, construction of the proposed Project would have some effect on discrete decisions about whether to develop specific oil sands projects if (1) no new pipeline capacity to Canadian ports or to the United States becomes operational and (2) the price of oil in the long run persists at a level where other transport options are no longer economical.

The impact on oil sands development is difficult to gauge with precision, in part because the cost differential between other modes of transport and pipelines may change over time, and production costs vary from one oil sands development to another. While the Department does not know all of the production costs or other investment factors for specific Canadian projects, the Supplemental EIS concluded that many projects are expected to break even when sustained oil prices are in the range of $65-$75 per barrel. On this basis, the Department's analysis found that oil sands production is expected to be most sensitive to transport costs with oil prices in or below that range.

In making long-term investment decisions, companies often distinguish between new development and production from existing projects with previously sunk capital costs. While oil prices consistently below supply costs over the long-term may delay or even cancel some future projects, decisions about proceeding with or expanding existing projects and those already under construction or with financing in place are largely based on marginal operating costs. In general, existing projects and those under development are unlikely to slow or stop unless revenues fall below current operating costs, which are much lower than total supply costs ($20 to $40 per barrel according to most estimates reviewed). This helps to explain why, to date, Canadian crude oil production, including from the oil sands, has proven resilient despite a significant drop in the price of oil, and it underpins the Department's recognition that some additional Canadian crude production is probable in the near-term.

Since the publication of the Supplemental EIS, the price of the benchmark West Texas Intermediate (WTI) crude oil has declined by over 60 percent from $98.23 a barrel in January of 2014 to a low of $38.24 a barrel in August 2015. WTI is approximately $45 a barrel at present. The lower prices represent the degree to which global liquids production continues to outpace consumption. Despite an estimated 1.2 million bpd of growth in global consumption of petroleum and other liquids in 2014, global production increased by 2.3 million bpd. This pattern, which has continued throughout 2015, has resulted in global liquids inventory builds that are estimated at approximately 2.3 million bpd through the first seven months of the year, the highest level of inventory builds through July of any year since 1998.

Though some companies investing in the oil sands have indicated that they plan to move forward with existing operations and projects under construction, others have cut back on capital expenditures. The Department notes that several upstream producers and oilfield service companies have pursued layoffs in order to lower operating costs. Recent projections anticipate that Canadian oil production will continue to grow, but potentially at a slower rate than previously anticipated. Moreover, recent price drops highlight the uncertainty recognized in the Supplemental EIS of the long-term estimates.

While the Department understands that short-term fluctuations in price are less indicative of the industry's general outlook than broader macroeconomic forces, the Department highlights that oil prices are volatile, particularly over the short term, and long-term trends that drive the investment decisions of oil-sands producers are difficult to predict. Canadian production growth forecasts and the amount of new transportation capacity needed to meet them are uncertain. As a result, the crude oil price thresholds potentially relevant to future production levels could change if supply costs or production expectations prove different than estimated in the Supplemental EIS. While it is not possible to draw firm conclusions about the impact of the recent drop in oil prices on long-term Canadian production, the Department remains cognizant of its short-term impact and the potential for a continued and broader impact in the long term.

Crude-by-Rail

In recent years, industry has looked toward existing Canadian crude oil production forecasts and commercial realities tied to prevailing midstream bottlenecks as justification for further investment in alternative crude oil transportation. Although there are a number of possible alternative transportation avenues for crude from the oil sands to reach U.S. or other markets, significant investment has been made in the development of crude-by-rail loading and off-loading facilities throughout North America. Current WCSB rail loading capacity has been estimated to exceed 775,000 bpd and continues to grow. Under current market conditions, existing pipelines coupled with crude-by-rail facilities will likely have the capacity to accommodate new supply from upstream projects under construction and in various stages of completion in western Canada.

The extent to which rail transport will actually occur, however, or would prove to be a major form of transport for WCSB crude to the United States in the long term, remains uncertain. Utilization of rail facilities will depend upon many factors, including the

availability of cheaper pipeline transport options from the respective production areas, the rate of growth in emerging areas of crude production, demand from refineries that may be better served by rail from these sources, differences in the price of oil paid in the production areas and the price of oil paid at the refinery markets (particularly on the coasts), and arbitrage opportunities that may be available through faster rail-based transport.

Producers seeking to preserve margins in the face of narrowing price gaps between Western Canada Select crude, WTI, and other crudes such as the Mexican Maya, may seek to maximize the efficiency of existing pipeline infrastructure in lieu of rail. Moreover, implementation of new Department of Transportation rules intended to improve the safe transportation of large quantities of crude-by-rail may lead to a marginal increase in crude-by-rail costs.

5.3 Potential Spill Risk and Safety Impacts: Many concerns were raised in comments received by the Department regarding the potential environmental effects of a pipeline release, leak, and/or spill. The Supplemental EIS analyzes impacts from potential releases from the proposed Project by analyzing historical spill data. The analysis identifies the types of pipeline system components that historically have been the source of spills, the sizes of those spills, and the distances those spills would likely travel. The resulting potential impacts to natural resources, such as surface waters and groundwater, are also evaluated and mitigation measures are included that are designed to prevent, detect, minimize, and respond to oil spills.

The Supplemental EIS analyzes historical crude oil pipeline incident data within the PHMSA and National Response Center incident databases. Over a period of ten years, from January 2002 through July 2012, a total of 1,692 incidents were reported in the United States, of which 321 were reported to be pipe incidents and 1,027 incidents were reported to involve different equipment components such as tanks, valves, or pumps.

Most spills over this period were small. Of the 1,692 incidents between 2002 and 2012, 79 percent of the incidents were in the small (zero to 50 barrel) range—roughly equivalent to a spill of up to 2,100 gallons. Four percent of the incidents were in the large (greater than 1,000 barrel) range. If a pipeline spill were to occur, the severity of its impact would depend on the volume and aerial extent of oil released; the distance of the impacted entity from the spill source; site-specific environmental circumstances, including climate and species present; and the timing and nature of response efforts.

