

**UNDER THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES
BETWEEN STATES AND NATIONALS OF OTHER STATES AND THE
INSTITUTION RULES AND ARBITRATION RULES OF THE INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES
AND
CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT**

**TransCanada Corporation &
TransCanada PipeLines Limited**

Claimants,

v.

**The Government of the
United States of America**

Respondent.

REQUEST FOR ARBITRATION

June 24, 2016

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REQUEST FOR ARBITRATION

I. INTRODUCTION

1. Pursuant to Articles 1116(1), 1117(1), and 1120(1)(a) of the North American Free Trade Agreement (“NAFTA”),¹ and Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”), TransCanada Corporation and TransCanada PipeLines Limited (collectively “Claimants”) hereby submit their Request for Arbitration (“Request”) under the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (“ICSID Institution Rules”) and the Rules of Procedure for Arbitration Proceedings (“ICSID Arbitration Rules”) of the International Centre for Settlement of Investment Disputes (“ICSID” or “the Centre”). Claimants’ claims against the Government of the United States of America (“United States” or “Respondent”)² arise out of the November 6, 2015 denial of the application by TransCanada Keystone Pipeline, L.P. (“Keystone”) for a Presidential Permit to construct the Keystone XL Pipeline, and Respondent’s actions leading to that denial. Respondent’s actions breached U.S. obligations under Articles 1102 (National Treatment), 1103 (Most-Favored-Nation Treatment), 1105 (Minimum Standard of Treatment) and 1110 (Expropriation and Compensation) of the NAFTA.

2. On January 6, 2016, Claimants filed a Notice of Intent to submit a claim to arbitration under Chapter 11 of the NAFTA.³ Pursuant to Article 1118 of the NAFTA, on February 8, 2016, Claimants requested negotiations with Respondent to reach an amicable settlement of the dispute.⁴ The parties held consultations in Washington, DC on April 26, 2016, and continued those consultations through subsequent written and oral communications. Unfortunately, the parties were

¹ See North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, December 17, 1992 (“NAFTA”), Chapter 11 (Exhibit C-001). The NAFTA entered into force on January 1, 1994. See Excerpts of United States Department of State, Treaties in Force, A List of Treaties and Other International Agreements of the United States in Force on January 1, 2013, p. 490 (Exhibit C-099); Global Affairs Canada, Treaty Law Division, Treaty List Entry for NAFTA, last modified March 3, 2014, <http://www.treaty-accord.gc.ca/search-recherche.aspx?type=10&page=TLA&lang=eng> (search “1994/2”) (last visited June 20, 2016) (Exhibit C-100).

² Claimants and Respondent are hereinafter collectively referred to as “the parties.”

³ See TransCanada Corporation and TransCanada PipeLines Limited, Notice of Intent to Submit a Claim to Arbitration, January 6, 2016 (Exhibit C-098).

⁴ See Letter from Kristine L. Delkus, TransCanada, to Amos Hochstein, Special Envoy and Coordinator for International Energy Affairs, U.S. Department of State, February 8, 2016 (Exhibit C-002).

unable to settle the dispute. Pursuant to NAFTA Articles 1119 and 1120(1), respectively, Claimants submit this Request more than 90 days after delivery of their Notice of Intent and more than six months after the events giving rise to their claims.

II. PARTIES TO THE ARBITRATION

3. Claimants in this matter are two Canadian enterprises: (i) TransCanada Corporation; and (ii) TransCanada PipeLines Limited. The contact information for both Claimants is the same, and appears below:

450 1st Street, SW
Calgary, Alberta, Canada T2P5H1
Tel: 403-920-7680
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E-mail: brenda_hounsell@transcanada.com

4. Proof of Claimants' Canadian nationality is included with this Request.⁵

5. Pursuant to NAFTA Article 1116(1), Claimants are submitting claims on their own behalf, and, pursuant to NAFTA Article 1117(1), on behalf of the following U.S. enterprises that they own and/or control: (i) TransCanada PipeLine USA Ltd.; (ii) TC Oil Pipeline Holdings Inc.; (iii) TC Oil Pipeline Operations Inc.; (iv) TransCanada Oil Pipelines Inc.; (v) Marketlink, LLC; (vi) TC Terminals LLC; (vii) TransCanada Keystone Pipeline, LLC; (viii) TransCanada Keystone Pipeline GP, LLC; and (ix) TransCanada Keystone Pipeline, LP. (These enterprises are hereinafter collectively referred to as "Claimants' U.S. enterprises"). The contact information for each of Claimants' U.S. enterprises is the same, and appears below:

700 Louisiana Street, Suite 700
Houston, Texas, USA 77002-2700
Tel: 832-320-5864
Fax: 832-320-6864
E-mail: charlotte_smith@transcanada.com

6. Proof of the U.S. nationality of each of Claimants' U.S. enterprises,⁶ as well as Claimants' ownership of each of these enterprises,⁷ is included with this Request.

⁵ See TransCanada Corporation's Canadian Certificate of Compliance, August 7, 2015 (Exhibit C-003); TransCanada PipeLines Limited's Canadian Certificate of Compliance, August 7, 2015 (Exhibit C-004).

7. Claimants are represented in these proceedings by Sidley Austin LLP. All correspondence and notices to Claimants should be addressed to counsel for Claimants at the following addresses:

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8. Respondent is the Government of the United States of America. Claimants understand that Respondent's address, for the purposes of these proceedings, is as follows:

Executive Director (L/EX)
Office of the Legal Adviser
Department of State
Washington, DC, USA 20520

⁶ See TransCanada PipeLine USA Ltd. – Certificate of Incorporation, October 24, 1979 (Exhibit C-005); TC Oil Pipeline Holdings Inc. – Certificate of Incorporation, December 12, 2007 (Exhibit C-006); TC Oil Pipeline Operations Inc. – Certificate of Incorporation, December 12, 2007 (Exhibit C-007); TransCanada Oil Pipelines Inc. – Certificate of Incorporation, November 18, 2005 (Exhibit C-008); Marketlink, LLC – Certificate of Formation and Certificate of Amendment, September 2, 2010 and April 5, 2013 (Exhibit C-009); TC Terminals LLC – Certificate of Formation, February 28, 2012 (Exhibit C-010); TransCanada Keystone Pipeline, LLC – Certificate of Formation, November 18, 2005 (Exhibit C-011); TransCanada Keystone Pipeline GP, LLC – Certificate of Formation, May 30, 2006 (Exhibit C-012); TransCanada Keystone Pipeline, LP – Certificate of Limited Partnership, June 2, 2006 (Exhibit C-013).

