



# Water Protector Legal Collective

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September 10, 2020

## **Via Electronic Mail**

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U.S. Army Corps of Engineers

South Dakota Regulatory Office

28563 Powerhouse Road, Room 118

Pierre, SD 57501

## **Re: Water Protector Legal Collective Comment on TransCanada/TC Energy's new Keystone XL water permit application**

The Water Protector Legal Collective (“WPLC”) submits this comment to the U.S. Army Corps of Engineers (“USACE” or “Army Corps”) in opposition to TC Energy’s new water permit application required to build the proposed Keystone XL pipeline. The Water Protector Legal Collective is an indigenous-centered legal non-profit organization dedicated to providing support and advocacy for Indigenous peoples, environmental, and climate justice movements.

The Army Corps must deny TC Energy’s application for an individual Clean Water Act permit because: (1) the construction and operation of the proposed Keystone XL will significantly degrade the thousands of bodies of water it crosses, including the Missouri River watershed and the Ogallala Aquifer; (2) Indigenous Nations have not consented to the proposed pipeline; and (3) the Keystone XL pipeline project is not commercially viable and does not serve the public interest.

### ***Background: The Keystone XL Pipeline***

The proposed Keystone XL Pipeline route (“KXL”) originates in Canada and crosses through Montana, South Dakota, and Nebraska, connecting to the existing Keystone Cushing extension pipeline, which extends to Cushing, Oklahoma and the U.S. Gulf Coast area. This route cuts directly through the bulk of the Missouri River watershed and over the deepest, most-saturated portions of the Ogallala Aquifer. It crosses the aquifer in South Dakota at a point where the aquifer is very close to the surface and covered by very permeable soil, creating a high risk that any spill will seep down into the aquifer.

The intended purpose of KXL is to transport diluted bitumen (“dilbit”) crude, a hazardous and highly toxic material. The KXL route would consist of approximately 1,209 miles of new pipeline, with approximately 327 miles of pipeline in Canada and approximately 882 miles in the United States. The proposed pipeline would have a transport capacity of 830,000 barrels per day of dilbit, through a 36-inch pipe at a pressure of more than 1,400 pounds per square inch of pressure, cutting through the unceded territory of the Oceti Sakowin, the Great Sioux Nation, the unceded territory of the Ponca Nation, and the states of Montana, South Dakota and Nebraska.<sup>1</sup>

By TC Energy’s own admission, 15,296 acres of land will be impacted during construction with 5,569 permanently retained by the company; the proposed pipeline would cross 1,073 bodies of water, 56 perennial rivers and streams, 24 miles of mapped floodplains, and 383 acres of wetlands, 2 acres of which may be permanently lost.<sup>2</sup>

In its most recent water permit application, TC Energy states: “[t]here are a total of 729 locations along the pipeline route where wetlands and waterbodies would be impacted by the pipeline crossing, access roads, and temporary workspace. A majority of impacts to wetlands and waterbodies would occur from open-trench crossings (temporary excavation and side-cast filling) of the pipeline.”<sup>3</sup> Open trench crossing will increase sediment pollution and risk of spill in the river. Keystone XL will cross several major rivers, including Yellowstone, Missouri, Milk, Frenchman, Cheyenne, Bad, White, Elkhorn, and Platte by horizontal directional drilling with a significant risk of frac-out, resulting in toxic contamination of the river crossed.<sup>4</sup>

This new application for a water-crossing permit comes on the heels of court decisions striking down the Nationwide Permit 12 (“NWP 12”) that had previously granted the Corps’ blanket approval needed for Keystone XL’s completion, without having conducted an environmental impact assessment, without considering the impact on Indigenous and rural communities, nor the significant effects on the environment.<sup>5</sup>

### ***Sources of Life: The Missouri River & Ogallala Aquifer***

The Missouri River is the longest river in North America, stretching 2,341 miles from Montana to Missouri. Its watershed of 529,350 square miles covers one-sixth of the United States and 5% of the entire North American continent. In a normal year, the Missouri provides

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<sup>1</sup> Keystone XL Pipeline Map, Indigenous Environmental Network and Climate Alliance Mapping Project, available at: <https://climatealliancemap.org/kxl-map>.

<sup>2</sup> Memorandum in support of Presidential Permit dated March 23, 2017, P.20-21.

<sup>3</sup> Joint Notice of Permit Pending, Application No. NOW-2020-01055-PIE, public notice dated August 14, 2020, available at: <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll7/id/15088>.

<sup>4</sup> *BoldAlliance et al. v. Department of Interior et al.*, CV 20-59-GF-BMM-JTJ

<sup>5</sup> *Northern Plains Res. Council v. United States Army Corps of Eng'rs*, 2020 U.S. Dist. LEXIS 66745 (D.Mont., April 15, 2020); *Standing Rock Sioux Tribe vs. US Army Corp of Engineers*, 440 F. Supp. 3d 1, (D. D.C. 2020).

45% of the water in the lower Mississippi; in a dry year, it provides up to 70%. Over 12 million people live in the Missouri watershed. The Missouri provides a municipal water supply for over 3 million of those people, and feeds at least 891 intakes for federal, private, and tribal irrigation. This is not a modern development: people have depended on the Missouri and its tributaries for sustenance and transportation for over 12,000 years. More than ten Tribal Nations traditionally populated the watershed, and many of those Nations still do.

The proposed Keystone XL pipeline route would cross the Milk and Missouri Rivers in Montana less than a quarter mile from the Ft. Peck Reservation. These rivers are the Tribes' only fresh water sources and put at high risk the Tribes' new \$300M water treatment plant.<sup>6</sup>

The Missouri River has central importance to the Tribes' cultural and religious practices because water is an important part of the Tribes' religious and cultural ceremonies, numerous religious and cultural sites are located in and on the River, and the Tribes traditionally understand the River itself to be a sacred, sentient being that supports other sacred beings in and around it.<sup>7</sup>

The Ogallala Aquifer is one of the world's largest, underlying a 174,000 square mile section of the western United States. One of the largest sources of freshwater in the United States, it begins in southeastern Tripp County South Dakota and extends to Texas. It is the source of drinking water and irrigation for millions of people in the heartland of America including the populations of Kansas City, Omaha, the Cheyenne River Sioux Tribe, and the Ponca Nations of Nebraska and Oklahoma. On its own, it supplies 30% of U.S. groundwater used for irrigation. Although groundwater pumping has severely depleted the Ogallala, over 2 million people still depend on it for drinking water, as does over 90% of High Plains irrigation. Finally, \$20 billion of the world economy in food and fiber depends on the Ogallala.

***The Army Corps must deny TC Energy's permit application because:***

**(1) Construction and operation of the proposed Keystone XL pipeline will significantly degrade the thousands of bodies of water it crosses, including the Missouri River watershed and the Ogallala Aquifer, in direct contravention of the Clean Water Act ("CWA") and the public interest.**

The purpose of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. To achieve that purpose, the Clean Water Act

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<sup>6</sup> "Fort Peck Assiniboine Sioux Nation Elders Hold First Frontline #NoKXL Action in Montana," Indigenous Environmental Network, April 15, 2020, available at: <https://www.ienearth.org/fort-peck-assiniboine-sioux-nation-elders-hold-first-frontline-nokxl-action-in-montana/>. In addition to crossing the Milk and Missouri Rivers near the Ft. Peck Reservation, KXL would also cross the Cheyenne River, the southern border of the Cheyenne River Sioux Reservation, and less than a mile from the Reservation. Likewise, it would cross the White River very near to the Rosebud Sioux Reservation.

<sup>7</sup> See Ponca Nation Resolution #01-01092018, regarding Rights of Nature, attached hereto as ***Exhibit 1***.

prohibits projects that significantly degrade the nation's waters. Under 40 C.F.R. 230.10(c), "significant degradation" occurs when the discharge of pollutants causes significant adverse effects to:

- **human health and welfare;**
- **wildlife living in or dependent on the waterway;**
- **the stability and biological processes of the waterway itself; and**
- **the aesthetic, economic, and recreational value of the waterway.**

The proposed Keystone XL pipeline will cause significant adverse effects in all four of these categories because of the impact of construction and the significant risk of spills and their resulting long-term impact.

### ***Spill Risk***

It is an unquestionable fact that pipelines leak—it is not a matter of “if” but rather “when.” TC Energy has proven that it cannot construct and operate pipelines in a way that protects the integrity of the nation's water. Any failure of the pipeline resulting in a spill will result in petroleum products in any of the 1,073 bodies of water it crosses, including the Missouri River watershed and the Ogallala Aquifer, significantly degrading these essential waters.

TC Energy has consistently provided inaccurate data over the past 12 years regarding the risk of a spill from the pipeline. They told the SD Public Utilities Commission that dilbit is unlikely to travel more than 300 feet from the spill site, that the risk of a spill affecting a high consequence area would occur not more than once in 250 years, that the chance of a leak is not more than one spill in 7,400 years for any given mile of pipe, and that the chance of leak in South Dakota is not more than one release in 24 years.<sup>8</sup> An examination of the spill history of the Keystone Pipeline—another TC Energy project—demonstrates that none of this is true.<sup>9</sup>

University of Nebraska professor Dr. John Stansbury conducted an independent analysis which provides more detail on the potential risks for the Ogallala Aquifer. Dr. Stansbury concluded that safety assessments provided by TC Energy are misleading: "We can expect no fewer than 2 major spills per state during the 50-year projected lifetime of the pipeline. These

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<sup>8</sup> Amended Final Decision and Order of the Public Utilities Commission of the State of South Dakota on the Application of TC Energy for Keystone XL, available at: <https://puc.sd.gov/commission/orders/hydrocarbonpipeline/2010/hp09-001c.pdf>, Par. 44, 49, 50.