An oil spill that reaches a surface waterbody or wetland could cause effects such as reduced dissolved oxygen levels or high benzene contaminant levels. The Supplemental EIS states that acute toxicity could occur if substantial amounts of crude oil were to enter rivers and streams. If diluted bitumen were released and it flowed into surface water, the diluent fraction would tend to volatilize or dissolve into the water, leaving bitumen behind to sink or become suspended. Upwards of 25 percent of residual hydrocarbons could be reasonably removed by natural attenuation, while active recovery methods would be required for remediation of the remaining spill volume. Aggressive cleanup

methods could mix oil and water, which might result in longer-lasting impacts to sensitive waterbody habitat. Passive cleanup methods are less likely to impact resources, but require a timeframe on the order of tens of years.

There are 39 stream crossings within 40 miles upstream of protected or specially designated segments of the Niobrara and Missouri rivers, which are in proximity to the proposed Project route. The shortest distance an oil spill would have to travel to impact a protected waterbody is approximately 28.5 miles. Based on an analysis of PHMSA historical incident data of large-diameter pipeline releases, the probability of a spill occurring that would convey oil to a protected waterbody is once every 542 years.

Spilled crude oil could affect wildlife directly and indirectly. Direct effects include physical processes such as oiling and toxicological effects, which could cause sickness or mortality. Indirect effects include habitat impacts, nutrient cycling disruptions, and alterations to the ecosystem.

A surface release could produce localized effects on plant populations by direct oiling or by oil permeating through the soil, affecting root systems and indirectly affecting plant respiration and nutrient uptake. Generally, most past spills on terrestrial habitats have caused minor ecological damage, and ecosystems have shown a good potential for recovery.

There are 1,232 identified wells within the potential range of a large spill from the proposed Project. In Nebraska, the potential spill range from the proposed Project overlaps with the Steele City Wellhead Protection Area. Keystone agreed to provide an alternative water supply if an accidental release from the proposed Project contaminates groundwater or surface water used as potable water or for irrigation or industrial purposes.

Normal operations would be expected to result in less than one human injury per year. In the event of a spill, human health exposure pathways could include direct contact with crude oil, inhalation of airborne emissions from crude oil, or consumption of food or water contaminated by either the crude oil or components of the crude oil. Mitigation measures, including spill response and containment and emergency response plans, would reduce and minimize human and environmental exposures.

Keystone has agreed to incorporate additional mitigation measures in the design, construction, and operation of the proposed Project, in some instances exceeding what is normally required, including 59 Special Conditions recommended by PHMSA. Many of these mitigation measures are intended to reduce the likelihood of a release occurring. Other measures provide mitigation intended to reduce the consequences and impact of a spill should such an event occur.

The Supplemental EIS also discusses transportation by rail, in particular as part of the No Action Alternative scenarios (in other words, scenarios that may occur if the proposed Project is denied), and concludes that transport by rail likely results in a greater number

of injuries and fatalities per ton-mile than transportation by pipeline, as well as a greater number of accidental releases of crude oil and a greater overall volume of crude oil released. However, the average size of an accidental release associated with crude-by-rail transportation is smaller than the average size of an accidental release associated with a pipeline.

5.4 Socioeconomic Impacts: Socioeconomic impacts associated with the proposed Project were also of particular concern in the comments received by the Department throughout its process. The Supplemental EIS analyzes these impacts and provides information regarding economic activity that may result from an approval of the proposed Project.

Employment and Economic Activity

The Department utilized subject matter experts and established methodologies to characterize the macroeconomic impacts of the proposed project. Construction spending on the proposed Project was found to support a combined total of approximately 42,100 jobs throughout the United States for the up to two-year construction period. Of these jobs, approximately 16,100 would be direct jobs supported at firms that are awarded contracts for goods and services, including construction, by Keystone. The other approximately 26,000 jobs would result from indirect and induced spending; this would consist of goods and services purchased by the construction contractors and spending by employees working for either the construction contractor or for any supplier of goods and services required in the construction process. About 12,000 jobs, or 29 percent of the total 42,100 jobs, would be supported in Montana, South Dakota, Nebraska, and Kansas.

Of the 42,100 supported jobs described above, approximately 3,900 (or 1,950 per year if construction took two years) would comprise a direct, temporary, construction workforce in the proposed Project area. Employment supported by construction of the proposed Project would translate to approximately $2.05 billion in employee earnings. Of this, approximately 20 percent ($405 million in earnings) would be allocated to workers in the proposed Project area. The remaining 80 percent, or $1.6 billion, would occur in other locations around the country.

According to Keystone, once the proposed Project enters service, operations would require approximately 50 total employees in the United States: 35 permanent employees and 15 temporary contractors. This small number would result in negligible impacts on population, housing, and public services in the proposed Project area.

The total estimated property tax from the proposed Project in the first full year of operations would be approximately $55.6 million spread across 27 counties in three states. This impact to local property tax revenue receipts would be substantial for many counties, constituting a property tax revenue benefit of 10 percent or more in 17 of these 27 counties. Operation of the proposed Project is not expected to have an impact on residential or agricultural property values.

Construction contracts, materials, and support purchased in the United States would total approximately $3.1 billion. Another approximately $233 million would be spent on construction camps for workers in remote locations of Montana, South Dakota, and northern Nebraska. Construction of the proposed Project would contribute approximately $3.4 billion to the U.S. gross domestic product (GDP). This figure includes not only earnings by workers, but all other income earned by businesses and individuals engaged in the production of goods and services demanded by the proposed Project, such as profits, rent, interest, and dividends.

When compared with the GDP in 2012 (the figure available when the Supplemental EIS was drafted), the proposed Project's contribution represents approximately 0.02 percent of annual economic activity across the nation.

Health Impacts

A number of commenters raised concerns about the potential for impacts on human health associated with the proposed Project. The Department took into account, with peer-reviewed research where appropriate, impacts to human health throughout the various resource areas in the Supplemental EIS.

For example, in the Potential Releases chapter, the Supplemental EIS examined potential health risks associated with exposure to crude oil and other relevant chemicals, were there to be a spill. In the Air Quality and Noise chapter, the Supplemental EIS addressed air pollution that would be associated with the construction and operation of the proposed Project. In the Cumulative Effects Assessment and Extraterritorial Concerns chapter, the Supplemental EIS described potential changes in pollution associated with refineries. Finally, the Supplemental EIS also examined potential human health impacts in Canada associated with oil sands development and pipeline construction and operation.