⁷ See TransCanada PipeLine USA Ltd. – Share certificates issued to TransCanada PipeLines Limited (Exhibit C-014); TC Oil Pipeline Holdings Inc. – Share certificate issued to TransCanada Pipeline USA Ltd., December 12, 2007 (Exhibit C-015); TC Oil Pipeline Operations Inc. – Share certificate issued to TC Oil Pipeline Holdings Inc., December 12, 2007 (Exhibit C-016); TransCanada Oil Pipelines Inc. – Share certificates issued to TransCanada Pipeline USA Ltd., various dates (Exhibit C-017); Marketlink, LLC – Excerpt of Limited Liability Company Agreement, September 2, 2010 (Exhibit C-018); TC Terminals LLC – Excerpt of Limited Liability Company Agreement, February 29, 2012 (Exhibit C-019); TransCanada Keystone Pipeline, LLC – Excerpt of Limited Liability Company Agreement, November 21, 2005 (Exhibit C-020); TransCanada Keystone Pipeline GP, LLC – Texas Franchise Tax Public Information Report, April 15, 2014 (Exhibit C-021); TransCanada Keystone Pipeline, LP – Excerpt of Third Amended and Restated Limited Partnership Agreement, January 1, 2010 (Exhibit C-022) (BCI); Organizational Chart of TransCanada Corporation and TransCanada PipeLines Limited, Keystone Pipeline – USA Corporate Structure, December 2, 2015 (Exhibit C-023) (BCI).

III. FACTUAL BACKGROUND

A. AT THE TIME KEYSTONE SUBMITTED ITS APPLICATIONS FOR A PRESIDENTIAL PERMIT, U.S. POLICY WAS TO EXPEDITE APPROVAL OF ENERGY TRANSMISSION PROJECTS

9. Executive Order 11423 (“EO 11423”),⁸ as amended, and Executive Order 13337 (“EO 13337”),⁹ provide that a person or entity must obtain a Presidential Permit before it may construct and operate certain energy facilities that cross a U.S. international boundary. The President delegated authority to the U.S. Department of State (“State Department”) to review and grant applications for a Presidential Permit to construct cross-border oil pipelines.

10. On September 19, 2008, Keystone submitted an application to the State Department for a Presidential Permit to construct the Keystone XL Pipeline, an oil pipeline that would cross the boundary between Canada and the United States.¹⁰ After almost three and a half years passed without a decision from the State Department, the U.S. Congress enacted legislation to force the agency to act on the application within 60 days. On January 18, 2012, the State Department denied the application without prejudice, claiming it needed still more time beyond the 60-day deadline to review the merits. As was made clear at the time, Keystone was free to submit a new application, which it did on May 4, 2012. The State Department denied that application over three and a half years later, on November 6, 2015.

11. At the time Keystone submitted its applications, the express policy of the United States was to expedite the development of energy production and transmission projects, including oil pipelines. That remains the official policy of the United States even today, despite the denials of Keystone’s applications. The policy is summarized in Executive Order 13212 (“EO 13212”), which is entitled, “Actions to Expedite Energy-Related Projects.” According to EO 13212, “In general, it is the policy of this Administration that executive departments and agencies (agencies) shall take appropriate actions, to the extent consistent with applicable law, to expedite projects that

⁸ See Executive Order 11423, 33 Fed. Reg. 11741, August 16, 1968 (Exhibit C-024).

⁹ See Executive Order 13337, 69 Fed. Reg. 25299, April 30, 2004 (“EO 13337”) (Exhibit C-025).

¹⁰ See Application of TransCanada Keystone Pipeline, L.P. for a Presidential Permit Authorizing the Construction, Operation, and Maintenance of Pipeline Facilities for the Importation of Crude Oil to be Located at the United States-Canada Border, September 19, 2008 (“2008 Keystone XL Presidential Permit Application”) (Exhibit C-026).

will increase the production, transmission, or conservation of energy.”¹¹ EO 13212 further states, “For energy-related projects, agencies shall expedite their review of permits or take other actions as necessary to accelerate the completion of such projects, while maintaining safety, public health, and environmental protections. The agencies shall take such actions to the extent permitted by law and regulation, and where appropriate.”¹² According to its preamble, EO 13337 is designed in part “to further the policy” set forth in EO 13212 “to 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 for land transportation...while maintaining safety, public health, and environmental protections....”¹³

12. In the course of reviewing an application for a Presidential Permit to construct and operate a cross-border oil pipeline, the State Department assesses the environmental impact of the proposed pipeline. If the State Department determines that the pipeline is in the U.S. national interest, the State Department will issue the permit. According to the State Department’s Public Notice 6590, “Within the context of appropriate border security, safety, health, and environmental requirements, it is in the U.S. national interest to facilitate the efficient movement of legitimate goods and travelers across U.S. borders.”¹⁴ The review process culminates with the issuance of a Record of Decision (“ROD”) and National Interest Determination (“NID”), which set forth the State Department’s reasons for its decision, and the issuance or denial of the permit, respectively.

13. To Claimants’ knowledge, Respondent never denied an application for a Presidential Permit for a cross-border oil pipeline until it denied Keystone’s applications for the Keystone XL Pipeline. The State Department’s previous practice had been to assess applications based on a set of essentially standard and largely technical criteria, and to address any environmental concerns with proposed pipelines through, for example, the imposition of specific construction and environmental mitigation measures or enhancements to the design of the pipeline. As the Congressional Research

¹¹ Executive Order 13212, 66 Fed. Reg. 28357, May 22, 2001 (“EO 13212”), Section 1 (Exhibit C-027).

¹² EO 13212 at Section 2 (Exhibit C-027).

¹³ EO 13337 at Preamble (Exhibit C-025).

¹⁴ U.S. Department of State, Public Notice 6590, “Inclusion of U.S. Expiration Dates in Presidential Permits for International Border Crossings,” April 24, 2009 (Exhibit C-028).

Service has explained, “[T]he permitting process is generally used to determine *how* a project must be implemented to comply with federal law (and meet the national...interest standard) rather than *whether* it can be implemented.”¹⁵

14. Time is of the essence in constructing a pipeline after a Presidential Permit has been granted. As the State Department explained in Public Notice 6590, “It is not in the U.S. national interest to commit scarce government resources...as well as private resources (e.g., land, capital, etc.) for border crossing projects that cannot successfully be implemented within a reasonable time period.”¹⁶ For that reason, a Presidential Permit will expire if the permittee has not begun construction of the pipeline within five years after the permit has been granted.

15. Claimants and Keystone legitimately expected that the State Department would process Keystone’s application for a Presidential Permit for the Keystone XL Pipeline within these general parameters. For political reasons, however, the State Department refused to expedite the processing of Keystone’s applications, and ultimately took over seven years to make a decision. Furthermore, the final national interest determination, which formed the basis for denying the application, was not consistent with the objective of (in the words of Public Notice 6590) “facilitat[ing] the efficient movement of legitimate goods and travelers across U.S. borders.” Nor was the national interest determination based on any finding that the project failed to comply with “border security, safety, health, and environmental requirements.” As discussed in further detail below, the denial was based on an arbitrary political calculation.

B. POLITICIZATION OF THE APPROVAL PROCESS FOR THE KEYSTONE XL PIPELINE

16. Over the course of the more than seven year period between the time when Keystone submitted its first application and the eventual denial of Keystone’s second application, the Keystone XL Pipeline became the focus of intense political controversy. Respondent ultimately denied Keystone’s application, not because of any concerns over the merits of the pipeline, but because President Obama wanted to prove his Administration’s environmental credentials to a

¹⁵ Congressional Research Service, Presidential Permit Review for Cross-Border Pipelines and Electric Transmission, Report No. R44140, August 6, 2015, p. 3 (emphasis in original) (Exhibit C-029).