<sup>9</sup> Testimony of Kent Moeckly at the SD DENR Water Management Board hearings, 2019-2020. The Keystone pipeline did go through the farm owned by Kent Moeckly where he observed and photographed improper construction practices placing pipe in a flooded trench, in the area where a 407,400 gallon spill occurred on November 16, due to rupture of a pipe caused by mechanical damage from the original construction because weight was placed on the pipe due to the potential for buoyancy in flooded conditions.



spills could release as much as 180 thousand barrels of oil each.”<sup>10</sup> Dr. Stansbury’s analysis estimated that the pipeline could have 91 significant spills in 50 years versus TransCanada telling the public the pipeline would have 11 spills.<sup>11</sup>

The United States Department of Transportation Pipeline and Hazardous Materials Safety Administration (PHMSA) has cited the Keystone Pipeline, another TC Energy project, at least 36 times during the 10 years it has been operational. These citations consist of documented spills, warning letters, and Notices of Violation for failures of construction, design, materials, and operation.<sup>12</sup> Included in these are several major spills:<sup>13</sup>

- 400 barrels of dilbit spilled near Freeman, South Dakota in 2011,
- 400 barrels of dilbit spilled in South Dakota in 2016;
- 6,592 barrels of dilbit spilled in South Dakota in 2017;
- 4,515 barrels spilled in a North Dakota wetland in 2019; and
- As recently as May 2020, 442 barrels of dilbit spilled in Texas.

### ***Impact of Spill***

The Army Corps must consider the persistence and permanence of any adverse effects when determining whether a waterway has been significantly degraded. This is particularly relevant here because the Keystone XL will pump diluted bitumen, or dilbit, a pollutant much more difficult to clean than conventional crude oil. Dilbit, by its very nature, increases the permanence and persistence of any adverse effects from a spill. Heavy, sticky tar sands oil will not flow through a pipeline efficiently, so it is mixed with diluents like naphtha, causing both chemical and physical impacts, if released.<sup>14</sup> It will thickly coat and adhere to solid surfaces, vegetation, debris, wildlife, response equipment, and Personal Protective Equipment.

Dilbit undergoes very slow natural degradation, making its impact on the spill environment more persistent and permanent. Normal environmental processes, such as wave action and sunlight, intensify toxicity and exacerbate the difficulty with location and cleanup. In rivers, there is a greater potential for dilbit to submerge and end up many miles downstream of

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<sup>10</sup> “Analysis of Frequency, Magnitude and Consequence of Worst-Case Spills from the Proposed Keystone XL Pipeline,” Dr. John Stansbury, University of Nebraska Water Center, 2011, available at: <http://watercenter.unl.edu/downloads/2011-Worst-case-Keystone-spills-report.pdf>.

<sup>11</sup> *Id.*

<sup>12</sup> See PHMSA website for warning letters and Notice of Violations, available at: [https://primis.phmsa.dot.gov/comm/reports/operator/OperatorIE\\_opid\\_32334.html?nocache=7202#\\_OuterPanel\\_tab\\_1](https://primis.phmsa.dot.gov/comm/reports/operator/OperatorIE_opid_32334.html?nocache=7202#_OuterPanel_tab_1).

<sup>13</sup> See PHMSA website for documentation of spills, <https://primis.phmsa.dot.gov>. The PHMSA Incident Report is attached hereto as ***Exhibit 2***.

<sup>14</sup> American Petroleum Institute (API), “Diluted Bitumen,” <https://www.api.org/oil-and-natural-gas/wells-to-consumer/exploration-and-production/oil-sands/diluted-bitumen>.

the release site; sunken oil can become re-suspended during higher flow conditions and migrate downstream.<sup>15 16</sup> Impacts of an oil spill are particularly devastating to Indigenous communities who rely on subsistence activities such as hunting and fishing. In addition, costs of an oil spill cleanup can be exorbitant.<sup>17</sup>

### ***A New Environmental Impact Assessment is Required***

The USACE is not in compliance with the National Environmental Policy Act. To determine the true potential impact of a spill and environmental effects of the project, pursuant to the National Environmental Policy Act and Endangered Species Act, the Army Corps must conduct an environmental impact assessment and present an Environmental Impact Statement before any permit may be allowed. Reliance upon any analysis conducted prior to 2017 is unsupportable in light of the substantial changes that have occurred in the oil and gas industry in the past 3 years.

The proposed route of the Keystone XL pipeline would cross the Missouri River in Montana downstream of the Fort Peck Spillway and would be trenched across federal property administered by the USACE for the Fort Peck Project. On January 21, 2020, without a full environmental impact assessment, the USACE granted a Section 408 permit which was signed and incorporated in the Bureau of Land Management's (BLM) decision to grant a right-of-way and temporary use permit on federally administered land for the project on January 22, 2020.<sup>18</sup>

Likewise, TC Energy's new application relies on outdated Environmental Impact Statements that contain flawed analysis which have been ruled invalid and are the subject of ongoing litigation due to their continued inadequacy.<sup>19</sup> The Corps may not rely upon or adopt the flawed and inadequate U.S. Department of State Supplemental Environmental Impact Statement dated 2019, which in part relies upon the similarly flawed and invalidated 2014

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<sup>15</sup> U.S. Department of Commerce, National Oceanic and Atmospheric Administration National Ocean Service, Office of Response and Restoration, "Diluted Bitumen Spills," available at: <https://response.restoration.noaa.gov/sites/default/files/Diluted-Bitumen-Dilbit.pdf>

<sup>16</sup> The 2010 Enbridge pipeline tar sands spill in the Kalamazoo River was not discovered for 17 hours, resulting in a spill of 843,000 gallons of dilbit, with a clean-up cost of more than \$1 billion dollars.

<sup>17</sup> Expert witness Dr. Jeffrey Short, who has over 31 years of direct experience with oil pipeline spills and 68 publications, testified for the Yankton Sioux Tribe in the SD DENR Water Management Board hearing to the risks and hazards of crude oil and diluted bitumen spills.

<sup>18</sup> The USACE decision to grant the Section 408 permit allowing the crossing of the Missouri River is now the subject of federal litigation filed by Assiniboine and Sioux Tribes of the Ft. Peck Reservation on May 29, 2020.

<sup>19</sup> In their new permit application's "Statement of Avoidance, Minimization, and Compensatory Mitigation for Unavoidable Impacts to Aquatic Resources," TC Energy references Section 3.14 of the 2011 Keystone XL Final EIS, Section 2.2 of the January 2014 Keystone XL Final Supplemental EIS, and Chapter 2.0 of the December 2019 Keystone XL Final Supplemental EIS, available at: <https://www.state.gov/keystone-pipeline-xl/>.

SEIS.<sup>20</sup> The Corps may not rely upon an analysis that is more than 5 years old, has been determined to be inadequate by a court of law and the Corps is bound by NEPA to conduct its own proper review.

**Without compliance with NEPA, the environmental impact, including the harm as a result of a spill, has not been adequately assessed.** The federal court denied TC Energy use of a nationwide permit precisely because the previous Environmental Impact Statements were inadequate. While the court did not foreclose TC Energy's application for an individual permit like the one at issue here, the Army Corp cannot avoid its statutory and judicially noticed duty to conduct a proper, current Environmental Impact Study.

**Accordingly, the risks to human health and welfare, wildlife, and the sustainability of the waterway that are detailed herein are part of the public record and are not exhaustive:**

***Risk to Human Health and Welfare***

The pipeline route crosses the Ogallala Aquifer, which begins in southeastern Tripp County South Dakota and extends south to Texas. In South Dakota, the aquifer is within 5 feet of the surface, below soil with very high permeability of both the sandy surficial soils and deeper soils which render the aquifer particularly vulnerable to contamination. The aquifer is the source of drinking water and irrigation for millions of people. The proposed pipeline also cuts across the Missouri River watershed, a waterway that supplies over 2 million people with drinkable water. Any dilbit spill into these waters would cause significant adverse effects to anyone drinking the water or relying on the water to irrigate their crops.

Some populations that depend on the Ogallala Aquifer:<sup>21</sup>

- Kansas City – approximately 44.7K
- Omaha – approximately 420K
- Lincoln – approximately 24K
- Overland Park – approximately 36.7K
- St. Joseph – approximately 7.3K
- Council Bluffs – approximately 60K
- Bellerose – approximately 4.8K

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<sup>20</sup> *Indigenous Environmental Network v. United States Department of State*, 347 F. Supp. 3d 561, 580-81 (D. Mont. 2018).

<sup>21</sup> "Analysis of Frequency, Magnitude and Consequence of Worst-Case Spills from the Proposed Keystone XL Pipeline," Dr. John Stansbury, University of Nebraska Water Center, 2011, available at: <http://watercenter.unl.edu/downloads/2011-Worst-case-Keystone-spills-report.pdf>.

The proposed pipeline presents another more pressing, sinister harm to human health and welfare along its route. TC Energy has planned for at least ten construction camps along the Keystone XL. These camps invariably lead to an increase in violent crime, particularly sexual assault. Indigenous women bear the brunt of this violence.<sup>22</sup>

### ***Risk to Wildlife – Threatened and Endangered Species***

There are 13 federally listed threatened or endangered species in the project area as of 2015 which include: American burying beetle, black footed ferret, interior least tern, whooping crane, pallid sturgeon, piping plover, western prairie fringed orchid, northern long eared bat, rufa red knot. Potential impact on wildlife include habitat loss, alteration, fragmentation, mortality, reduced survival or fertility due to stress or avoidance of feeding due to construction, noise, and the presence of more humans.<sup>23</sup> Construction and operation would also impact biologically unique landscapes and vegetation communities.<sup>24 25</sup> As part of its assessment, the Corps must also consult with the U.S. Fish and Wildlife Service and/or National Marine Fisheries Service ("NMFS"). 16 U.S.C. § 1536(a)(2).