Environmental Justice

According to the Office of Environmental Justice in EPA, environmental justice refers to the "fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." A total of 17 separate census areas with minority and/or low income populations could potentially be affected by construction or operation of the proposed Project. Temporary environmental justice impacts during construction could include exposure to construction dust and noise, disruption to traffic patterns, and increased competition for medical or health services in underserved populations. Positive impacts could include increased employment and earnings.

Minority or low-income populations could be more vulnerable should an oil release occur along the segment of the pipeline that transits through their communities. Further, Indian tribes with significant dependence on natural resources could be disproportionately affected.

Mitigation of environmental justice concerns would include ensuring adequate communication with affected populations, such as through public awareness materials in appropriate languages so as to ensure an appropriate level of emergency preparedness. With respect to employment opportunities, Keystone has committed to employee and supplier diversity and has programs in place to mitigate impacts on vulnerable populations.

Some comments, particularly from Indian tribes, have expressed concern that temporary camps of construction workers along the proposed Project route may increase crime and otherwise disrupt local communities. In their letters to the Department of February 2, 2015, the Department of Homeland Security and the Department of the Interior also expressed concerns in this regard. Keystone committed to take several measures to ensure greater safety for those communities along the route, including security provisions and a code of conduct for the workers.

5.5 Physical Disturbance Impacts:

Water Resources

Construction and operation of the proposed Project could result in temporary and permanent surface water impacts, including stream sedimentation, changes in stream channels and stability, and temporary reduction in stream flow. The proposed Project's pipeline route would avoid surface water whenever possible, but would cross approximately 1,073 surface water bodies, including 56 perennial rivers and streams, as well as approximately 24 miles of mapped floodplains. Mitigation measures would include tunneling the pipeline underneath major rivers to mitigate construction impacts, erosion control during construction, and restoration of waterbodies as soon as practical after construction.

Wetlands

The proposed Project would affect approximately 383 acres of wetlands, two acres of which may be permanently lost. Remaining wetlands affected by the proposed Project would remain as functioning wetlands, provided that impact minimization and restoration efforts described in the mitigation plan are successful. Keystone has made route modifications to avoid wetland areas (such as the sensitive NDEQ-identified Sand Hills Region) and has committed to additional mitigation measures.

Threatened and Endangered Species

Fifteen federally protected, proposed, and candidate species occur in the proposed Project area: 13 federally listed threatened or endangered species, and two candidate species for listing as threatened or endangered. The endangered American burying beetle (*Nicrophorus americanus*) is the only species that is likely to be adversely affected by the proposed Project, but other species could potentially be affected. Those include the federally endangered black-footed ferret (*Mustela nigripes*), interior least tern (*Sternula antillarum*), whooping crane (*Grus americana*), and pallid sturgeon (*Scaphirhynchus albus*); the threatened piping plover (*Charadrius melodus*), Western prairie fringed orchids (*Platanthera praeclara*), northern long-eared bat (*Myotis septentrionalis*), and

rufa red knot (*Calidris canutus rufa*); and federal candidate species the greater sage-grouse (*Centrocercus urophasianus*) and Sprague's pipit (*Anthus spragueii*).

The FWS issued a May 2013 Biological Opinion regarding potential impacts of the proposed Project on seven federally protected species and included conservation measures for two federal candidate species. The American burying beetle was the only species likely to be adversely affected by the proposed Project, but the FWS has determined that its continued existence would not likely be jeopardized. Keystone committed to avoidance and conservation measures as well as compensatory mitigation for species included in the May 2013 FWS Biological Opinion and four implementing agreements (appendices to the Biological Opinion). Keystone has also developed species-specific assessment, avoidance, conservation, and compensatory mitigation measures for other Federal or state species of concern.

The Department reinitiated ESA Section 7 consultations with the FWS on whether the proposed Project could have impacts on the northern long-eared bat and the rufa red knot (both recently designated as threatened), and if so, to develop avoidance and conservation measures as appropriate. The Department and FWS have concluded consultations with regard to the rufa red knot, but are still consulting on the northern long-eared bat.

Geology and Soils

The proposed Project's pipeline route extends through relatively flat and stable areas, and the potential for seismic hazards (earthquakes), landslides, or subsidence (sink holes) is low. The route would avoid the NDEQ-identified Sand Hills Region, where soils are particularly susceptible to damage from pipeline construction. Potential impacts to soil resources in other areas associated with construction or operation of the proposed Project and connected actions include soil erosion, loss of topsoil, soil compaction, an increase in the proportion of large rocks in the topsoil, soil mixing, soil contamination, and related reductions in the productivity of desirable vegetation or crops. Mitigation measures would include construction of temporary erosion control systems, implementation of topsoil segregation methods, and restoration of the ROW after construction.

Terrestrial Vegetation

Potential construction and operations-related impacts to terrestrial vegetation resources associated with the proposed Project include impacts to cultivated crops, developed land, grassland/pasture, upland forest, open water, forested wetlands, emergent herbaceous wetlands, and shrub-scrub communities. The proposed Project route would impact biologically unique landscapes and vegetation communities of conservation concern. Keystone committed to restore areas to preconstruction conditions as practicable, and reseed disturbed areas, and to use specific best management practices and procedures to minimize and mitigate the potential impacts to native prairie areas.

Wildlife

The proposed Project would cause minor impacts to wildlife and wildlife habitat. Potential impacts to wildlife include habitat loss, alteration, and fragmentation; direct mortality during construction and operation (e.g., wildlife collisions with vehicles and

power lines/power poles); and reduced survival or reproduction due to stress or avoidance of feeding caused by factors such as construction and operations noise and increased human activity. Mitigation measures to reduce potential construction and operations-related effects to wildlife where habitat is entered would include construction timing restrictions and buffer zones developed in consultation with regulatory agencies as well as measures to minimize adverse effects to wildlife habitats. Keystone committed to develop and implement a conservation plan for migratory birds and bald and golden eagles and their habitats in consultation with the FWS.

Fisheries

Impacts to fisheries within the rivers and perennial streams crossed by the proposed Project route would occur during construction and would be temporary. The Construction, Mitigation, and Reclamation Plan contains measures for waterbody crossings to reduce potential effects on fish and aquatic/stream bank habitat and otherwise minimize potential impacts to fisheries resources. Mitigation measures would include best practices in open-cut stream crossings to reduce stream bed disturbance, sediment impacts, and interference with spawning periods; crossing under large rivers using horizontal directional drilling methods; minimization of vehicle contact with surface waters; and development of site-specific contingency plans to address unintended releases of drilling fluids that include preventative measures and a spill response plan.