¹⁶ U.S. Department of State, Public Notice 6590, “Inclusion of Expiration Dates in Presidential Permits for International Border Crossings,” April 24, 2009 (Exhibit C-028).

vocal activist constituency that asserted that the pipeline would lead to increased production and consumption of crude oil and, therefore, significantly increased greenhouse gas (“GHG”) emissions. Respondent knew those assertions were false. In fact, the State Department had issued **five** Environmental Impact Statements between 2008 and 2015, all of which concluded that the Keystone XL Pipeline would *not* result in a significant increase in GHG emissions. The State Department reiterated that conclusion for a **sixth** time when it denied Keystone’s second application in November 2015.

17. The Keystone XL project was not controversial when Keystone submitted its first application in 2008. Indeed, several other pipelines were already in operation or being constructed in the United States at the time to deliver Canadian oil to U.S. refineries. The project became highly politicized, however, after a series of high profile accidents in the oil and gas sector (none of which involved TransCanada), and as environmental activists grew frustrated with the perceived failure of the Administration to take meaningful steps to reduce U.S. GHG emissions.¹⁷ Concocting an argument that denying the proposed pipeline would halt or slow development of the Canadian oil sands, environmental organizations seized on the Keystone XL Pipeline as a rallying point to energize the activist community. According to John Podesta, a former top advisor to President Obama, “People were beginning to doubt the President’s commitment. [The Keystone XL Pipeline] became the test of the question: Are we going to do anything long term about climate change?, as he had promised in the 2008 election.”¹⁸ As one environmental leader explained, “The goal [of the anti-Keystone XL campaign] is as much about organizing young people around a thing. But you have to have a thing. You can’t organize people around a tipping point on climate change.”¹⁹ One of the leading activist organizations opposed to the pipeline—a group called 350.org—has identified a key element of its advocacy strategy as “fight[ing] iconic battles against

¹⁷ See Ryan Lizza, “The President and the Pipeline,” *The New Yorker*, September 16, 2013 (“Lizza, ‘The President and the Pipeline’”) (“According to [environmental leader and major donor Tom] Steyer, the opposition to Keystone [XL] emerged from the President’s failed efforts to tackle climate change early in his Administration....As President, he didn’t confront the fossil-fuel industry in the way that many environmentalists and some advisers had hoped”) (Exhibit C-030).

¹⁸ Lizza, “The President and the Pipeline” (quoting John Podesta, former Counselor to President Obama) (Exhibit C-030).

¹⁹ Lizza, “The President and the Pipeline” (quoting Kate Gordon, think tank official and climate activist) (Exhibit C-030).

fossil fuel infrastructure.”²⁰ That is exactly what they did with respect to the Keystone XL Pipeline. Keystone XL was no longer just part of the network of hundreds of thousands of miles of other oil pipelines crisscrossing the United States, but a symbol of the entire oil industry.²¹ By September 2011, the Keystone XL Pipeline had become a “flashpoint” for environmentalists fixated on the (incorrect) notion that the pipeline would result in higher GHG emissions.²² The proposed pipeline also became a contentious, partisan campaign issue during the 2012 and 2014 elections.

18. As the Administration continued to dither and make excuses for delaying a decision on the application, the politicization of the review process accelerated. As White House Press Secretary Josh Earnest stated on November 3, 2015, just days before the formal denial:

We’ve talked about how aggressively advocates on both sides of this issue have politicized this particular infrastructure project. I would venture to say that there’s probably *no infrastructure project in the history of the United States that’s been as politicized as this one*....And [in] my experience when things that are worthy of technical consideration get politicized, that rarely speeds up the technical consideration. That typically has the effect of slowing it down.²³

19. To this day, no other pipeline project has received the type of treatment Respondent accorded to the Keystone XL Pipeline project. For example, in 2008, the same year Keystone submitted its first application for the Keystone XL Pipeline, the State Department issued a Presidential Permit for the Keystone I Pipeline, after concluding that the pipeline was in the U.S. national interest. In 2009, one year after Keystone submitted its application for the Keystone XL Pipeline, the Obama Administration issued a Presidential Permit for the construction of the Alberta

²⁰ 350.org, How We Work, <http://350.org/how/> (archived December 8, 2015) (Exhibit C-031).

²¹ As one journalist explained, “For many activists, the opposition to Keystone [XL] isn’t really about the pipeline; they admit that no single project will tip the balance on climate change. Rather, they want Obama to use Keystone as a *symbolic opportunity* to move America away from fossil fuels.” Lizza, “The President and the Pipeline” (emphasis added) (Exhibit C-030).

²² See Matthew Daley, “Steven Chu Talks Keystone XL Pipeline, Suggest U.S. Support,” *Associated Press*, September 1, 2011 (Exhibit C-032).

²³ Press Briefing by Press Secretary Josh Earnest, November 3, 2015 (emphasis added), available at <https://www.whitehouse.gov/the-press-office/2015/11/03/press-briefing-press-secretary-josh-earnest-1132015> (Exhibit C-033).

Clipper pipeline, again after concluding that the pipeline was in the U.S. national interest. These Presidential Permit applications were granted in 27 months or less. The Keystone I and Alberta Clipper pipelines originate in the same location (*i.e.*, the oil sands in Alberta, Canada) and carry the same product (*i.e.*, Western Canadian Sedimentary Basin (“WCSB”) crude oil) as the proposed Keystone XL Pipeline. Other pipelines also carry the same product to the United States. For example, Spectra Energy’s Express Pipeline transports oil from the Alberta oil sands into the United States.²⁴

20. In November 2013, five years after Keystone submitted its first application, and over a year and a half after Keystone’s second application, the State Department granted a Presidential Permit to Houston, Texas-based Kinder Morgan for the Cochin Pipeline.²⁵ The Permit was necessitated by a change in the ownership of an existing pipeline; however, Kinder Morgan explained in its application that it intended to reverse the direction of the pipeline to carry light condensates from Illinois to Alberta.²⁶ Condensate is a low-density, low-viscosity oil that is combined with thick oil-sands bitumen and enables the oil-sands crude to flow through pipelines. In other words, the purpose of the reversal was to facilitate the transportation of oil extracted from Canada’s oil sands. The State Department nevertheless properly determined in that case that there was no need even to conduct an environmental review of the reversal, or change the terms of the permit.

21. On September 22, 2015, Tony Clark, a sitting Commissioner on the U.S. Federal Energy Regulatory Commission, provided the following explanation of how the Administration had mishandled the process for reviewing Keystone’s application for the Keystone XL Pipeline:

[The Keystone XL Pipeline] has clearly been held up over political reasons, not because it is any different than any of those other pipelines....In an administrative practices act, that’s not how you want a functional government to operate. You want a much more clear process by which any pipeline developer or intervenors who are

²⁴ See Spectra Energy, Application for a New Presidential Permit to Express Pipeline LLC, May 16, 2013, *available at* <http://www.state.gov/documents/organization/210856.pdf> (stating that the original Presidential Permit application was filed on May 10, 1996 and granted on August 30, 1996) (Exhibit C-034).

²⁵ See Department of State, Presidential Permit for Kinder Morgan Cochin, LLC, 78 Fed. Reg. 73582, December 6, 2013 (Exhibit C-035).