### ***Risk to Sustainability of Waterways and Other Environmental Harm***

Oil from the Western Canadian oil sands (tar sands oil) is substantially more carbon intensive than other crude oil and its use will significantly contribute to carbon pollution.<sup>26</sup> If completed, the annual carbon pollution produced by the tar sands oil delivered through Keystone XL would be responsible for at least “181 million metric tons of carbon dioxide equivalent (CO<sub>2</sub>e) each year, comparable to the tailpipe emissions from more than 37.7 million cars or 51 coal-fired power plants.”<sup>27</sup> Though already high enough, a 2015-2016 Argonne National Laboratory study indicates that the actual carbon pollution may be 5-20% higher. The Presidential Permit was denied in 2015 in part because this pipeline would cause carbon emissions that would contribute to the catastrophic global climate crisis.<sup>28</sup> At a time when

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<sup>22</sup> For additional detail, *see* Treaty Rights – Workforce Camps and Violence Against Indigenous Women, *infra*.

<sup>23</sup> Memorandum in support of Presidential Permit dated March 23, 2017. P.22

<sup>24</sup> Memorandum in support of Presidential Permit dated March 23, 2017. P.22

<sup>25</sup> The route of the pipeline would go through land belonging to John Harter, a South Dakota farmer and rancher, including a substantial wetland where groundwater saturates the area. Contamination would destroy his ranch operation and ability to make a living, per his sworn testimony before the South Dakota DENR Water Management Board.

<sup>26</sup> Memorandum in support of Presidential Permit dated March 23, 2017 quoting the Environmental Protection Agency data. P.12

<sup>27</sup> David Turnball, “Cooking the Books: The True Climate Impact of Keystone XL,” April 16, 2013, available at: <http://priceofoil.org/2013/04/16/cooking-the-books-the-true-climate-impact-of-keystone-xl/>.

<sup>28</sup> “Third-Party Consultant Environmental Review of the TransCanada Keystone XL Pipeline Risk Assessment,” Exponent, Inc., April 26, 2013, available at: <https://2012-keystonepipeline-xl.state.gov/documents/organization/221278.pdf>.

decisive action is needed to curb the effects of climate change, the Keystone XL pipeline will only make the carbon pollution problem worse.

**(2) Tribal Nations and Indigenous peoples have not consented to the proposed Keystone XL pipeline, which crosses through ancestral Indigenous lands and threatens waterways that Indigenous communities rely on for their subsistence. Accordingly, the Army Corps must deny this permit—granting it would violate the inherent sovereignty of Tribal Nations and rights of Indigenous peoples under treaty rights recognized by the United States Constitution and international law.**

### *Inherent Sovereignty and Treaty Rights*

As with the Dakota Access Pipeline, the pipeline crosses tribal lands and TC Energy has failed to consult tribes along the route. Tribal nations such as the Cheyenne River Sioux, Rosebud Sioux, Yankton Sioux and Oglala Sioux, which partnered with Standing Rock to oppose DAPL, have repeatedly expressed adamant opposition to KXL, as have the Ponca Tribe of Nebraska, the Ponca Nation of Oklahoma, the Ft. Peck Assiniboine and Sioux Tribes, Ft. Belknap Indian Community and other Tribal nations along the route. To date, over 150 Tribes in the United States and Canada have signed and entered into a Treaty Alliance Against Tar Sands Expansion, aimed at preventing pipeline projects such as Keystone XL.<sup>29</sup>

Inherent sovereignty is a basic principle that articulates that the authority lawfully vested in a Tribal Nation are those powers that predate discovery and have never been extinguished. It is within the inherent sovereignty of Tribes to self-govern and to enter into Nation-to-Nation policy agreements with the United States government via treaties. The Supremacy Clause of the United States Constitution, ensconced in Article VI, Clause 2, states that: “all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”

As such, when moving forward on energy development projects such as this one, the USACE and Department of State must obtain consent by consensus and engage in meaningful Nation-to-Nation consultation that goes beyond a perfunctory mechanism and “checking of a box.”

The Army Corps and Department of State have failed to obtain consent by consensus and engage in adequate and meaningful Nation-to-Nation consultation with affected Tribal Nations.

The proposed route of the pipeline crosses lands in North Dakota belonging to the Great Sioux Nation, Oceti Sakowin, the unceded territory, in which they have an absolute right under

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<sup>29</sup> See Treaty Alliance Against Tar Sands Expansion, September 22, 2016; most recently updated on April 30, 2018, a copy of the Treaty is attached hereto as *Exhibit 3*; see also List of Signatory Nations, attached hereto as *Exhibit 4*.

the Ft. Laramie Treaties of 1851 and 1868 to roam and occupy, which has never been abrogated by the Tribe nor by Congress. In *Standing Rock Sioux Tribe vs. US Army Corp of Engineers*, 440 F. Supp. 3d 1, (D. D.C. 2020), the Corps was ordered to consider these rights arising from the Fort Laramie Treaty of 1851 in relation to the Dakota Access Pipeline as part of its environmental impact assessment; specifically, the Corps is required to consider how the pipeline would affect the Tribes' hunting and fishing resources.

This order, while specific to the Dakota Access Pipeline, applies equally to all tribes potentially impacted by the KXL pipeline. For example, in and along the Missouri River are cultural and religious sites that are central to the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, which provide plants used in religious and cultural practices, or are locations for traditional religious ceremonies and practices, as does the Cheyenne River to the Cheyenne River Sioux Tribe. Moreover, the 2019 DSEIS failed to consider at all the Tribes' unique historical, cultural, and spiritual relationship with the water itself and the Tribes' exercise of hunting, fishing, and gathering rights within the Reservation which would be impacted by the KXL pipeline.

### ***Free, Prior, and Informed Consent—not Mere Consultation***

Under United States federal laws such as the Native American Graves Protection and Repatriation Act of 1990 (“NAGPRA”), federal land-managing agencies are required to “consult” with federally recognized Indian Tribes prior to actions that might involve the intentional removal or excavation of Native American human remains and other cultural items. As defined by the Department of the Interior, “Consultation is built upon government-to-government exchange of information and promotes enhanced communication that emphasizes trust, respect, and shared responsibility.”<sup>30</sup> Nevertheless, mere consultation as a procedural mechanism, is not sufficient—it must also amount to consent by consensus.

The United Nations Declaration on the Rights of Indigenous Peoples, adopted by the United Nations General Assembly in 2007 and recognized by the U.S. State Department as having both moral and political force, recognizes, among other things, that Free, Prior and Informed Consent (“FPIC”) is a pre-requisite for any activity that affects Indigenous ancestral lands, territories, or natural resources.

FPIC “recognizes indigenous peoples' inherent and prior rights to their lands and resources and respects their legitimate authority to require that third parties enter into an equal and respectful relationship with them based on the principle of informed consent. Procedurally, free, prior and informed consent requires processes that allow and support meaningful choices by

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<sup>30</sup> Department of the Interior Policy on Consultation, available at: <https://www.doi.gov/sites/doi.gov/files/migrated/cobell/upload/FINAL-Departmental-tribal-consultation-policy.pdf>



indigenous peoples about their development path.”<sup>31</sup> FPIC is intrinsically tied to the concept of self-determination: that “human beings, individually and as groups, are equally entitled to be in control of their own destinies.”<sup>32</sup> As stated in the Charter of the United Nations (United Nations 1945) (treaty ratified by the United States in 1945) and in Article 1 of the International Covenant on Economic, Social and Cultural Rights (UN General Assembly 1966) (treaty signed by the United States in 1992), self-determination is to be provided to ‘all peoples’. Accordingly, Tribes must be afforded more than mere consultation when their very existence is at risk due to projects such as the Keystone XL pipeline.

### *Cultural Surveys*

The Keystone XL pipeline route falls within the area of landforms of significant spiritual value to the Dakota and Lakota people, such as Slim Buttes, North Cave Hills, South Cave Hills, Woman Who Lived with the Wolves, Touch the Cloud Camp, and Spotted Elk Camp, among many other sites. The spiritual impacts to the Dakota and Lakota people have not been considered, as neither the U.S. Government nor the State of South Dakota engaged in government-to-government consultation with the Tribes.

The USACE and TC Energy must follow proper procedures for surveys for identifying and evaluating traditional cultural properties along the proposed pipeline route. The Tribes along the proposed route have not been afforded the opportunity to conduct a proper traditional cultural property survey in a manner consistent with the requirements of federal law. This failure was recognized by a federal district court in Montana in *Indigenous Environmental Network v. United States Department of State*, 347 F. Supp. 3d 561, 580-81 (D. Mont. 2018).<sup>33</sup> Concern regarding the risk to historical and cultural resources which are posed by the pipeline have been expressed by the Tribes and was articulated in a letter on February 2, 2015 by Department of the Interior. An Unanticipated Discoveries Plan must be prepared by the U. S. Department of State consistent with federal law with input from and every Tribe which may be impacted along the route.

The Department of State failed in its obligation to consult and work collaboratively with these and other Tribes, even though the pipeline route implicates Treaty rights.<sup>34</sup> For example, the U.S. Department of State’s 2014 Final Supplemental Environmental Impact Statement (“FSEIS”) was prepared without proper consultation or meaningful nation-to-nation consent by consensus with the Rosebud Sioux Tribe and the Cheyenne River Sioux Tribe, even though the

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<sup>31</sup> UN Sub-Commission on the Promotion and Protection of Human Rights 2004, p. 5.

<sup>32</sup> Former U.N. Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, quoted in conference report on ‘Common Roots, Common Futures: Different Paths to Self-determination—An international Conversation’, University of Arizona, 2012.

<sup>33</sup> Testimony of Rosebud Tribal Historic Preservation Officer Ben Rhodd at the SD DENR Water Management Board hearings, 2019-2020.

<sup>34</sup> Testimony of Cheyenne River Sioux Tribe’s Tribal Historic Preservation Officer Steve Vance at the SD DENR Water Management Board hearings, 2019-2020.

pipeline route implicates Treaty rights and is immediately adjacent to several Tribal communities in South Dakota.<sup>35</sup> These failures are further evidenced by the testimony of John Harter, a farmer and rancher in Tripp County, South Dakota across whose land the pipeline was scheduled to cross and who invited the Rosebud Sioux Tribe to conduct a survey of his property for cultural and historical sites of importance and found a stone turtle effigy on his property. Federal law requires that a proper, legally sufficient cultural, historical, and paleontological survey along the proposed pipeline route be done and in light of their prior failure to do so, the permit should be denied.<sup>36</sup>

### ***Workforce Camps and Violence Against Indigenous Women***

A U.S. Department of Justice Bureau of Statistics report found that, over a seven year period, oil-producing counties in North Dakota and Montana experienced a 70% increase in violent victimization while non-oil-producing counties in those states experienced a decrease during the same timeframe, and that women in the oil-producing counties experienced a 54% increase in unlawful sexual contact, including high rates of sex trafficking of women and children and high rates of Missing and Murdered Indigenous Women.