Land Use, Recreation, and Visual Resources

Approximately 15,296 acres of land would be affected by construction of the proposed Project, though only approximately 5,569 acres would be retained for operation within permanent easements along the pipeline ROW and at the locations of ancillary facilities (e.g., access roads, pump stations). Approximately 89 percent of the total affected acreage (13,597 acres) is privately owned and the remainder government-owned. Rangeland (approximately 63 percent) and agricultural land (approximately 33 percent) comprise the vast majority of land use types that would be affected by construction. Impacts to land use resources include lease or acquisition and development of the pipeline ROW and land for ancillary facilities (e.g., access roads, pump stations, and construction camps), damage to agricultural features and productivity, visual impacts, and increased dust and noise.

Construction activities would temporarily affect recreational traffic and use patterns in special management and recreational areas, such as historic or scenic trails and rivers with recreational designations. Impacts of operation of the proposed Project on recreation would be minimal.

Visual impacts associated with the proposed Project would primarily occur during construction, when pipeline and ancillary facility construction, trenching, and facilities such as pipe yards would be visible. Permanent visual impacts following operation would include the presence of new ancillary facilities as well as visual disturbances in the landscape, such as tree removal, along the pipeline route.

Keystone committed to compensate landowners for construction- and operation-related impacts. It would implement measures to reduce impacts to land uses, recreation, and visual resources such as topsoil protection, restoring disturbed areas, and developing traffic access and management plans.

Air Quality and Noise

If the proposed Project is permitted, construction dust and emissions from construction equipment would typically be localized, intermittent, and temporary since pipeline construction would move through an area relatively quickly. During normal operation of the proposed Project, there would be only minor emissions from valves and pumping equipment at the pump stations. Keystone would implement mitigation measures to reduce air quality impacts, including dust control measures and compliance with state and local air quality restrictions.

Construction noise impacts would also be localized, intermittent, and temporary. Noise impacts from operation of the pipeline would be limited to the electrically driven pump stations. During construction, Keystone would limit the hours during which activities with high-decibel noise levels are conducted in residential areas, require noise mitigation procedures, and develop site-specific mitigation plans to comply with regulations. During operations, Keystone would implement a noise control plan to mitigate noise impacts at affected sites and, as necessary, install sound barriers.

5.6 Cultural Resources: Pipeline construction may present a risk to historic and cultural resources unless appropriately addressed through avoidance or mitigation. This risk was a key concern for Indian tribes and other commenters. The Department of Interior in its February 2, 2015 letter to the Secretary reiterated these concerns. The Department concluded a Programmatic Agreement (an agreement with several interested parties that contemplates mitigation of certain cultural resources impacts in the event of construction). The Programmatic Agreement is appended to the Supplemental EIS, and was concluded in consultation with Indian tribes, federal and state agencies, and the permit applicant. The Department incorporated input from Indian tribes to amend the Programmatic Agreement on cultural resources that had been developed for Keystone's 2008 permit application. The Programmatic Agreement describes the processes that would be followed by Keystone and applicable state and federal agencies to identify cultural resources and to avoid or mitigate adverse impacts.

The proposed Project was designed to avoid disturbing cultural resources listed in the National Register of Historic Places (NRHP), those considered to be eligible for listing in the NRHP, and others of potential concern that have not been evaluated for NRHP listing, to the extent possible. With regard to cultural resources that cannot be avoided, Keystone has committed to minimize and mitigate impacts whenever feasible. Additionally, Keystone would implement Unanticipated Discovery Plans in order to ensure minimization of impacts to as-yet-unknown cultural resources that might be inadvertently encountered during construction or operation of the proposed Project.

5.7 Cumulative Effects: The cumulative effects analysis in the Supplemental EIS evaluates the way that the proposed Project's impacts interact with the effects of other past, present, or reasonably foreseeable future actions or projects. The goal of the cumulative impacts analysis is to identify situations where sets of comparatively small individual impacts, taken together, constitute a larger collective impact. Cumulative effects associated with the proposed Project and connected actions vary among individual environmental resources and locations. Generally, where long-term or permanent impacts from the proposed Project are absent, the potential for additive cumulative effects with other past, present, and reasonably foreseeable future projects is negligible.

5.8 Alternatives: The Supplemental EIS provides a detailed description of the categories of alternatives to the proposed Project that were analyzed, as well as the alternative screening process and the detailed alternatives identified for further evaluation.

Consistent with NEPA and Council on Environmental Quality (CEQ) regulations, the Department compared the proposed Project with four reasonable alternatives: a pipeline that partly follows an alternative route (the "I-90 Corridor Pipeline Alternative"), and three different "No Action Alternative" scenarios that could result if the Presidential Permit is not granted and the crude oil from the WCSB and the Bakken formations is carried on a different form of transport.

Consistent with CEQ regulations and the Department's authority, the Supplemental EIS specifically identifies the alternatives that are before the decisionmaker in considering the application and making the national interest determination pursuant to the President's Executive Order 13337: the No Action Alternative (Permit denial) and the proposed Project (Permit approval).

<u>No Action Alternative</u>
The Supplemental EIS separately analyzed three No Action Alternative scenarios, which are described briefly below. The No Action Alternative analysis considers what would likely happen if the Presidential Permit is denied or the proposed Project is not otherwise implemented. It includes the Status Quo Baseline, which serves as a benchmark against which other alternatives are evaluated. Under the Status Quo Baseline, the proposed Project would not be constructed, its capacity to transport WCSB crude would not be replaced, and the resulting direct, indirect, and cumulative impacts that are described in this Supplemental EIS would not occur. The Status Quo Baseline is a snapshot of the crude oil production and delivery systems at January 2014 levels.