²⁶ See Kinder Morgan Cochin LLC, Application for a New Presidential Permit, November 14, 2012, pp. 3-5, *available at* <http://www.state.gov/documents/organization/201743.pdf> (Exhibit C-036).

opposed to it know the process by which that takes place—to have one sort of plucked out and held up for fairly arbitrary and capricious reasons primarily related to politics is not a good system of regulation.²⁷

22. When the State Department denied Keystone’s application in November 2015, it very clearly explained the basis for its decision. The Administration felt it needed to do something to burnish its environmental credentials, even if that action conflicted with the State Department’s factual conclusions and was purely symbolic, and even if it deprived Claimants of the multi-billion-dollar value of their investments in the United States.

C. THE STATE DEPARTMENT’S SEVEN-YEAR REVIEW OF KEYSTONE’S PRESIDENTIAL PERMIT APPLICATIONS FOR THE KEYSTONE XL PIPELINE

1. The Keystone XL Pipeline Project

23. The proposed Keystone XL Pipeline described in Keystone’s 2008 Presidential Permit application would have transported up to approximately 900,000 barrels per day (“bpd”) of WCSB crude oil from an oil supply hub near Hardisty, Alberta to delivery points in Oklahoma and Texas. As shown in the map below,²⁸ the pipeline was to consist of three segments in the United States: (1) the “Steele City Segment,” which would run from the Canadian border near Morgan, Montana to Steele City, Nebraska, where it would connect with the “Cushing Extension,” which runs from Steele City to Cushing, Oklahoma; (2) the “Gulf Coast Segment,” which would run from Cushing to Nederland, Texas; and (3) the “Houston Lateral,” which would run from the Gulf Coast Segment in Liberty County, Texas to Moore Junction, near Houston, Texas.

²⁷ “Should Politics be Kept Out of Pipeline Decisions,” *Wall Street Journal* Interview with Tony Clark, September 22, 2015, available at <http://www.wsj.com/video/should-politics-be-kept-out-of-pipeline-decisions/edcaf9d2-0781-4f57-bc4d-57424f8dcbd4.html> (video at 0:38) (Exhibit C-037).

²⁸ See United States Department of State, Final Environmental Impact Statement for the Proposed Keystone XL Project, August 26, 2011 (“FEIS”), p. ES-4 (Exhibit C-038).



24. At the time Keystone submitted its first application, Claimants and Keystone consulted extensively with the State Department regarding their investment plans and the commercial viability of the project. Indeed, as part of the application process, Keystone was required to prove the utility of the project by securing contractual commitments from shippers to utilize the pipeline, and, at the time of its first application, Keystone had secured binding shipper contracts totaling 300,000 bpd.²⁹ Keystone also indicated that it expected to “begin construction of the Gulf Coast

²⁹ See 2008 Keystone XL Presidential Permit Application at p. 9 (Exhibit C-026).

Segment in 2010 and the Steele City Segment and Houston Lateral the following year,” *i.e.*, in 2011.³⁰

25. In November 2008, Keystone submitted a draft Request for Proposal (“RFP”) to the State Department to retain a third-party contractor to prepare an Environmental Impact Statement (“EIS”) on the State Department’s behalf. Although the contractor worked at the direction of the State Department, Keystone was required to pay for this contractor—an amount that eventually ran to approximately US \$25 million. In the draft RFP, Keystone included an illustrative schedule of milestones, which listed May 8, 2010 as the target date for the ROD. Claimants’ and Keystone’s expectations that the State Department would issue the Presidential Permit within approximately two years after Keystone filed its 2008 application were reasonable, based on their own previous experiences with the Presidential Permit process. Earlier that year, the State Department had issued a Presidential Permit for the Keystone I pipeline just 23 months after Keystone filed its application.³¹ These expectations were also reasonable based on their consultations with the State Department. While the State Department suggested modifications to many of the intermediate milestone dates listed in Keystone’s draft RFP, it did not object to the May 8, 2010 target date for an ROD. These expectations were also consistent with the schedule for the State Department’s then-ongoing review of Enbridge Energy LLP’s application for the Alberta Clipper pipeline, which ultimately resulted in the Obama Administration issuing a Presidential Permit in 2009, within 27 months of the application.³²

26. In April 2010, the State Department issued its first Draft Environmental Impact Statement (“DEIS”), which—in accordance with the State Department’s recent practice—examined a wide array of issues, including, for example, the impact of the pipeline on water resources, wetlands, wildlife, air quality, and cultural resources. The State Department also examined the issue of GHG

³⁰ TransCanada Keystone XL Project Environmental Report, November 2008, p. 2-42 (Exhibit C-039). In its July 6, 2009 Supplemental Filing, Keystone modified its planned construction timetable with construction of the Gulf Coast Segment expected to begin in 2010, the Steele City Segment in 2011 and the Houston Lateral in 2012, with the Gulf Coast Segment entering service in 2011 and the Steele City Segment and Houston Lateral entering service in 2012. *See* TransCanada Keystone XL Supplemental Filing, July 6, 2009, pp. 2-46 to -47 (Exhibit C-040).

³¹ *See* U.S. Department of State, Media Note, Keystone Pipeline Presidential Permit, March 14, 2008, *available at* <http://2001-2009.state.gov/r/pa/prs/ps/2008/mar/102254.htm> (Exhibit C-042).

³² *See* U.S. Department of State, Media Note, Permit for Alberta Clipper Pipeline Issued, August 20, 2009, *available at* <http://www.state.gov/r/pa/prs/ps/2009/aug/128164.htm> (Exhibit C-043).

emissions and concluded that “the proposed Keystone XL Project would result in limited adverse environmental impacts during both construction and operation”³³ and that “the incremental impact of the Project on GHG emissions would be minor” because “the crude oil delivered by the Project would be replacing similar crude oils from other sources....”³⁴

27. In the DEIS, the State Department also examined the routing of the pipeline through Nebraska. The State Department would later blame controversy over the routing through Nebraska as a reason to delay a decision on the application, but in the DEIS, the State Department concluded that environmental concerns related to the routing of the pipeline through Nebraska (including through the sensitive Sand Hills region) could be addressed without significant changes to the route through the application of “[s]pecial construction techniques and environmental protection measures” and “[m]inor re-routes...to locate the right of way in areas of increased soil moisture (decreased erosion potential), while avoiding wetlands wherever possible,” among other mitigation measures.³⁵ Nebraska did not regulate the routing of pipelines through the state, so only the Federal Government reviewed the matter at the time Keystone submitted its first application.

28. The two key findings in the DEIS—that the Keystone XL Pipeline would not have a significant impact on GHG emissions and that the pipeline would not have an adverse environmental impact on Nebraska—did not fit the political narrative that certain environmental activists and members of Congress wanted to pursue. Despite the State Department’s findings, they demanded that the Administration deny the permit on the (false) ground that the pipeline would promote extraction of crude oil from Canada’s oil sands, and therefore result in greater GHG emissions.³⁶

³³ United States Department of State, Draft Environmental Impact Statement for the Keystone XL Oil Pipeline Project, April 16, 2010 (“DEIS”), p. ES-22 (Exhibit C-044).

³⁴ DEIS at p. ES-21(Exhibit C-044).

³⁵ DEIS at pp. 2-27, 3.2-10 (Exhibit C-044).