The increase in crime observed in the Bakken region was coincident with workforce camps in the area which are analogous with those TC Energy would use in Montana, South Dakota and Nebraska, which would bear the same risks and likely the same high rates of violence as the Bakken camps and that security and code of conduct in the camps would be inadequate to prevent the rise in crime from these camps.<sup>37</sup> The impacts of those crimes will remain in those communities forever. The problems created by the workforce camps are exacerbated by the severe shortage of law enforcement officers on the Yankton Sioux and Rosebud Sioux Reservations, both of which are in close proximity to the proposed Winner man camp in South Dakota. As the proximity of the workforce camps to the Reservations and their locations along the pipeline route, and within Lakota and Dakota Treaty Territory will significantly increase the potential for looting, and other impacts to cultural and spiritual sites within the Tribes' treaty and ancestral territory. The close proximity of the workforce camps to reservations along the route, for example the Cheyenne River Sioux Reservation in South Dakota, will significantly increase the potential for illegal hunting and fishing on the Cheyenne River Sioux Reservation. The problem of exposure to Covid-19 would be increased dramatically

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<sup>35</sup> Testimony of Rosebud Sioux Tribal President Rodney Bordeaux at the SD DENR Water Management Board hearings, 2019-2020.

<sup>36</sup> For example, South Dakota as defined by the legislature in the Historic Preservation Act: "The South Dakota legislature declares that it is in the best interest of the of the state and its citizens to provide for the preservation of its historical... and cultural sites by protecting, restoring, and rehabilitating sites... which are of historical significance." SDCL § 1-19A-1.

<sup>37</sup> Testimony of Kate Finn an attorney and expert at the SD DENR Water Management Board hearings, 2019-2020.

by an influx of workers from outside of the area to work on the pipeline and the resultant increase of exposure to populations along the pipeline and the taxing of health care systems in areas along the route.

### *Rights of Nature*

The Keystone XL pipeline violates the inherent Rights of Nature. Indigenous nations have long recognized the inherent Rights of Nature—this worldview removes the artificial difference between humans and the natural world.<sup>38</sup> On September 16, 2011, guided by the “principles of traditional indigenous knowledge, spiritual values, and respectful use of the land,” Tribal governments in the United States and First Nations in Canada, along with traditional Treaty Councils, private individuals, and organizations impacted by TC Energy’s proposed KXL tar sands pipeline, came together to articulate opposition to the Keystone XL pipeline in the Mother Earth Accord.<sup>39</sup>

The Mother Earth Accord recognizes that: “the tar sands in northern Alberta, Canada is one of the largest remaining deposits of unconventional oil in the world, containing approximately 2 trillion barrels... [development would not only destroy an area larger than the state of Florida, but would have] devastating impacts to Mother Earth and her inhabitants and perpetuates the crippling addiction to oil of the United States and Canada.”

In addition to the Mother Earth Accord, the aforementioned Treaty Alliance Against Tar Sands Expansion articulates the pledge of Indigenous peoples and Nations to protect the earth.

Among the signatory nations of the Treaty Alliance, several Nations have passed resolutions reaffirming the commitment to protecting the inherent Rights of Nature. For instance, the Ponca Nation passed a resolution recognizing the inherent Rights of Nature. Among those rights articulated, are the right to exist, to be free from contamination, pollution, and toxic waste. Within the Ponca Nation’s present-day homeland and traditional territories, it is a criminal offense to violate the statute created by said resolution.<sup>40</sup>

As international law and policy also moves in the direction of recognizing the Rights of Nature through a shift towards Earth jurisprudence, collectively—and the Army Corps, specifically—must be compelled to “consider the consequences of the entwined

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<sup>38</sup> See also “Sustainable development: Harmony with Nature,” Expert Report to United Nation General Assembly, August 1, 2016, available at: <http://undocs.org/en/A/71/266>.

<sup>39</sup> Mother Earth Accord, September 16, 2011, available at: <https://www.ienearth.org/mother-earth-accord/>; see also Ponca Nation Resolution against Keystone XL, attached hereto as *Exhibit 5*.

<sup>40</sup> See Ponca Nation Resolution, fn. 7, *supra*.

reality [between humans and Nature in] economic and political interactions.”<sup>41</sup> The completion of KXL runs afoul of those principles.

**(3) The Keystone XL pipeline is not commercially viable and does not serve the public interest.**

### ***Presidential Permit***

The first two applications for a Presidential Permit filed by TC Energy in 2008 and 2012 were denied on the basis that it would not serve the national interest. In 2015, after immense opposition to KXL, President Obama vetoed the pipeline indicating that the project would undercut United States efforts to fight climate change.

Subsequently, the Trump administration reversed course and TC Energy was invited by President Trump to resubmit its application. On January 26, 2017, it resubmitted the application it had filed in 2012. Without any further proper assessment, and by executive order fast-tracking development, the presidential permit was approved.

Due to the known harm from construction and the risks of a spill, including the abysmally poor track record of TC Energy’s Keystone Pipeline for spills, leaks, poor construction, design, operation and maintenance over the past 10 years, and the risk to Tribal cultural and water resources, the climate, human, animal, fish, avian, insect and plant life posed by the proposed pipeline, and the lack of commercial economic viability, granting a permit is contrary to the public interest.

### ***Not Commercially Viable***

The Cambridge Dictionary defines “commercial viability” as “the ability of a business, product, or service to compete effectively and to make a profit.” The project is not commercially viable based on the fact that there is no substantial demand for additional pipeline capacity.<sup>42</sup> The breakeven cost of production per barrel is between \$65-75 per barrel, is double the current price per barrel of tar sands oil which is now \$31.07 and the demand for oil has dramatically decreased in 2020 due to the impact of Covid-19. The number of active oil rigs in U.S. fields fell by 4 to 172 and oil production will likely end the year about 20% lower than at the start<sup>43</sup>. There are already more than 190,000 miles of oil pipelines in the United States.<sup>44</sup>

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<sup>41</sup> See fn. 38, *supra*.

<sup>42</sup> Memorandum in support of Presidential Permit dated March 23, 2017. P.13

<sup>43</sup> <https://www.worldoil.com/news/2020/8/14/drilling-rig-count-falls-on-distant-prospects-of-an-oil-price-recovery>

According to the North Dakota Pipeline Authority, over 1 million bpd of new pipeline capacity has been built since Keystone XL was first proposed, with more expected. Meanwhile, low oil prices have blunted once projected increases in Bakken oil production. Thus, it is unlikely TransCanada would even be able to find US producers interested in long term shipping contracts.

### ***Keystone XL Does Not Serve the Public Interest***

Aside from its lack of commercial viability, tar sands oil production does not benefit the American population. KXL will not use U.S. steel,<sup>45</sup> it won't carry U.S. oil, and over half of the products carried by KXL are likely to be exported. Tar sands oil is made mostly into diesel, not gasoline. Most diesel is exported. According to Oil Change International, the refineries that KXL would predominantly supply in the Texas Gulf Coast, exported 60% of their gasoline production, 40% of their diesel production, and 95% of their petcoke.<sup>46</sup>

A foreign export pipeline that does nothing to increase the energy independence of the United States is not in the public interest.

### **CONCLUSION**

TC Energy has proven that it cannot construct and operate pipelines in a way that protects the integrity of the nation's waters. There is no evidence the Keystone XL pipeline will be any different. Any potential economic benefit from the pipeline is miniscule and eclipsed by the reasonably foreseeable harms it will cause. Any mishap on the pipeline will dump petroleum products into the Missouri River watershed and the Ogallala Aquifer, significantly degrading these essential waters. Any spill will hurt the waters themselves, and the wildlife that lives in and among them. This pipeline will cause persistent physical, cultural, and economic harm to the people who live along the Missouri and above the Ogallala, some of whom have depended on these waters for over 10,000 years. As such, the Keystone XL pipeline runs contrary to the public interest—we cannot drink oil. Accordingly, the Army Corps must deny TC Energy this permit.

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<sup>44</sup> <https://www.api.org/oil-and-natural-gas/wells-to-consumer/transporting-oil-natural-gas/pipeline/where-are-the-pipelines>

<sup>45</sup> The majority of steel is sourced from India. Another large portion of the steel was made in Italy and Canada by a subsidiary of a Russian company (Evraz). See "Trump Lies about Keystone XL," Mark Hefflinger, Bold Nebraska, available at: <http://boldnebraska.org/trump-lies-about-keystone-xl-turns-his-back-on-unions-and-fails-at-negotiating-best-deal-for-america-with-u-s-steel-for-pipelines/>.

<sup>46</sup> "Potential Keystone XL refineries continue to increase exports," Oil Change International, January 31, 2014, <http://priceofoil.org/2014/01/31/potential-keystone-xl-refineries-continue-increase-petroleum-product-exports/>



On behalf of the Water Protector Legal Collective, thank you for the opportunity to provide comments at this important juncture.