The No Action Alternative includes analysis of three alternative transport scenarios that, based on the findings of the market analysis, are believed to meet the proposed Project's purpose (i.e., providing WCSB and Bakken crude oil to meet refinery demand in the Gulf Coast area) if the Presidential Permit for the proposed Project were denied, or if the pipeline were otherwise not constructed. Under the alternative transport scenarios, other environmental impacts would occur in lieu of the proposed Project. The Supplemental EIS includes analysis of various combinations of transportation modes for oil, including

truck, barge, tanker, and rail. These scenarios are considered representative of the crude oil transport alternatives with which the market could respond in the absence of the proposed Project. These three alternative transport scenarios (the Rail and Pipeline Scenario, Rail and Tanker Scenario, and Rail Direct to the Gulf Coast Scenario) are described below.

Rail and Pipeline Scenario: Under this scenario, WCSB and Bakken crude oil (in the form of dilbit or synbit) would be shipped via rail from Lloydminster, Saskatchewan and Epping, North Dakota respectively (the nearest rail terminal served by two Class I rail companies for both locations), to Stroud, Oklahoma, where it would be temporarily stored and then transported via existing and expanded pipelines approximately 17 miles to Cushing, Oklahoma to interconnect with the interstate oil pipeline system. This scenario would require the construction of two new or expanded rail loading terminals in Lloydminster, Saskatchewan (the possible loading point for WCSB crude oil), one new terminal in Epping, North Dakota (the representative loading point for Bakken crude oil), seven new terminals in Stroud, and up to 14 unit trains (consisting of approximately 100 cars carrying the same material and destined for the same delivery location) per day (12 from Lloydminster and two from Epping) to transport the equivalent volume of crude oil as would be transported by the proposed Project.

Rail and Tanker Scenario: The second transportation scenario assumes WCSB and Bakken crude oil would be transported by rail from Lloydminster to a western Canada port (assumed to be Prince Rupert, British Columbia), where it would be loaded onto Suezmax tankers (capable of carrying approximately 986,000 barrels of WCSB crude oil) for transport to the U.S. Gulf Coast (Houston and/or Port Arthur) via the Panama Canal. Bakken crude would be shipped from Epping to Stroud via BNSF Railway or Union Pacific rail lines, similar to the method described under the rail and pipeline scenario. The rail and tanker scenario would require up to 12 unit trains per day between Lloydminster and Prince Rupert, and up to two unit trains per day between Epping and Stroud. This scenario would require the construction of two new or expanded rail loading facilities in Lloydminster with other existing terminals in the area handling the majority of the WCSB for shipping to Prince Rupert. Facilities in Prince Rupert would include a new rail unloading and storage facility and a new marine terminal encompassing approximately 4,200 acres and capable of accommodating two Suezmax tankers. For the Bakken crude portion of this Scenario, one new rail terminal would be necessary in both Epping, North Dakota, and Stroud, Nebraska.

Rail Direct to the Gulf Coast Scenario: The third transportation scenario assumes that WCSB and Bakken crude oil would be shipped by rail from Lloydminster, Saskatchewan, and Epping, North Dakota, directly to existing rail facilities in the Gulf Coast region capable of off-loading up to 14 unit trains per day. These existing facilities would then either ship the crude oil by pipeline or barge the short distance to nearby refineries. As with the rail and tanker scenario, this scenario would likely require construction of up to two new or expanded terminals to accommodate the additional WCSB shipments out of Canada. One new rail loading terminal would be needed in Epping to ship Bakken crude

oil. Sufficient off-loading rail facilities currently exist or are proposed in the Gulf Coast area such that no new terminals would need to be built under this scenario.

Comparison of Alternatives Before the Decisionmaker

The Supplemental EIS provides detailed analysis of the differences between these alternatives. With regard to GHG emissions, during operation of the No Action Alternative transportation scenarios, including rail and combination modes, the increased number of trains along the rail routes would produce GHG emissions from diesel fuel combustion and electricity generation to support rail terminal operations. Annual GHG emissions (direct and indirect) attributed to the No Action transportation scenarios would be greater than for the proposed Project, but those emissions relate solely to the movement of equivalent amounts of oil from Alberta to the Gulf Coast. Construction of the rail terminals would also involve large numbers of truck trips to transport construction materials and equipment. This increased traffic could cause congestion on roads. Increased shipment of crude by rail could reduce rail capacity available for other goods.

Transportation by rail would likely lead to a greater number of injuries and fatalities per ton-mile than transportation by pipeline, as well as a greater number of accidental releases of crude oil and a greater overall volume of crude oil released. However, the average size of an accidental release associated with crude-by-rail transportation is smaller than the average accidental release associated with a pipeline.

Physical disturbance impacts of the No Action Alternative would vary depending upon the modes of transportation chosen by shippers. All three scenarios would require new or expanded facilities, likely concentrated near loading and off-loading terminals. Nevertheless, expansion of infrastructure would affect fewer acres of land (1,500-6,427) during construction than a new pipeline. During operations, the No Action Alternative would permanently affect between 1,500 acres and 6,303 acres of land, compared to 5,309 acres for the proposed Project.

6.0 Foreign Affairs and Energy Security

***6.1 North American Energy Security*:** Short-term energy security typically refers to security of supply, or a country's ability to procure fuels that satisfy its current energy mix. Over the long-term, however, energy security encompasses broader considerations about the structure, level, and composition of energy supply and demand. Both short-term supply security and long-term efforts to address broader policy goals by reducing demand or moving towards alternative energy sources were common themes in public comments. Recognizing that global energy security is a vital part of U.S. national security, the Department works closely with our international partners to ensure adequate supplies of energy reach the global economy and to help manage geopolitical changes arising from shifting patterns of energy production and consumption. Whether promoting national and regional markets that facilitate financing for transformational and clean energy or inspiring civil society and governments to embrace transparent and responsible development of natural resources, the Department works to ensure energy is employed as a tool for stability, security, and prosperity.

Historically, oil has been a major source of U.S. energy security concerns due to our relatively high volume of net imports, and oil's economic importance and military uses. While U.S. oil imports have abated sharply in recent years, the United States remains a net oil importer. Accordingly, the U.S. national interest in ensuring access to stable, reliable, and affordable energy supplies will persist in the foreseeable future. Furthermore, because oil is traded globally, the United States will remain integrated with global oil markets and subject to global price volatility. Nonetheless, U.S. energy security does not exist in a vacuum and must be weighed in tandem with a number of other critical foreign policy considerations, including climate change and U.S. policies that lay the foundation for a clean energy future.