³⁶ For example, in a July 2, 2010 letter to the State Department, Congressman Henry Waxman (D-Calif.), the Chairman of the House Energy Committee, expressed concern that the Keystone XL Pipeline “would have a major adverse impact on the carbon intensity of U.S. transportation fuel.” Letter from Representative Henry Waxman to Secretary of State Hillary Clinton, July 2, 2010, *available at* <http://www.circleofblue.org/waternews/wp-content/uploads/2010/08/State.070210.Clinton.Keystone.pdf> (Exhibit C-045).

29. Nevertheless, in October 2010, then-Secretary of State Hillary Clinton publicly stated that the State Department was “inclined” to approve the permit.³⁷ A State Department spokesman subsequently confirmed Secretary Clinton’s statement, stating that “her words obviously stand.”³⁸ The State Department did not indicate at that time that political symbolism would play any role in its decision, or that it was focused on anything other than the merits of the project.

30. In response to intense political pressure, the State Department took the unprecedented step of deciding to prepare a *Supplemental* Draft EIS (“SDEIS”) after the DEIS and before the final EIS. In its March 15, 2011 announcement of a public comment period for the SDEIS, the State Department’s Office of the Spokesman stated that the State Department “expect[ed] to make a decision on whether to grant or deny the permit before the end of 2011.”³⁹ The State Department reiterated this intention in its April 15, 2011 announcement of the public release of the SDEIS.⁴⁰

31. In the SDEIS, the State Department concluded for the **second time** that the proposed pipeline would not significantly increase GHG emissions. As stated in the SDEIS, “[O]n a global scale, emissions are not likely to change [as a result of the pipeline].”⁴¹ In addition, the State Department once again reviewed the proposed route, and considered additional alternative routes, including routes developed to avoid, or minimize the distances through, the Sand Hills in Nebraska.⁴² The State Department again found that, as compared to the other technically and economically feasible alternative routes it considered, the proposed pipeline route through Nebraska best protected the environment.⁴³

³⁷ See Elana Schor, “Labor Uses Automated Calls to Tout Controversial Oil Pipeline,” *The New York Times*, October 21, 2010 (Exhibit C-046).

³⁸ Art Hovey, “Hillary Clinton’s comments did refer to Keystone XL Pipeline,” *Lincoln (Neb.) Journal Star*, October 21, 2010 (Exhibit C-047).

³⁹ U.S. Department of State, Media Note, State Department Announces Next Steps in Keystone XL Pipeline Permit Process, Office of the Spokesman, March 15, 2011, available at <http://www.state.gov/r/pa/prs/ps/2011/03/158402.htm> (Exhibit C-048).

⁴⁰ See U.S. Department of State, Media Note, State Department Releases Keystone XL Pipeline Supplemental Environmental Impact Statement, Office of the Spokesman, April 15, 2011, available at <http://www.state.gov/r/pa/prs/ps/2011/04/161015.htm> (Exhibit C-049).

⁴¹ United States Department of State, Supplemental Draft Environmental Impact Statement for the Keystone XL Project (“SDEIS”), p. 3-197 (Exhibit C-050).

⁴² See SDEIS at p. ES-2 (Exhibit C-050).

⁴³ See SDEIS at p. 4-59 (Exhibit C-050); see generally SDEIS at pp. 4-31 to 4-52 (Exhibit C-050).

32. As reflected in the SDEIS, all relevant parties—the State Department, Claimants, and Keystone—were continuing to work closely to move the project forward. As is typical in such review proceedings, the parties agreed to certain modifications to address environmental and other concerns. The SDEIS described 57 project-specific conditions, recommended by the U.S. Department of Transportation, Pipeline and Hazardous Material Safety Administration and developed with the State Department, for the design, construction, and operation of the Keystone XL Pipeline.

33. On June 6, 2011,⁴⁴ and again on July 22, 2011,⁴⁵ the State Department confirmed that it expected to make a decision on Keystone’s application that year.

34. On July 26, 2011, the U.S. House of Representatives passed H.R. 1938, a bill entitled, “North American-Made Energy Security Act,” which set a deadline of November 1, 2011 for the State Department to make a decision on Keystone’s application. The day before the bill passed the House of Representatives, the White House issued an official Statement of Administration Policy stating that the legislation was unnecessary because “the Department of State has been working diligently to complete the permit decision process for the Keystone XL Pipeline and has publicly committed to reaching a decision before December 31, 2011.”⁴⁶ The bill was placed on the Senate calendar but was not taken up for a vote.

35. At an August 4, 2011 press conference with Canadian Foreign Minister John Baird, Secretary of State Clinton again confirmed that the State Department expected to make a decision by the end of 2011.⁴⁷

⁴⁴ See U.S. Department of State, Media Note, State Department Announces Additional Public Meetings on Keystone XL Pipeline, June 6, 2011, available at <http://www.state.gov/r/pa/prs/ps/2011/06/165157.htm> (Exhibit C-051).

⁴⁵ See U.S. Department of State, Briefing on the Next Steps in Keystone XL Permitting Process, Daniel A. Clune, Principal Deputy Assistant Secretary, Bureau of Oceans and International Environmental and Scientific Affairs, July 22, 2011, p. 3, available at <http://www.state.gov/e/oes/rls/remarks/2011/168981.htm> (Exhibit C-052).

⁴⁶ Statement of Administration Policy, H.R. 1938 – North American-Made Energy Security Act, July 25, 2011, available at https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr1938r_20110725.pdf (Exhibit C-053).

⁴⁷ See U.S. Department of State, Remarks with Canadian Foreign Minister John Baird after their Meeting, Hillary Clinton, Secretary of State, August 4, 2011, p. 3, available at <http://www.state.gov/secretary/20092013clinton/rm/2011/08/169568.htm> (Exhibit C-054).

36. In August 2011, the State Department issued its Final EIS (“FEIS”), which concluded for a **third time** that the pipeline would not significantly increase GHG emissions. The State Department found 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.”⁴⁸

37. In the FEIS, the State Department also confirmed (also for the third time) that the proposed route through Nebraska was, from an environmental perspective, the best of the options it considered.⁴⁹ Nevertheless, days after the State Department issued the FEIS, Nebraska Governor Dave Heineman asked the State Department to deny Keystone’s application because of the specific route that was being proposed.⁵⁰ Then, on October 25, 2011—just two months before the State Department’s deadline to decide Keystone’s application—Governor Heineman decided to hold a special legislative session to enact legislation to regulate the siting of oil pipelines within Nebraska.⁵¹ As a result, over three years after Keystone submitted its first application, the state of Nebraska introduced an entirely new regulatory approval regime to address environmental concerns that the State Department had already reviewed three times and concluded were not problematic.

2. Delay and Denial of the First Presidential Permit Application

38. As late as November 2, 2011, the State Department’s spokesperson maintained that “the Department’s goal remains to complete the process before the end of the year so a decision can be made before the end of the year,” but included the caveat that “if thoroughness demands a little bit more time, nobody’s slammed the door on that.”⁵²

⁴⁸ FEIS at p. 3.14-53 (Exhibit C-038). In its fact sheet accompanying the FEIS, the State Department again confirmed that “[w]e are on track for the Department of State to make a determination by the end of this year” and provided a timetable showing the “Decision Issued” in December 2011. U.S. Department of State, Fact Sheet, Final Environmental Impact Statement, August 26, 2011, pp. 1-2, *available at* <http://www.state.gov/r/pa/prs/ps/2011/08/171084.htm> (Exhibit C-055).