Sincerely,

Natali 

Natali Segovia, Esq.  
Staff Attorney, Water Protector Legal Collective

*Mni Wiconi. Water is Life.*

**Enclosed herewith:**

- Exhibit 1 – Ponca Nation Resolution regarding Rights of Nature
- Exhibit 2 – PHMSA Incident Report
- Exhibit 3 – Treaty Alliance Against Tar Sands Expansion
- Exhibit 4 – List of Signatory Nations
- Exhibit 5 – Ponca Nation Resolution against Keystone XL





# Ponca Tribe of Oklahoma

"Rich in Culture and Tradition"

"Equal Opportunity Employer and Provider"

RESOLUTION # 01-01092018

## A RESOLUTION RECOGNIZING THE IMMUTABLE PONCA TRIBAL RIGHTS OF NATURE

**WHEREAS**, the Ponca Tribe of Indians of Oklahoma (herein the "Tribe" or the "Ponca Tribe") is an Indian Tribe existing from time *in memoriam*, which has for many generations governed itself to provide for the common peace and the common protection of all things in Nature; and

**WHEREAS**, today the Ponca Tribe is a United States federally recognized Tribe of nearly 4,000 members with the headquarters located in White Eagle, Oklahoma; and

**WHEREAS**, the Ponca Tribal Business Committee is authorized to conduct and transact all business of the Ponca Tribe subject to the requirements of the Ponca Constitution duly adopted on September 20, 1950; and

**WHEREAS**, the Ponca Tribal Business Committee is authorized to exercise all executive, legislative, and judicial powers of the Tribe, in accordance with the Tribal Constitution; and

**WHEREAS**, when this world was created there was a natural law which preexists humans, providing for the right of all things and all beings to be, to continue, to change and to attempt to thrive;

**WHEREAS**, Ponca people, like all people, are a part of nature. Nature gives all physical sustenance and affords all the opportunity for all People for all intellectual, moral, social and spiritual growth; and

**WHEREAS**, Ponca people in their original instructions from Wakonda were taught that human beings are a part of Nature; that water is the container of all life, and all life is the container of water; and

**WHEREAS**, the protection of Nature is a major issue which affects the well-being of people throughout the world; and

**WHEREAS**, in the long evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, many people have acquired the power and the desire to transform Nature in countless ways and on an unprecedented scale; and

**WHEREAS**, in the short time of the lives of the signatories to this Law we have witnessed that humans have transformed Nature. That power, if used wisely, can serve to protect Nature and to enhance the quality of the lives of all things, including People alive today and for the People and all living things in future generations. Wrongly or heedlessly applied, the same power can do incalculable harm to Nature, to humans, and to all living things.

**WHEREAS**, we, the signatories of this law, see around us growing evidence of human-made harm in Nature: dangerous levels of pollution in water, air, earth and living beings; major and undesirable disturbances in the processes of Nature; and gross deficiencies, harmful to the physical, mental and social health of all sentient beings, all caused by the unmanaged, powerful science and technology of humans; and

**WHEREAS**, one of the largest oil companies in the world began in the heart of Ponca Tribe and it has since expanded around the world; and

**WHEREAS**, the unfettered and ever-growing use of oil, gas and coal – all revived from the decayed remains of living being that died millions of years ago, and which Nature largely sequestered away from those things living today – not only severely changes our climate, it physically and spiritually places living things in Nature today squarely in contact with that which died and was buried long ago; and

**WHEREAS**, we as Poncas see increased rates of death in our community which have no explanation other than the severe alteration of Nature caused by human technology, science, and the unthinking, unmanaged and unfettered use of oil, gas and coal; and

**WHEREAS**, a point has been reached in history when we as Poncas feel it necessary to take every step we can to ensure prudent care for Nature, not only because of the consequences to us as people, but also because of our ethical duty to not harm all things in Nature which are related to us and are a part of us. Through ignorance or indifference, we can do, and already have done, massive and irreversible harm to Nature. We as Ponca People accept that responsibility; and



**WHEREAS**, through fuller knowledge and wiser action, and by acknowledging our responsibility for the past we can in the future protect Nature, reverse many of the harms we and others have caused, and protect not just for humans, but for all things, a good and free life. Attaining freedom will require all humans to use knowledge to act in collaboration with Nature. To defend and improve the condition of all living things, presently and in the future has become an imperative goal for humankind. This is a goal to be pursued together with, and in harmony with all things in Nature, and in concert with all humans who aspire to be bound to the established and fundamental goals of peace; and

**WHEREAS**, achieving this goal will demand the acceptance of responsibility by citizens and communities and by enterprises and institutions at every level, all sharing equitably in common efforts. Individuals in all walks of life as well as organizations in many fields, by their values and the sum of their actions, will shape the world environment of the future; and finally

**WHEREAS**, we believe that Ponca Law has always recognized Right of Nature, and therefore, we **RESOLVE** that the following shall be immediately recorded as the customary law of the Ponca Tribe, existing since time in memoriam until the end of all days:

#### **Article 1. Nature**

- (1) Nature is a unique, indivisible, self-regulating community of interrelated beings that sustains, contains and reproduces all other beings. The term "being" includes ecosystems, natural communities, species and all other natural entities, including people, which exist as part of Nature.
- (2) Each being is an integral part of Nature.
- (3) The inherent rights of Nature are inalienable in that they arise from the same source as existence.
- (4) All beings are entitled to all the inherent rights recognized in this law without distinction of any kind, such as may be made between organic and inorganic beings, species, origin, use to human beings, or any other status.
- (5) All beings have rights which are specific to their species or kind and appropriate for their role and function within the communities within which they exist.
- (6) The rights of each being are limited by the rights of other beings and any conflict between their rights must be resolved in a way that respects Nature and each

being within Nature.

## **Article 2. Inherent Rights Nature**

- (1) Nature and all beings of which it is composed have the following inherent rights:
  - a. the right to life and to exist, subject to the traditional roles and ethical harvesting of plants and animals by humans for sustenance;
  - b. the right to maintain its identity and integrity as a distinct, self-regulating and interrelated being;
  - c. the right to clean water as a source of life;
  - d. the right to clean air as a source of life;
  - e. the right to be free from contamination, pollution and toxic or radioactive waste;
  - f. the right to not have its genetic structure modified or disrupted;
- (2) Each being has the right to a place and to play its role in Nature, which may include the responsible and ethical taking and consuming of living beings as is traditional, ethical, just and proper for sustenance and the perpetuation of life;
- (3) Every being has the right to well-being and to live free from torture or cruel treatment by human beings.

## **Article 3. Duties of Human Beings to Nature**

- (1) Every human being is responsible for respecting and living in harmony with Nature.
- (2) Within the Jurisdiction of the Ponca Tribe, all human beings, all governments, all corporations and public and private institutions must act in accordance with the rights and obligations recognized in Article 2 of this Law, and the failure to do so shall constitute a crime against Nature;
- (3) Within the Jurisdiction of the Ponca Tribe, the possession or use of nuclear materials for any purpose other than for medical diagnostic or medical treatment shall constitute a crime against Nature; and
- (4) Within the Jurisdiction of the Ponca Tribe, the possession or use of biological or



chemical weapons shall constitute a crime against Nature.

#### **Article 4. Penalties for Crimes against Nature**

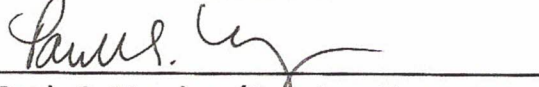
- (1) A Crime against Nature shall be enforced by the Ponca Tribal Court and the rules of Criminal Procedure then normally applicable in the Ponca Tribal Court shall apply to all Crimes against Nature.
- (2) The Ponca Tribal Prosecutor shall, in her discretion, prosecute all Crimes against Nature as is her custom and practice.
- (3) A Crime against Nature shall be considered a misdemeanor if the result of the Crime does not pose a substantial threat to the continued existence of a population of beings or if the perpetrator of the Crime against Nature agrees within a reasonable time to restore the population of beings impacted by the Crime against Nature.
- (4) A Crime against Nature shall be considered a Felony if the crime poses a substantial threat to the continued existence of a population of beings or if the perpetrator of the Crime against Nature refuses within a reasonable time to restore the population of beings impacted by the Crime against Nature.
- (5) Violations of Article 3 (3) and Article 3 (4) shall always be considered a felony.
- (6) Misdemeanor Crimes against Nature shall incur, in the discretion of the Ponca Tribal Court, a maximum sentence of 30 days in prison, and a fine of \$500, for each day of each offense, and the sentences may be added together and shall maintain their status as a misdemeanor no matter how many days in prison or dollars ultimately result.
- (7) Felony Crimes against Nature shall incur, in the discretion of the Ponca Tribal Court, a maximum sentence of 1 year in prison, and a fine of \$5,000, for each day of each offense, and the sentences may be added together and shall maintain their status as a Felony no matter how many days in prison or dollars ultimately result.
- (8) If the offender is a corporate entity, the Chairman of the Board of the Corporate entity who serves in that position at the time the Crime of Nature is committed shall personally serve the sentence for any Crime against Nature caused by the corporation.

# CERTIFICATION

We, the undersigned, hereby affirm at an official meeting of the Ponca Tribal Business Committee, held on the 9<sup>th</sup> Day of JAN, 2018 at which a quorum was present, the above resolution was presented and approved by a vote of 6 For, 0 Against, 0 Abstain and, 1 Absent.