U.S. policymakers have often viewed oil imports from neighboring countries as beneficial for energy security. As such, Canada's role as the largest and fastest-growing source of U.S. crude imports cannot be dismissed. According to the latest statistics from the Energy Information Administration (EIA), the United States imported 2.88 million bpd of crude oil from Canada in 2014, which accounted for more than 39 percent of total U.S. crude oil imports (net U.S. crude imports were 6.99 million bpd day in 2014) and is an increase of 12 percent over 2013 volumes from Canada. Although domestic production growth from tight oil formations, which is predominately light crude, continues to supplant the majority of international alternatives, U.S. imports of Canadian crude oil are increasing. The vast majority of these imports reach U.S. markets via existing pipeline infrastructure between Canada and the United States. A growing share, however, reaches markets by rail. In 2014 crude imports by rail from Canada exceeded 140,000 bpd. While WCSB rail loading capacity has continued to grow, through August 2015, crude imports by rail from Canada have averaged 103,000 bpd.

Canadian oil is a relatively stable and secure source of energy supply for many reasons, and few countries share all of the political or physical characteristics that enable Canada to remain in this position. Its producing areas are physically close to the U.S. market, and there are limited chokepoints to disrupt trade between Canada and the United States. Canada has a low likelihood of political unrest, resource nationalism, or conflict – above-ground factors that sometimes disrupt oil production in other regions. Additionally, it is not a member of OPEC, which acts to restrict oil production and influence market conditions. The Canadian oil sector is efficiently run, without undue political interference. Canadian oil sands projects have low production decline rates compared to conventional oil fields, providing greater geologic certainty of future supply levels.

The proposed Keystone XL pipeline would serve as a reliable means of transport for U.S. crude oil imports. However, the significance of the pipeline for U.S. energy security is limited. The Supplemental EIS indicates that in most scenarios the proposed Project is unlikely to change significantly the pattern of U.S. crude oil consumption. Alternative and existing pipelines from Canada, crude by rail, and seaborne oil imports could all play a role in different scenarios. In so far as U.S. demand continues to be met in part by foreign crude oil imports, domestic refineries capable of processing heavy crude will

likely maintain access to Canadian crude oil, which will compete with comparable foreign heavy crudes to meet domestic needs.

As with its analysis of the proposed Project's impact on crude flows, the Supplemental EIS recognized that the proposed Project is unlikely to have a meaningful effect on domestic fuel prices. While crude oil prices matter to those involved in producing oil or refining oil into products, most Americans are mainly concerned with the price of gasoline and other refined products. The price of those refined products in the United States continues to be set largely by global crude prices, which are tied to global production and consumption, rather than the availability of pipelines. The findings in the Supplemental EIS have been reinforced by EIA studies that assert that U.S. gasoline prices move with the international benchmark Brent crude oil price rather than WTI. Accordingly, energy security concerns stemming from the proposed Project's impact on domestic fuel prices are largely unwarranted – cross-border pipeline capacity does not measurably translate into lower retail gasoline prices.

As policy makers engage in strategic planning related to the domestic and global energy mix of the future, the link between energy security and climate change is also an important consideration. The 2014 Quadrennial Defense Review and the International Security Advisory Board's report on energy geopolitics highlights the role energy plays in solving the challenge posed by climate change. At present, expected fossil-fuel consumption trends would make it impossible to meet climate change mitigation goals. Ambitious energy policies—on a global scale—are necessary to address the challenge and mitigate risks. To safeguard broader national security interests, energy use must also be sustainable—not just in terms of ensuring available supplies for the future, but also in terms of lowering the impact that energy use is having on the global environment. As countries prioritize and address their energy security needs, including access to affordable and sustainable energy, it is imperative that fundamental reform of the global energy system is pursued to avoid significant growth in greenhouse gas emissions and the correlated costs of climate mitigation and adaptation.

***6.2 Relationship with Canada*:** Canada remains an ardent proponent of the Keystone XL Pipeline and has repeatedly and strongly advocated for the proposed Project at all levels within the U.S. Government. As such, a decision against the proposed Project could temper Canada's willingness to partner with the United States on some bilateral and international issues. A negative permit decision may lead to a cooling of U.S.-Canadian relations and could affect Canadian cooperation on Western Hemisphere issues and international security cooperation. However, the United States' enduring bilateral relationship with Canada, including as it pertains to trade relations and energy interconnectivity, is resilient and is likely to outlast any single foreign policy discrepancy.

Canada is and will remain one of the United States' closest strategic allies. Numerous geographic, defense, commercial, political, environmental, and social ties bind the two countries. We have the biggest and the most consequential economic relationship in the world with over $2 billion per day in trade. Canada shares U.S. values in the global promotion of democratic governance and free markets and coordinates closely with the

United States on most foreign policy issues. U.S.-Canadian supply chains are interlinked and U.S. and Canadian companies are heavily invested in each other's markets. We recognize Canada's role as a secure conduit for crude oil to reach the U.S. market, and we acknowledge the United States' role as the Canadian energy sector's number one customer.

***6.3 Climate Change-Related Foreign Policy Considerations*:** The State Department's consideration of the application for the proposed Project is informed by the broader context of climate change and the leadership role that the United States has and must continue to play internationally on climate change. More and more frequently, national governments have placed climate change-related issues on the agendas of a range of high-level bilateral and multilateral negotiations, including among heads of state and foreign ministers, making U.S. credibility on the fight to combat climate change a major factor in determining U.S. foreign policy success.

The vital importance of climate change leadership to U.S. foreign policy is not surprising:

- The science has made clear that to move onto an emissions trajectory consistent with keeping the global temperature increase below 2 degrees Celsius above pre-industrial levels, the world needs to be making a decisive shift to lower carbon energy sources now.

- Countries around the world widely accept the conclusive scientific evidence that climate change is occurring now, and that human activity is the dominant cause of increasing temperatures. 2014 was the warmest year on record, following on a succession since 2000 of 13 of the warmest years on record, and global GHG concentrations continue to rise in the atmosphere.

- There is increasing understanding by governments, experts, and the public that every region of the world is affected by the negative impacts of climate change, including the likelihood of more frequent and intense droughts, floods, and storm surges in some regions; rising sea levels; and impacts on a host of habitats that support communities and livelihoods. There is further understanding that GHG emissions and climate change do not respect national boundaries.