⁴⁹ *See* FEIS at pp. ES-10 to -14 (Exhibit C-038).

⁵⁰ *See* Letter from Gov. Dave Heineman to President Barack Obama and Secretary Hillary Clinton, August 31, 2011, *available at* http://journalstar.com/heineman-s-letter-to-federal-officials/pdf_0d95f919-9b24-5668-8079-78d3873c233b.html (Exhibit C-056).

⁵¹ *See* State of Nebraska, Proclamation, October 25, 2011, *available at* <http://nebraskalegislature.gov/pdf/news/proclamation.pdf> (Exhibit C-057).

⁵² U.S. Department of State, Daily Press Briefing, Victoria Nuland, State Department Spokesperson, November 2, 2011, p. 10, *available at* <http://www.state.gov/r/pa/prs/dpb/2011/11/176589.htm> (Exhibit C-058).

39. On November 6, 2011, a demonstration took place outside the White House urging the President to deny the application.⁵³ Four days later, on November 10, 2011, the State Department announced that it would not make a decision on the Keystone XL Pipeline until it had further evaluated alternative routes through Nebraska.⁵⁴ Rather than delaying the decision by a few weeks or months, the State Department expected that this further review could extend until the first quarter of 2013.⁵⁵ As numerous reports pointed out at the time,⁵⁶ this would push the decision on Keystone's application beyond the November 2012 presidential election.

40. The State Department said that the delay was due to "national concern about the pipeline's route" through Nebraska.⁵⁷ The State Department explained that the delay was not due to any inadequacies in its environmental assessments but instead was related to its national interest determination. During a press briefing on November 10, 2011, Kerri-Ann Jones, Assistant Secretary, Bureau of Oceans and International Environmental and Scientific Affairs, stated that "we have come to this decision during the national interest period, which is different from the...environmental impact statement period."⁵⁸ According to the State Department, the *only* issue holding up the State Department's decision on the application was the routing through Nebraska. Assistant Secretary Jones stated that "the purpose of what the review that we're going to be doing is specifically to look at the alternative routes through Nebraska. It wouldn't be broader than

⁵³ See, e.g., "Thousands in D.C. Protest Pipeline," *CBS/AP*, November 6, 2011 (Exhibit C-059).

⁵⁴ See U.S. Department of State, Media Note, Keystone XL Pipeline Project Review Process: Decision to Seek Additional Information, November 10, 2011, available at <http://www.state.gov/r/pa/prs/ps/2011/11/176964.htm> (Exhibit C-060).

⁵⁵ See U.S. Department of State, Media Note, Keystone XL Pipeline Project Review Process: Decision to Seek Additional Information, November 10, 2011, available at <http://www.state.gov/r/pa/prs/ps/2011/11/176964.htm> (Exhibit C-060).

⁵⁶ See, e.g., John M. Broder & Dan Frosch, "U.S. Delays Decision on Pipeline Until After Election," *New York Times*, November 10, 2011 (Exhibit C-061); Dan Berman & Darren Goode, "Obama punts Keystone XL pipeline," *Politico*, November 10, 2011 (Exhibit C-062); Christi Parsons & Paul Richter, "Keystone XL pipeline decision delayed until after 2012 election," *Los Angeles Times*, November 11, 2011 (Exhibit C-063).

⁵⁷ U.S. Department of State, Media Note, Keystone XL Pipeline Project Review Process: Decision to Seek Additional Information, November 10, 2011, available at <http://www.state.gov/r/pa/prs/ps/2011/11/176964.htm> (Exhibit C-060).

⁵⁸ U.S. Department of State, Briefing on Alternative Routes for the Keystone XL Pipeline, Kerri-Ann Jones, Assistant Secretary, Bureau of Oceans and International Environmental and Scientific Affairs, November 10, 2011, p. 3, available at <http://www.state.gov/e/oes/rls/remarks/2011/176996.htm> (Exhibit C-064).

that.”⁵⁹ The reasonable inference from the State Department’s announcement was that, if the Nebraska routing issue could be resolved, the State Department would proceed to a final decision. That proved not to be the case.

41. In light of the State Department’s finding that its decision would be delayed for at least another year, Keystone announced on November 14, 2011 that it would re-route the pipeline around the Sand Hills region in Nebraska.⁶⁰ This agreement appeared to satisfy the concerns of Nebraska officials. According to Nebraska Senator Mike Johanns, “The issues in Nebraska have been resolved.”⁶¹ Both Senator Johanns and Governor Heineman supported approval of Keystone’s Presidential Permit application, subject to Nebraska’s final approval of a new route through its territory.⁶² On November 22, 2011, Nebraska enacted legislation to require approval of oil pipeline routes by the state Public Service Commission or the governor.⁶³ Despite the State Department’s earlier pronouncement that the only issue holding up the permit was ensuring a satisfactory route through Nebraska—an issue that would now be resolved through state-level procedures—the State Department continued to refuse to act on Keystone’s application.

42. In December 2011, Congress attached to a larger piece of tax legislation a provision requiring the President to grant the Presidential Permit for the Keystone XL Pipeline within 60 days, unless the President determined that the pipeline was not in the national interest;⁶⁴ however, the legislation also provided that the permit would require reconsideration of the routing of the

⁵⁹ U.S. Department of State, Briefing on Alternative Routes for the Keystone XL Pipeline, Kerri-Ann Jones, Assistant Secretary, Bureau of Oceans and International Environmental and Scientific Affairs, November 10, 2011, p.4, available at <http://www.state.gov/e/oes/rls/remarks/2011/176996.htm> (Exhibit C-064).

⁶⁰ See Associated Press, “TransCanada agrees to reroute Keystone XL pipeline,” *The Guardian*, November 14, 2011 (Exhibit C-065).

⁶¹ Roberta Rampton, “Republicans make pipeline jobs issue for Obama,” *Reuters*, November 30, 2011 (Exhibit C-066).

⁶² See Press Release, Johanns Supports Keystone XL Bill, November 30, 2011, available at http://web.archive.org/web/20120915155324/http://www.johanns.senate.gov/public/?p=PressReleases&ContentRecord_id=bfec1978-67b8-44ad-a59d-842a0b9eabf0&ContentType_id=bc82adff-27b4-4832-8fd6-aecbe3e7d8e3 (archived September 15, 2012) (Exhibit C-067); Dean Pagani, “Heineman Keystone Solution,” *Governors Journal*, January 17, 2012 (quoting Gov. Heineman: “At a minimum, the president of the United States could do a conditional yes”), available at <http://web.archive.org/web/20120622095025/http://governorsjournal.com/2012/01/heineman-keystone-solution/> (archived June 22, 2012) (Exhibit C-068).

⁶³ See generally *Thompson v. Heineman*, 289 Neb. 798, 803-07 (2015) (Exhibit C-069).