Earl S. Howe III/Chairman



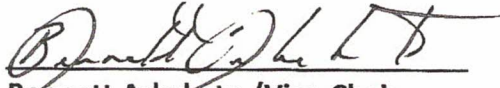
Paula S. Mendoza/Secretary-Treasurer



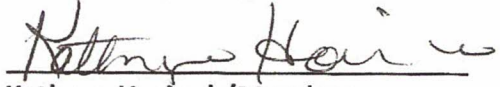
Douglas G. Rhodd, Sr./Member



Kinsel V. Lieb/Member



Bennett Arkeketa,/Vice-Chairman



Kathryn Horinek/Member

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Douglas G. Eagle Sr., Member



Incidents/Accidents - Hazardous Liquid

Time run: 9/10/2020 12:12:05 PM

ODES - Data as of 9/9/2020 7:03:24 PM

SMART - Data as of 9/9/2020 6:15:45 PM

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<A target="" blank" href = "/HIPPublicServices/getPublicReport/?reportAbsolutePath=/BIP Reports/ODES2/HazLiquid.xdo&rptid=13488&_xt=HazLiquid&_xf=pdf&_xautorun=true" > Pdf</A>	72679	20130129	4/5/2013	Supplemental Final	8/1/2013	ONSHORE	No	CRUDE OIL	1040369	3/7/2013	2013	3/7/2013	BUTLER	KANSAS	INTERSTATE	-97.01220	37.97020	No	No	No	N	ONSHORE PIPELINE INCLUDING VALVE SITES	MATERIAL/WELD/EQUIP FAILURE	THREADED CONNECTION/COUPLING FAILURE	0	0	\$12,550	0.5	0.0
<A target="" blank" href = "/HIPPublicServices/getPublicReport/?reportAbsolutePath=/BIP Reports/ODES2/HazLiquid.xdo&rptid=11336&_xt=HazLiquid&_xf=pdf&_xautorun=true" > Pdf</A>	72678	20110208	6/28/2011	Supplemental Final	4/3/2013	ONSHORE	No	CRUDE OIL	977695	5/29/2011	2011	5/29/2011	DONIPHAN	KANSAS	INTERSTATE	-95.13500	39.71864	No	No	Yes	N	ONSHORE PUMP/METER STATION EQUIPMENT AND PIPING	MATERIAL/WELD/EQUIP FAILURE	THREADED CONNECTION/COUPLING FAILURE	0	0	\$333,500	8.5	0.0
<A target="" blank" href = "/HIPPublicServices/getPublicReport/?reportAbsolutePath=/BIP Reports/ODES2/HazLiquid.xdo&rptid=11334&_xt=HazLiquid&_xf=pdf&_xautorun=true" > Pdf</A>	72676	20110171	6/8/2011	Supplemental Final	4/3/2013	ONSHORE	No	CRUDE OIL	975573	5/7/2011	2011	5/7/2011	SARGENT	NORTH DAKOTA	INTERSTATE	-97.90570	45.95307	No	No	Yes	Y	ONSHORE PUMP/METER STATION EQUIPMENT AND PIPING	MATERIAL/WELD/EQUIP FAILURE	THREADED CONNECTION/COUPLING FAILURE	0	0	\$1,316,000	400.0	0.0
<A target="" blank" href = "/HIPPublicServices/getPublicReport/?reportAbsolutePath=/BIP Reports/ODES2/HazLiquid.xdo&rptid=11335&_xt=HazLiquid&_xf=pdf&_xautorun=true" > Pdf</A>	72678	20110129	4/28/2011	Supplemental Final	4/3/2013	ONSHORE	No	CRUDE OIL	970232	3/16/2011	2011	3/16/2011	NEMAHA	KANSAS	INTERSTATE	-96.05340	39.86822	No	No	Yes	N	ONSHORE PUMP/METER STATION EQUIPMENT AND PIPING	MATERIAL/WELD/EQUIP FAILURE	PUMP OR PUMP-RELATED EQUIPMENT	0	0	\$339,300	15.0	0.0
<A target="" blank" href = "/HIPPublicServices/getPublicReport/?reportAbsolutePath=/BIP Reports/ODES2/HazLiquid.xdo&rptid=35467&_xt=HazLiquid&_xf=pdf&_xautorun=true" > Pdf</A>	72679	20110181	6/10/2011	Supplemental Final	12/16/2016	ONSHORE	No	CRUDE OIL	968357	2/23/2011	2011	2/17/2011	COWLEY	KANSAS	INTERSTATE	-97.05390	37.36120	No	No	No	N	ONSHORE PUMP/METER STATION EQUIPMENT AND PIPING	MATERIAL/WELD/EQUIP FAILURE	OTHER EQUIPMENT FAILURE	0	0	\$5,524	0.2	0.0
<A target="" blank" href = "/HIPPublicServices/getPublicReport/?reportAbsolutePath=/BIP Reports/ODES2/HazLiquid.xdo&rptid=35466&_xt=HazLiquid&_xf=pdf&_xautorun=true" > Pdf</A>	73558	20110081	3/7/2011	Supplemental Final	12/16/2016	ONSHORE	No	CRUDE OIL	966497	2/3/2011	2011	2/3/2011	PAYNE	OKLAHOMA	INTERSTATE	-96.75140	35.93030	Yes	No	Yes	N	ONSHORE PUMP/METER STATION EQUIPMENT AND PIPING	INCORRECT OPERATION	OVERFILL/OVERFLOW OF TANK/VESSEL/SUMP	0	0	\$25,065	0.4	0.0
<A target="" blank" href = "/HIPPublicServices/getPublicReport/?reportAbsolutePath=/BIP Reports/ODES2/HazLiquid.xdo&rptid=11330&_xt=HazLiquid&_xf=pdf&_xautorun=true" > Pdf</A>	72678	20110062	3/1/2011	Supplemental Final	4/3/2013	ONSHORE	No	CRUDE OIL	966126	1/31/2011	2011	1/30/2011	CLINTON	MISSOURI	INTERSTATE	-94.32140	39.60887	No	No	No	N	ONSHORE PUMP/METER STATION EQUIPMENT AND PIPING	MATERIAL/WELD/EQUIP FAILURE	PUMP OR PUMP-RELATED EQUIPMENT	0	0	\$20,045	0.2	0.0
<A target="" blank" href = "/HIPPublicServices/getPublicReport/?reportAbsolutePath=/BIP Reports/ODES2/HazLiquid.xdo&rptid=11331&_xt=HazLiquid&_xf=pdf&_xautorun=true" > Pdf</A>	72677	20100200	9/16/2010	Supplemental Final	4/3/2013	ONSHORE	No	CRUDE OIL	951480	8/19/2010	2010	8/19/2010	CEDAR	NEBRASKA	INTERSTATE	-97.33710	42.63521	No	No	No	N	ONSHORE PUMP/METER STATION EQUIPMENT AND PIPING	MATERIAL/WELD/EQUIP FAILURE	MALFUNCTION OF CONTROL/RELIEF EQUIPMENT	0	0	\$33,018	0.2	0.0
<A target="" blank" href = "/HIPPublicServices/getPublicReport/?reportAbsolutePath=/BIP Reports/ODES2/HazLiquid.xdo&rptid=11332&_xt=HazLiquid&_xf=pdf&_xautorun=true" > Pdf</A>	72677	20100166	8/5/2010	Supplemental Final	4/3/2013	ONSHORE	No	CRUDE OIL	945213	6/23/2010	2010	6/23/2010	MINER	SOUTH DAKOTA	INTERSTATE	-97.69431	43.96535	No	No	No	N	ONSHORE PUMP/METER STATION EQUIPMENT AND PIPING	MATERIAL/WELD/EQUIP FAILURE	THREADED CONNECTION/COUPLING FAILURE	0	0	\$30,417	2.4	0.0
<A target="" blank" href = "/HIPPublicServices/getPublicReport/?reportAbsolutePath=/BIP Reports/ODES2/HazLiquid.xdo&rptid=11333&_xt=HazLiquid&_xf=pdf&_xautorun=true" > Pdf</A>	72677	20100119	6/21/2010	Supplemental Final	4/3/2013	ONSHORE	No	CRUDE OIL	941193	5/21/2010	2010	5/21/2010	BEADLE	SOUTH DAKOTA	INTERSTATE	-97.92161	44.62351	No	No	Yes	N	ONSHORE PUMP/METER STATION EQUIPMENT AND PIPING	MATERIAL/WELD/EQUIP FAILURE	THREADED CONNECTION/COUPLING FAILURE	0	0	\$207,508	0.1	0.1
Grand Total																									0	0	\$110,326,611	12,415.7	0.1



# TREATY ALLIANCE

## AGAINST TAR SANDS EXPANSION

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We have inhabited, protected and governed our territories according to our respective laws and traditions since time immemorial. Sovereign Indigenous Nations entered into solemn treaties with European powers and their successors but Indigenous Nations have an even longer history of treaty making amongst themselves. Many such treaties between Indigenous Nations concern peace and friendship and the protection of Mother Earth.

The expansion of the Alberta Tar Sands, a truly massive threat bearing down on all of the Indigenous Peoples of Turtle Island and beyond, calls now for such a treaty between Indigenous Nations:

Plans for major increases in the production of the Tar Sands have led to many new projects aimed at building, converting or expanding pipelines as well as introducing or increasing oil train and tanker traffic, all of which threaten many Indigenous Nations' territories, waterways, shores and communities with the very real risk of toxic and hazardous oil spills.

The expansion of the Tar Sands would also lead to increased destruction and poisoning of the lands, waters and air of the Indigenous Peoples directly on the frontlines and downstream of the Tar Sands.

In addition, every single Indigenous Nation on Turtle Island will suffer terrible harm if such pipeline, rail and tanker projects move ahead because, by leading to the expansion of the Tar Sands, such projects will unquestionably fuel catastrophic climate change. Climate change has already started to endanger our peoples' way of life and now threatens our very survival.

Tar Sands expansion is a collective threat to our Nations. It requires a collective response.

**Therefore**, our Nations hereby join together under the present treaty to officially prohibit and to agree to collectively challenge and resist the use of our respective territories and coasts in connection with the expansion of the production of the Alberta Tar Sands, including for the transport of such expanded production, whether by pipeline, rail or tanker.

As sovereign Indigenous Nations, we enter this treaty pursuant to our inherent legal authority and responsibility to protect our respective territories from threats to our lands, waters, air and climate, but we do so knowing full well that it is in the best interest of all peoples, both Indigenous and non-Indigenous, to put a stop to the threat of Tar Sands expansion.

We wish to work in collaboration with all peoples and all governments in building a more equitable and sustainable future, one that will produce healthier and more prosperous communities across Turtle Island and beyond, as well as preserve and protect our peoples' way of life.