- Additionally, as indicated in the 2014 Quadrennial Defense Review, the U.S. national security community has recognized that climate change is a threat multiplier that will aggravate stressors abroad such as poverty, environmental degradation, political instability, and social tensions. This assessment is shared by many allies, including the United Kingdom, Germany, and France. Indeed, the Global Security Defense Index prepared by the American Security Project indicates that about 70 percent of nations have explicitly stated that climate change is a national security concern.

A broad range of countries, both developed and developing, are implementing plans to reduce their emissions and to increase the resilience of their economies. How the U.S. is

viewed as addressing climate change may affect the U.S. relationship with many of those countries, especially those that are vulnerable to climate change impacts, across a range of foreign policy priorities.

Over the past few years, the United States has acted concertedly to reduce emissions and has taken other actions to combat climate change across relevant sectors. This has generally involved transitioning wherever practicable away from more-polluting to less-polluting sources of energy, driving toward greater energy efficiency, and shifting away from more potent greenhouse gases. Other governments follow the United States' domestic rulemaking and policy process with interest, including:

- The adoption and implementation of the Clean Power Plan, which will advance the transition to clean energy sources, including natural gas and renewable energy;

- The marked increase in fuel economy standards for light- and heavy-duty vehicles, which has served to reduce combustion of fossil fuels by increasing vehicle efficiency and promoting a transition to advanced vehicles;

- Increases in efficiency standards in a broad range of household and commercial appliances and federal buildings, which will save individual Americans thousands of dollars; and

- A range of actions to reduce highly potent greenhouse gases, including methane and hydrofluorocarbons.

The United States is the world's largest economy and second-largest GHG emitter. As such, strong U.S. domestic policy to combat climate change sets an important example for other countries and puts an "action speaks louder than words" credibility behind the U.S. message. The United States' ambitious efforts at home help spur ambitious climate action by others, driving global emissions trends in the right direction. In short, the extent to which the United States takes action and is understood to be a leader is directly correlated to the United States' effectiveness in encouraging other countries to step up and take strong action on climate change.

The impact that U.S. climate-related actions can have on those of other countries was evident in the U.S.-China joint announcement in 2014 of the two nations' respective actions to reduce their emissions, as well as the 2015 joint Presidential statement in which China announced it will launch its national carbon emissions trading system in 2017. China's specific commitments to limit its emissions mark a major advance in its approach, and were surely encouraged by its assessment of the corresponding U.S. actions. Likewise, the more than 150 countries that have come forward with their emissions targets were similarly encouraged by U.S. leadership.

Further, the U.S. commitment to combatting climate change through its own domestic actions and policy decisions has enhanced and will enhance prospects for reaching a global climate agreement in December of 2015. Over the course of this year, countries have been determining the actions they will undertake in the context of this agreement to reduce their domestic emissions over the next 10-15 years, and strong U.S. efforts at home have had a positive impact. Sustained U.S. climate leadership will also help to encourage implementation of targets countries have put forward, and continued progress worldwide in combatting climate change. Advancing U.S. climate change policy in the international arena is also one of the United States' best tools to reduce the significant and costly adverse impacts of climate change at home.

As such, it is strategically important for the U.S. to continue to play a leadership role in the worldwide fight against climate change, and the perception of U.S. leadership is enhanced when the United States Government is seen as taking strong action to combat climate change. It is important, therefore, to understand that the decision on whether to approve the permit application for the proposed Project is not just a matter of high domestic interest and scrutiny, but also one that is likely to have international ramifications. Many will see it as a test of U.S. willingness to take significant and difficult decisions as part of a broader effort to address climate change.

The broad perception of the oil that would be carried by the proposed Project is that it would be "dirty" – more GHG-intensive over its lifecycle than alternate sources of crude, owing to the combination of the use of the heavy crude itself with the far more GHG-intensive process of extraction. This perception is supported by the findings in the SEIS. Whether or not that oil would still find other transport to market in the absence of the proposed Project (that complex issue is analyzed in the Supplemental EIS), the general perception is that a decision to approve the pipeline would pave the way for the long-term and intensive extraction and importation of that oil into the United States. Issuing a permit for the proposed Project would thus be understood at this time as a decision to facilitate particularly GHG-intensive crude imports into the United States for the long term, undermining the power of U.S. example as a leader in promoting the transformation to low-carbon economies.

Therefore, a decision to approve this proposed Project would undermine U.S. objectives on climate change; it could call into question internationally the broader efforts of the United States to transition to less-polluting forms of energy and would raise doubts about the U.S. resolve to do so. In turn, this could raise questions for some countries about how aggressively they should combat climate change domestically, and potentially reduce the United States' ability to advance climate and broader objectives with allies and other partners in various bilateral and multilateral contexts. An approval of the proposed Project would also undermine U.S. national security objectives as described in the 2015 National Security Strategy, which identified climate change and the reduction of global emissions as a U.S. national security priority, and limit the United States' ability to combat the negative impacts of climate change within U.S. borders. Conversely, a decision to deny the permit would support U.S. relationships with countries where

climate issues are important and encourage actions that combat climate change and benefit the United States.

7.0 Basis for Decision

Under the authority delegated to him by the President of the United States, the Secretary of State has determined that it would not serve the national interest to issue a Presidential Permit to TransCanada Keystone Pipeline L.P. to construct, connect, operate, and maintain pipeline facilities at the United States-Canada border in Phillips County, Montana, as part of the proposed Project. The Secretary of State has considered Keystone's Presidential Permit application filed with the Department on May 4, 2012, and all input received over the course of the Department's review. The determination to deny a Presidential Permit for the proposed Project is based on consideration of a broad range of factors, including the following assessments:

- While the proposed Project would have a limited benefit for energy security by providing additional infrastructure for the dependable supply of crude oil (and President Obama has previously emphasized the importance of sourcing foreign oil from our "neighbors like Canada and Mexico that are stable and steady and reliable sources"), the absence of the proposed Project will not prevent Canada from continuing to serve as a secure source of energy supply. Nor is it likely to significantly increase demand for crude imports from other, less reliable sources in most circumstances. The negligible-to-limited benefit to energy security potentially provided by the proposed Project is outweighed by the Secretary's assessment of the importance of the United States leading where it can by making difficult choices on issues of climate change at this time.