⁶⁴ See Temporary Payroll Tax Cut Continuation Act of 2011, Pub. L. 112-78, December 23, 2011, Section 501 (Exhibit C-070).

pipeline through Nebraska, coordination between the Federal and state governments with respect to possible new routes, and Presidential approval of any new route. The legislation, therefore, fully addressed the State Department's expressed desire to review the Nebraska route—the lone issue that the Administration had identified as the reason for delaying its decision on Keystone's application. Nevertheless, the Administration denied the permit on January 18, 2012, on the ground that it needed more time to review the Nebraska route.⁶⁵ The President's statement issued on the same day stated that “the rushed and arbitrary deadline insisted on by Congressional Republicans prevented a full assessment of the pipeline's impact” and made it clear 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.”⁶⁶

43. The Report to Congress on the President's decision to deny the application stated that “the determination does not preclude any subsequent permit application or applications for similar projects.”⁶⁷ The President provided assurances that the State Department was well advanced in conducting a meaningful assessment of the merits of the application and that the State Department's final national interest determination would be based on that assessment. Nevertheless, the State Department took advantage of the situation to prolong the process even

⁶⁵ The President found that, “based upon [Secretary Kerry's] recommendation, including the State Department's view that 60 days is an insufficient period to obtain and assess the necessary information,...the Keystone XL Pipeline project, as presented and analyzed at this time, would not serve the national interest.” Presidential Memorandum – Implementing Provisions of the Temporary Payroll Tax Cut Continuation Act of 2011 Relating to the Keystone XL Pipeline Permit, January 18, 2012, *available at* <https://www.whitehouse.gov/the-press-office/2012/01/18/presidential-memorandum-implementing-provisions-temporary-payroll-tax-cu> (Exhibit C-071); *see also* Report to Congress Under the Temporary Payroll Tax Cut Continuation Act of 2011, Section 501(b)(2), Concerning the Presidential Permit Application of the Proposed Keystone XL Pipeline, January 18, 2012, p. 5 (“The Department determined on November 10, 2011, that it needed additional information about potential route alternatives that would avoid the Nebraska Sand Hills before it could make a determination as to whether issuing a permit for the proposed Keystone XL pipeline was in the national interest. Without such additional information about the potential impacts of those alternative routes, the Department lacks information about the precise environmental, socio-economic, cultural, and other impacts of a significant portion of the pipeline route in the United States. This lack of information does not allow for a meaningful comparison of the potential impacts of the Keystone XL pipeline to other crude oil transport options used in North America”), *available at* <http://www.state.gov/documents/organization/182453.pdf> (Exhibit C-072).

⁶⁶ Statement by the President on the Keystone XL Pipeline, January 18, 2012, *available at* <https://www.whitehouse.gov/the-press-office/2012/01/18/statement-president-keystone-xl-pipeline> (Exhibit C-073).

⁶⁷ Report to Congress Under the Temporary Payroll Tax Cut Continuation Act of 2011, Section 501(b)(2), Concerning the Presidential Permit Application of the Proposed Keystone XL Pipeline, January 18, 2012, p. 5, *available at* <http://www.state.gov/documents/organization/182453.pdf> (Exhibit C-072).

further by arguing that the review would have to start anew if Keystone filed a new application. Assistant Secretary Jones explained as follows:

[I]f TransCanada comes in with a new application, it will trigger a new review process, a completely new review process. We cannot state that anything would be expedited....It would just have to go through all of the requirements that are needed for this kind of application review. So I couldn't really speak to when such a review could be finished. However, I could mention that we do have guidelines that would allow us to use information that's out there. So there is information out there from the process we've been through, but we would also have to look at this as a completely new application, and that's how it would be treated.⁶⁸

44. The State Department had no explanation for why it could not expedite a review of a new application from Keystone by simply picking up where it left off, particularly given that it could take into account "information out there from the process we've been through." The State Department's decision ran directly contrary to the instruction in EO 13212 and EO 13337 to expedite reviews of permits. It was also inconsistent with the directive in a Presidential Memorandum entitled, "Speeding Infrastructure Development through More Efficient and Effective Permitting and Environmental Review," that "agencies must do everything in their control to *ensure that their processes for reviewing infrastructure proposals work efficiently* to protect our environment, provide for public participation and certainty of process, ensure safety, and support vital economic growth."⁶⁹

3. Delay and Denial of the Second Presidential Permit Application

45. Given the Administration's assurances that the first denial was procedural and not a decision on the merits, Keystone continued to invest in the Keystone XL Pipeline project. By letter dated February 27, 2012, Keystone notified the State Department of its intention to file a second application for a Presidential Permit for the Keystone XL Pipeline, and subsequently to supplement

⁶⁸ U.S. Department of State, Briefing on the Keystone XL Pipeline, Kerri-Ann Jones, Assistant Secretary, Bureau of Oceans and International Environmental and Scientific Affairs, January 18, 2012, transcript *available at* <http://www.state.gov/r/pa/prs/ps/2012/01/181492.htm> (Exhibit C-074).

⁶⁹ Presidential Memorandum – Speeding Infrastructure Development through More Efficient and Effective Permitting and Environmental Review, August 31, 2011(emphasis added), *available at* <https://www.whitehouse.gov/the-press-office/2011/08/31/presidential-memorandum-speeding-infrastructure-development-through-more> (Exhibit C-101).

that application with plans for an alternate route through Nebraska.⁷⁰ Keystone thereafter proceeded to construct two segments of the Keystone XL Pipeline—the Gulf Coast Segment and the Houston Lateral. Keystone did not require a Presidential Permit to construct these two segments, as neither of them crossed an international boundary. Keystone still needed a Presidential Permit to construct the northern segment of the pipeline (the Steele City Segment), however, because that segment ran from Steele City to the Canadian border.

46. At a press conference held at a pipe storage yard owned by TransCanada in Cushing, Oklahoma, President Obama praised Keystone’s plan to build the Gulf Coast Segment, stating as follows:

I’ve come to Cushing, an oil town...because producing more oil and gas here at home has been, and will continue to be, a critical part of an all-of-the-above energy strategy....

Now, under my administration, America is producing more oil today than at any time in the last eight years....that’s important to know. Over the last three years, I’ve directed my administration to open up millions of acres for gas and oil exploration across 23 different states. We’re opening up more than 75 percent of our potential oil resources offshore. We’ve quadrupled the number of operating rigs to a record high. We’ve added enough new oil and gas pipeline to encircle the Earth and then some.

So we are drilling all over the place—right now. That’s not the challenge. That’s not the problem. In fact, the problem in a place like Cushing is that we’re actually producing so much oil and gas in places like North Dakota and Colorado that we don’t have enough pipeline capacity to transport all of it to where it needs to go—both to refineries, and then, eventually, all across the country and around the world. There’s a bottleneck right here because we can’t get enough of the oil to our refineries fast enough. And if we could, then we would be able to increase our oil supplies at a time when they’re needed as much as possible.

Now, right now, a company called TransCanada has applied to build a new pipeline to speed more oil from Cushing to state-of-the-art refineries down on the Gulf Coast. And today, I’m directing my administration to cut through the red tape, break through the

⁷⁰ See Letter from Kristine L. Delkus, TransCanada, to Deputy Secretary of State William J. Burns, U.S. Department of State, February 27, 2012 (Exhibit C-075).

bureaucratic hurdles, and make this project a priority, to go ahead and get it done....