Should you wish to join the above treaty, please sign inside the box and email the signed copy to the following address, accompanied by the name of the authorized representative who signed, the name of the Indigenous Nation that the authorized representative is signing on behalf of, as well as the date of signature: [info@treatyalliance.org](mailto:info@treatyalliance.org) (Please also ensure that you receive confirmation of receipt of your email)



# ABOUT THE TREATY

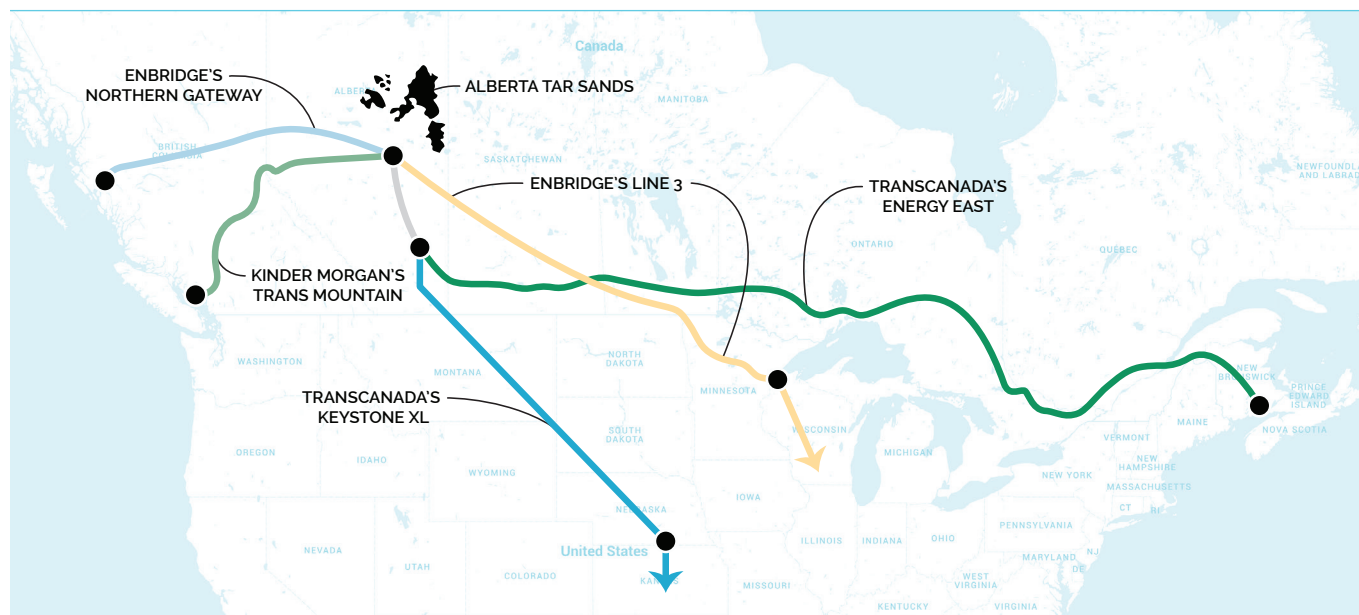
*The Treaty is an expression of Indigenous Law prohibiting the pipelines/trains/tankers that will feed the expansion of the Alberta Tar Sands.*

The alliance is part of an Indigenous Sovereignty resurgence taking place all over Turtle Island where Indigenous Peoples are reasserting themselves as the legitimate governments and caretakers of their territories.

The allied signatory Indigenous Nations aim to prevent a pipeline/train/tanker spill from poisoning their water and to stop the Tar Sands from increasing its output and becoming an even bigger obstacle to solving the climate crisis.

The world might not be able to immediately stop using oil tomorrow, but the last thing it needs is more oil, and especially not more of the dirtiest oil on the planet. It is critical that we urgently start building a more equitable and sustainable future and signatory Nations plan on being at the heart of that building process.

The Treaty's ban includes the following new, converted or expanded pipeline infrastructure projects in Canada and the US, any of which, if allowed to proceed, would lead to a major expansion of the Tar Sands:



*“We urgently need to get off oil to prevent a climate disaster for our People—not to dig a deeper hole.”*

**Grand Chief Stewart Phillip**  
of the Union of British Columbia Indian Chiefs





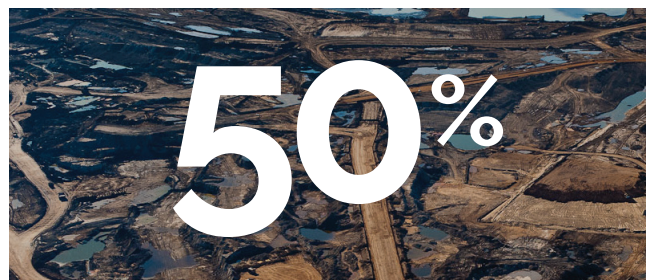
# MORE INFORMATION ON THE TREATY

## Tar Sands and Water Don't Mix



The expansion of the Tar Sands would lead to increased destruction and poisoning of the lands, waters and air of the Indigenous Peoples directly on the frontlines and downstream of the Tar Sands. In addition, Tar Sands expansion has given rise to pipelines/trains/tankers which threaten Indigenous Peoples' rivers, lakes, coasts and communities with toxic oil spills that would destroy ecosystems and could not be cleaned up.

## Tar Sands = Climate Change



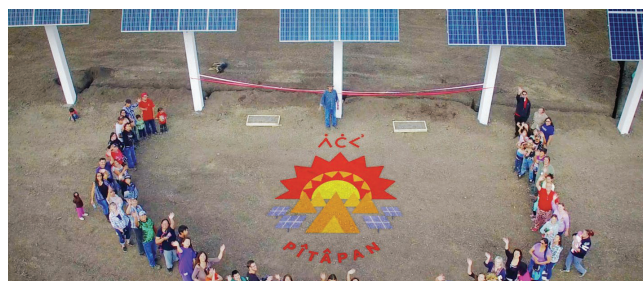
The expansion of the Tar Sands has been the biggest obstacle in Canada to addressing the climate crisis: since 1990, Tar Sands expansion has represented close to half of the total rise in Canada's greenhouse gas (GHG) emissions. Yet governments are allowing the Tar Sands to increase production even more – an astounding 50% increase in the coming years! But Tar Sands expansion can only happen with the help of new or expanded pipeline outlets.

## Indigenous Leadership is the Only Solution



While Indigenous Peoples have contributed the least to climate change, they stand to lose the most. Indigenous Nations have already led the charge with their allies against the Enbridge Northern Gateway and Keystone XL Tar Sands pipelines. This Treaty will take the fight the final step by ensuring that the Tar Sands are not able to escape by another pipeline route and thereby cripple efforts to fight the climate crisis. Otherwise, none of our peoples will be safe.

## Building A Better Future— All Together



Indigenous Nations need to also be equal partners in developing the responses and solutions to our climate crisis. And in the course of urgently getting off fossil fuels, it will be critical to ensure that no one is left behind, especially those in the environmental sacrifice zones like the many Indigenous communities near the Tar Sands. Many of those communities are in fact more than ready to move on from dirty oil and are leading the way.



# TREATY ALLIANCE

## AGAINST TAR SANDS EXPANSION

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### Signatory Nations

150 Indigenous Nations have thus far signed the Indigenous Treaty.

List updated as of April 30, 2018

Nations can send any changes to [info@treatyalliance.org](mailto:info@treatyalliance.org)

#### British Columbia

? Aq'am

Adams Lake

Boothroyd

Boston Bar First Nation

Cayoose Creek Band / St'at'imc

Coldwater

Dzawada'enuxw First Nation

Esk'etemc (Alkali Lake)

Gitanyow Hereditary Chiefs

Gwa'sala-'Nakwaxda'xw

Haisla Nation

Heiltsuk Nation

Katzie First Nation

Kwakiutl

Kwantlen First Nation

Kwikwasut'inuxw Haxwa'mis First Nation

Kwikwetlem First Nation

Lil'wat

Lower Nicola Indian Band / Nlaka'pamux

Lyackson First Nation

Lytton First Nation

Nadleh Whut'en First Nation /  
Carrier Sekani Tribal Council

Nak'azdli Whut'en

Nanoose First Nation

Neskonlith Indian Band / Secwepemc

Nooaitch

Ntequem

Nuxalk

Penelakut Tribe

Penticton Indian Band

Prophet River First Nation

Quatsino

Saik'uz First Nation /  
Carrier Sekani Tribal Council

Skawahlook

Skeetchestn Indian Band

Skuppah Indian Band

Songhees

Snuneymuxw

Splatsin / Secwepemc

Spuzzum

Stellat'en First Nation /  
Carrier Sekani Tribal Council

Sts'ailes

St'uwte'ws (Bonaparte) / Secwepemc

Sumas First Nation

Takla First Nation /  
Carrier Sekani Tribal Council

T'it'q'et / St'at'imc

Tl'azt'en Nation /  
Carrier Sekani Tribal Council

Tl'esqox First Nation / Tsilhqo'tin

Tsartlip First Nation

Ts'il Kaz Koh /  
Carrier Sekani Tribal Council

Ts'kw'aylaxw First Nation

Tsleil-Waututh Nation

West Moberly First Nation

Wet'suwet'en Nation /  
Carrier Sekani Tribal Council

Xaxli'p / St'at'imc

Xaxtsa / St'at'imc

Xeni Gwet'in / Tsilhqot'in

Yaqan Nukiy (Lower Kootenay Band)

Yunesit'in / Tsilhqot'in

## Quebec

Algonquin Nation

*Algonquin Anishinabeg  
Nation Tribal Council*

Kebaowek

Kitcisakik

Kitigan Zibi

Lac Simon

Long Point

Pikogan

Wahgoshig (Ontario)

*Algonquin Nation Secretariat  
Tribal Council*

Barriere Lake

Timiskaming

Wolf Lake

Malécite de Viger

Mi'gmawei Mawiomi

Gesgapegiag

Gespeg

Listuguj

Mohawks of Kahnawà:ke

Mohawks of Kanesatake

Nation Atikamekw

Manawan

Opitciwan

Nation Innue

Ekuanitshit

Essipit

Nutashkuan

Pakua shipi

Pekuakamiulnuatsh

Pessamit



Uashat mak Mani-utenam  
Unamen Shipu

Odanak

## **Ontario**

Anishinaabeg of Naongashiing First Nation  
Eagle Lake First Nation  
Matachewan First Nation  
Northwest Angle No.33 First Nation  
Serpent River First Nation  
Six Nations of the Grand River  
Wapekeka First Nation  
Wunnumin Lake First Nation