- Even if the proposed Project were approved, any impact on prices for refined petroleum products would be minimal. Oil trade is driven by commercial considerations and occurs in the context of a globally traded market in which crude oil and products are relatively fungible. The market continually adjusts both logistically and in terms of price to balance global supply and demand. As a result, the level or origin of U.S. oil imports has a minimal impact on the prices U.S. consumers pay for refined products.

- Uncertainties about the future growth of oil sands production remain. Oil prices are volatile, particularly over the short term, and long-term trends that drive the investment decisions of oil-sands producers are difficult to predict. Since production remains uncertain post 2018, the corresponding amount of transportation infrastructure required also remains uncertain. While the proposed Project by itself is unlikely to significantly impact the level of GHG-intensive extraction of oil sands crude or the continued demand for heavy crude oil at refineries in the United States, it is critical for the United States to prioritize actions that are not perceived as enabling further GHG emissions globally. Irrespective of the uncertainty highlighted above, an approval of the proposed

Project would facilitate transportation into our country of a highly carbon intensive energy source.

- The Department recognizes the importance of the proposed Project to Canada and places great significance on maintaining strong bilateral relations. Canada is one of the United States' closest strategic allies, and our economies are deeply integrated with over $2 billion in trade per day. Although the Government of Canada has indicated its strong interest in the completion of the Keystone XL pipeline and a denial of the permit will have a negative impact on our relationship, our strong and historic relationship with Canada will endure. The United States will continue to work with Canada to ensure our shared interests in energy, environmental, and economic issues prosper.

- The Department has considered the concerns of some Indian tribes raised in the context of the proposed Project regarding sacred cultural sites and avoidance of adverse impacts to the environment, including to surface and groundwater resources.

- The Department has considered the economic benefits of the proposed Project for the United States. During construction over a two-year period, spending on the proposed Project would support approximately 42,100 jobs (direct, indirect, and induced jobs combined), of which approximately 3,900 would be direct construction jobs. The majority of these jobs would be short-term in nature. According to the applicant, were the proposed project to enter service, operations would require approximately 50 employees in the United States, consisting of 35 full-time employees and 15 temporary contractors. The proposed Project would also generate tax revenue for communities in the pipeline's path and it is estimated that pipeline activity would contribute .02 percent to the national G.D.P. based on 2012 statistics. These economic benefits are meaningful, but in the assessment of the Secretary of State, they do not outweigh the fact that an approval would undermine the United States' successful foreign policy engagement in efforts to combat climate change on a global scale. Domestically, the United States must prioritize the development of a green economy, and work to transition to jobs that catalyze a clean energy future. Clean energy jobs would better utilize the skilled manufacturing workforce here in the United States and ensure that American workers are at the forefront of an industry that is in increasingly high demand throughout the world.

- This is a critical time for action on climate change. The science is clear and widely accepted, including among foreign governments, that climate change is occurring now, that human activity is the dominant cause, and that climate change impacts are already being felt around the world. These impacts include, among others, sea-level rise, and more frequent and intense droughts, floods, and storm surges. The decision to approve or deny a Presidential Permit for the proposed Project will be understood by many foreign governments and their citizens as a test of U.S. resolve to undertake significant and difficult decisions as part of a

broader effort to address climate change. In the judgment of the Secretary of State, the general understanding of the international community is that a decision to approve the proposed Project would precipitate the extraction and increased consumption of particularly GHG-intensive crude oil. Such a decision would be viewed internationally as inconsistent with the broader U.S. efforts to transition to less-polluting forms of energy and would undercut the credibility and influence of the United States in urging other countries to put forward ambitious actions and implement efforts to combat climate change, including in advance of the December 2015 climate negotiations.

- United States actions relating to climate have a significant leveraging effect on global emissions trends. The 2015 National Security Strategy identifies climate change and the reduction of global emissions as a national security priority for the United States. The large majority of greenhouse gas emissions are produced outside the United States, and the extent to which other countries take significant actions to reduce their emissions will largely determine the severity, scope, and timing of the negative impacts of climate change in the United States. Climate change serves as a threat multiplier. U.S. leadership on climate change strengthens our leverage with our international partners and helps enable us to convince other countries to make and implement meaningful reductions in their domestic emissions, to support our positions in international climate negotiations, and to support our objectives in bilateral and multilateral contexts.

- There would be a variety of other potential environmental and cultural impacts associated with the proposed Project (many of which Keystone agreed to mitigate), just as there would be for alternative methods of transporting crude oil. Comparing the non-GHG potential environmental impacts and cultural impacts of the proposed Project with those of alternatives for transporting crude oil yields a mixed picture. All of these potential impacts were part of the Department's consideration.

President Obama has made clear that "[t]he net effects of the pipeline's impact on our climate will be absolutely critical to determining whether this project can go forward."[1] While the permitting decision involves weighing many different policy considerations, a key consideration at this time is that granting a Presidential Permit for this proposed Project would undermine U.S. climate leadership and thereby have an adverse impact on encouraging other States to combat climate change and work to achieve and implement a robust and meaningful global climate agreement. Strong climate targets and an effective global climate agreement would lead to a reduction in global GHG emissions that would have a direct and beneficial impact on the national security and other interests of the United States. The world will continue to use fossil fuels, we know this. The Department will continue to evaluate applications for cross-border fossil fuel pipelines on their merits. But approving the proposed Project would not serve the national interest.

[1] Speech by President Barack Obama at Georgetown University, June 25, 2013.

8.0 National Interest Determination

Pursuant to the authority vested in me by the President under Executive Order 13337 of April 30, 2004 and subject to satisfaction of the requirements of sections 1(h) and 1(i) of Executive Order 13337, I hereby determine that issuance of a permit to TransCanada Keystone Pipeline, L.P., a limited partnership organized under the laws of the State of Delaware, to construct, connect, operate, and maintain facilities at the border of the United States and Canada for the transport of crude oil from Canada to the United States across the international boundary in Phillips County, Montana, would not serve the national interest.

The Secretaries of Defense, Interior, Commerce, Energy, Homeland Security and Transportation, the Attorney General, and the Administrator of the Environmental Protection Agency will be notified of this determination, and the determination will be final unless further consultations are required or the matter must be referred to the President for consideration and final decision pursuant to section 1(i) of said Executive Order.

NOV 3 2015

Date