## **New Brunswick**

Wolastoq Grand Council

## **Manitoba**

Barren Lands First Nation  
Berens River First Nation  
Black River First Nation  
Brokenhead Ojibway Nation  
Fox Lake Cree Nation  
Keeseekoowenin Ojibway First Nation  
Kinonjeoshtegon First Nation  
Lake Manitoba First Nation  
Long Plain First Nation  
Manto Sipi Cree Nation  
Mathias Colomb First Nation  
Misipawistik Cree Nation (Grand Rapids)  
Mosakahiken Cree Nation

Nisichawayasihk Cree Nation  
Northlands Denesuline First Nation  
O-Chi-Chak-Ko-Sipi First Nation  
O-Pipon-Na-Pwiwin Cree Nation  
Norway House Cree Nation  
Pimicikamak  
Pine Creek First Nation  
Sagkeeng Anicinabe  
Sandy Bay First Nation  
Sapotaweyak Cree Nation  
Sayisi Dene First Nation  
Skownan First Nation  
War Lake First Nation  
York Factory First Nation

## **Saskatchewan**

James Smith Band  
Ochapowace Cree Nation  
Peter Chapman Band  
Shiyo Nide' Oyate' (Pheasant Rump Nakota)

## **Alberta**

Piikani Nation / Blackfoot Confederacy  
Swan River First Nation

## **Yukon**

Vuntut Gwitchin First Nation

## **Minnesota**

Red Lake Band of Chippewa Indians  
White Earth Nation

## **Montana**

Northern Cheyenne Tribe

## **Nebraska**

Omaha Tribe of Nebraska

Ponca Tribe of Nebraska

Santee Sioux Nation

Winnebago Tribe of Nebraska

## **North and South Dakota**

Cheyenne River Sioux Tribe

Crow Creek Sioux Tribe

Lower Brule Sioux Tribe

Oglala Sioux Tribe

Rosebud Sioux Tribe

Standing Rock Sioux Tribe

Yankton Sioux Tribe

## **Oklahoma**

Ponca Tribe of Oklahoma

## **Washington State**

Lummi Nation



## **Ponca Tribe of Oklahoma**

*"Rich In Culture and Tradition"*

"Equal Opportunity Employer"

20 White Eagle Drive ♦♦ Ponca City, Oklahoma 74601 ♦♦ Phone: (580) 762-8104 ♦♦ Fax: (580) 762-2743

### **RESOLUTION #9-04212017**

#### **A RESOLUTION ADDRESSING THE PONCA TRIBE OF OKLAHOMA OPPOSITION TO THE PROPOSED KEYSTONE XL PIPELINE AND THE EXISTING KEYSTONE PIPELINE**

- WHEREAS,** the Ponca Tribal Business Committee is authorized to conduct and transact all business of the Ponca Tribe of Oklahoma under the aegis of the Ponca Constitution duly adopted on September 20, 1950, and
- WHEREAS,** the Ponca Tribal Business Committee is authorized to exercise all executive, legislative and judicial powers of the Tribe, in accordance with the Tribal Constitution, and
- WHEREAS,** the Ponca Tribal Business Committee is delegated with responsibility and obligation to elevate the health, social, and economic status of the Ponca membership to the highest level; and
- WHEREAS,** The Ponca Nation is concerned about the Proposed Keystone XL Pipeline and the existing Keystone Pipeline in Kay and Noble Counties on public safety, tribal buildings and trust property, homes of tribal members and the water supply available to the Ponca Nation and its members due to earthquakes, pipeline infrastructure and junior water uses by oil companies engaged in fracking operations and a growing epidemic of manmade earthquakes is adversely impacting the Ponca Nation and is showing potential to cause pipelines to rupture and/or explode and threatening another release of toxic hydrocarbons and
- WHEREAS,** A major oil transmission pipeline is planned to extend from northern Alberta, Canada, from areas that have sand mixed with tar and oil, called "tar sands", to refineries in the United States; and Ponca City is now receiving an increased amount of toxic emissions from tar sand transport. Tar sand is composed of sand, petroleum, and mineral salts; a highly toxic class of chemicals and also added. Tar sand produces 17% more greenhouse gases than traditional crude oil. The air quality has become life threatening, and residents are forced to breathe in dangerous emissions. **CHILDREN IN THE SURROUNDING AREA OF THE NEW PIPELINE ARE 56% MORE LIKELY TO DEVELOP LEUKEMIA VERSUS CHILDREN THAT LIVE TEN MILES AWAY;** and
- WHEREAS,** The route of the pipeline, called Keystone XL because it is the second oil transmission pipeline to be constructed by the same company that built the first Keystone Pipeline, crosses through Indian country in northern Alberta, Saskatchewan, Montana, North Dakota, South Dakota and Nebraska, near and potentially over many culturally

significant areas for Tribal Nations within those provinces and states; and specifically in the territory of our Sister Tribe, the Ponca Tribe of Nebraska, and the ancestral homelands once shared by the entirety of the Ponca Peoples prior to the illegal forced removal in 1877 and

**WHEREAS,** It would threaten major water aquifers, rivers and water ways, public drinking water sources, agricultural lands, animal life, cultural sites, and other resources vital to the peoples of the region in which the pipeline is proposed to be constructed and as the southern portion of Keystone XL has already been installed in the homeland of the Ponca Tribe of Oklahoma.

**WHEREAS,** Based on the relatively poor environmental record of the first Keystone Pipeline, which includes numerous spills, and other factors, it is probable that further environmental disasters will occur in Indian country if the new pipeline is allowed to be constructed; and

**WHEREAS,** The First Nations of Canada and the Tribal Nations within the U.S. have a long history of working to ensure protection of their environment, and the Keystone XL Pipeline poses grave dangers if it is constructed.

**WHEREAS,** The Ponca Tribe recognizes that, as restated in the United Nations Declaration on the Rights of Indigenous Peoples, the Ponca Tribe has always had and continues to have the legal right to maintain and strengthen its distinctive spiritual relationship with its traditionally owned or otherwise occupied and used lands, territories, waters and other resources in its homelands; as our Original Instructions are that we are to hold Water, Air and Earth as Sacred Elements of Creation and

**WHEREAS,** Unlike the United States government and companies that plan to build and operate the KXL2 pipeline, the Ponca Tribe, its Sister Tribe and All Indian Nations have lived on this land since time in memoriam, and shall remain as stewards of the land long after all others are gone;

**WHEREAS,** the decisions of the United States government and the companies who seek to build and operate the KXL2 threaten the fundamental rights of the Ponca Tribe, it's Sister Tribe, all the Indian Nations along the path of the threatened pipeline and all people, Indian and others alike;

**WHEREAS,** the Ponca Tribe recognizes that while the United States federal government and the large oil companies it is serving may be forgetting its Treaty obligations, all governments have a duty to ensure that the decisions made today do not impair the choices and opportunities of future generations and

**WHEREAS,** the Ponca Tribe recognizes that the United States Government has in the past respected its legal obligations as can be found in the words of the US EPA's Federal Indian Policy, which among other things require the United States to deal directly with Indian tribes on matters affecting Indian interests that are protected by the law;

**THEREFORE, BE IT RESOLVED** that the Ponca Tribe of Oklahoma stands in solidarity with the First Nations of Canada and with Tribal Nations in the United States in opposing the Keystone XL pipeline and the negative impacts on cultural sites and the environment in those portions of Indian country over and



through which it is proposed to be constructed, and disagrees with the Finding of No Significant Impact issued by the U.S. Environmental Protection Agency; and

**BE IT FURTHER RESOLVED** that the Ponca Tribe of Oklahoma approves the Mother Earth Accord and the Rights of Nature.

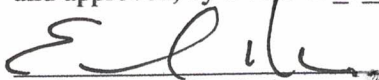
**BE IT FURTHER RESOLVED** that the Ponca Tribe of Oklahoma seeks to protect its interests and its recognized sovereignty in its traditional and presently existing territory and its Sister Tribe, the Ponca Tribe of Nebraska, congressionally designated Service Areas where the proposed routes of the pipeline will cross. The Tribe also desires to protect its historic, cultural, sacred and archaeological sites and resources in both its federally recognized territory as well as its traditional and aboriginal territory; and

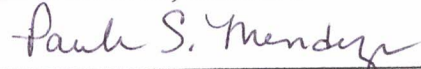
**FURTHERMORE BE IT RESOLVED** that the United States is urged to reduce its reliance on the world's dirtiest and most environmentally destructive form of oil the "tar sands" that threatens Indian country in both Canada and the United States and the way of life of thousands of citizens of the First Nations in Canada and American Indians in the U.S., and requests the U.S. government to take aggressive measures to work towards sustainable energy solutions that include clean alternative energy and improving energy efficiency; and

**BE IT FINALLY RESOLVED**, that this resolution shall be the policy of the Ponca Tribe of Oklahoma unless and until it is withdrawn by subsequent resolution.

#### CERTIFICATION

We, the undersigned hereby affirm that at an official meeting of the Ponca Tribal Business Committee, held on the 21 day of April, 2017, at which a quorum was present, the above resolution was presented and approved, by a vote of 7 For, 0 Against, 0 Absent, 0 Abstain.

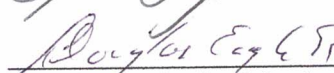
  
Earl S. Howe III, Chairman

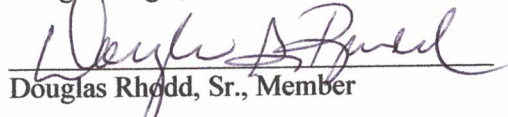
  
Paula S. Mendoza, Secretary/Treasurer

  
Kinsel Lieb, Member

  
Kathryn Horinek, Member

  
Bennett Arkeketa, Vice-Chairman

  
Douglas Eagle, Sr., Member

  
Douglas Rhodd, Sr., Member