...So, yes, we're going to keep on drilling. Yes, we're going to keep on emphasizing production. Yes, we're going to make sure that we can get oil to where it's needed.⁷¹

47. Thus, in 2012, the Administration fully supported the transportation of oil through the Keystone XL Pipeline, at least oil produced in the United States, and demonstrated that it knew how to expedite administrative reviews. In fact, the same day President Obama held his press conference in Cushing, he also issued a Memorandum regarding the review of domestic (rather than international) pipeline infrastructure projects. Under the subject heading, "Expedited Review of Pipeline Projects from Cushing to Port Arthur and Other Domestic Pipeline Infrastructure Projects," the Memorandum stated that, "[i]n expediting reviews..., agencies shall, to the maximum extent practicable and consistent with applicable law, utilize and incorporate information from prior environmental reviews and studies conducted in connection with previous applications for similar or overlapping infrastructure projects so as to avoid duplicating effort."⁷² The approach outlined in the Memorandum for the review of domestic pipeline applications contrasted sharply with the State Department's decision in January 2012 that it could *not* expedite a review of the portion of the Keystone XL Pipeline that crossed the Canadian border, based on information that the State Department had previously received.

48. Keystone formally submitted its second application for a Presidential Permit for the Keystone XL Pipeline in May 2012.⁷³ Around the same time, Keystone also submitted its revised

⁷¹ Remarks by the President on American-Made Energy, Cushing Pipe Yard, Cushing, Oklahoma, March 22, 2012, available at <https://www.whitehouse.gov/the-press-office/2012/03/22/remarks-president-american-made-energy> (Exhibit C-076).

⁷² Presidential Memorandum – Expediting Review of Pipeline Projects from Cushing, Oklahoma, to Port Arthur, Texas, and Other Domestic Pipeline Infrastructure Projects, March 22, 2012, available at <https://www.whitehouse.gov/the-press-office/2012/03/22/presidential-memorandum-expediting-review-pipeline-projects-cushing-okla> (emphasis added) (Exhibit C-077).

⁷³ See Application of TransCanada Keystone Pipeline, L.P. for a Presidential Permit Authorizing the Construction, Connection, Operation, and Maintenance of Pipeline Facilities for the Importation of Crude Oil to Be Located at the United States-Canada Border, May 4, 2012 (Exhibit C-078).

route proposal to Nebraska’s Department of Environmental Quality. On January 22, 2013, after an extensive public review process, Governor Heineman approved the proposed re-route.⁷⁴

49. In March 2013, the State Department released a new Draft Supplemental EIS (“DSEIS”), which concluded, for the **fourth time**, that the pipeline would *not* worsen carbon pollution. The DSEIS concluded “there would be no substantive change in global GHG emissions” if the pipeline were constructed.⁷⁵

50. The Administration made clear that its decision on Keystone’s application had shifted primarily from the route in Nebraska to a determination of whether the pipeline would have a material impact on GHG emissions. In June 2013, President Obama stated that “[o]ur national interest will be served only if [the Keystone XL Pipeline] project does not significantly exacerbate the problem of carbon pollution.”⁷⁶ Of course, President Obama knew that the State Department had already concluded on four separate occasions that the Keystone XL Pipeline would have no significant impact on carbon pollution. The President’s announcement was clear, however, and Keystone understood that its Presidential Permit application would be decided on its merits—in particular, the *actual* GHG impact of the pipeline.

51. In January 2014, the State Department issued its Final Supplemental EIS (“SEIS”), which affirmed the conclusions from the DSEIS and concluded for the **fifth time** that the pipeline would not significantly worsen carbon pollution. Specifically, the SEIS concluded 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

⁷⁴ See Letter from Nebraska Governor Dave Heineman to President Barack Obama and Secretary Hillary Clinton, January 22, 2013, available at http://www.keystone-xl.com/wp-content/uploads/2012/11/Governor_Pipeline_Approval.pdf (Exhibit C-079).

⁷⁵ United States Department of State, Draft Supplemental Environmental Impact Statement for the Keystone XL Project, March 2013 (“DSEIS”), p. 4.15-107 (Exhibit C-080). The DSEIS also compared the new Nebraska route and the route approved in the 2011 FEIS, noting that each iteration of the route performed better on certain environmental metrics. The State Department did not, however, determine whether one route was preferable to the other. See DSEIS at p. 5.3-1 (Exhibit C-080).

⁷⁶ Remarks by the President on Climate Change, Georgetown University, Washington, D.C., June 25, 2013, available at <https://www.whitehouse.gov/the-press-office/2013/06/25/remarks-president-climate-change> (Exhibit C-081).

oil at refineries in the United States (based on expected oil prices, oil-sands supply costs, transport costs, and supply-demand scenarios).”⁷⁷

52. The issuance of the SEIS began a 90-day period of interagency consultation, as required by Executive Order 13337. Agencies were expected to provide their views by early May 2014.⁷⁸ The issuance of the SEIS also triggered a public comment period, beginning on February 5, 2014 and closing on March 7, 2014.⁷⁹ Then, on April 18, 2014 (the afternoon of Good Friday), the State Department announced that it was indefinitely suspending the deadline for submission of interagency views on the Keystone XL Pipeline application in light of ongoing litigation in Nebraska over the Governor’s authority to approve the pipeline route—litigation that had been well understood by the State Department for several months.⁸⁰

53. While the State Department continued to stall, Keystone’s application became ever more politicized and emerged as an important issue in the 2014 federal mid-term elections. The very first bill introduced in the U.S. Senate in January 2015, after the mid-term elections, was a measure to authorize the development of the Keystone XL Pipeline.⁸¹ President Obama vetoed the legislation the same day he received it, asserting that the legislation “conflicts with established executive branch procedures and cuts short thorough consideration of issues that could bear on our national interest—including our security, safety, and environment.”⁸²

⁷⁷ United States Department of State, Final Supplemental Environmental Impact Statement for the Keystone XL Project, January 2014 (“SEIS”), p. 4.14-5 (Exhibit C-082).

⁷⁸ See EO 13337 at Section 1(c) (Exhibit C-025); U.S. Department of State, Background Briefing on the Review of the Presidential Permit Application for the Proposed Keystone XL Pipeline Project by Senior State Department Officials, April 18, 2014, p. 3, available at <http://www.state.gov/r/pa/prs/ps/2014/04/224994.htm> (“April 2014 State Department Background Briefing”) (Exhibit C-083).

⁷⁹ See Department of State, Notice of 30 Day Public Comment Period Regarding the National Interest Determination for TransCanada Keystone Pipeline, L.P.’s Presidential Permit Application, 79 Fed. Reg. 6984, February 5, 2014 (Exhibit C-84).

⁸⁰ See U.S. Department of State, Media Note, Keystone XL Pipeline Project Review Process: Provision of More Time for Submission of Agency Views, April 18, 2014, available at <http://www.state.gov/r/pa/prs/ps/2014/04/224982.htm> (Exhibit C-085); April 2014 State Department Background Briefing (Exhibit C-083).

⁸¹ See Keystone XL Pipeline Act, S. 1 (114th Congress), January 6, 2015 (Exhibit C-086).

⁸² Veto Message to the Senate: S. 1, Keystone XL Pipeline Approval Act, February 24, 2015, available at <https://www.whitehouse.gov/the-press-office/2015/02/24/veto-message-senate-s-1-keystone-xl-pipeline-approval-act> (Exhibit C-087).

54. On January 9, 2015, the Nebraska Supreme Court resolved the pending litigation concerning the pipeline route, thereby allowing the law granting the Governor authority to approve the pipeline route to stand.⁸³ The State Department lifted its suspension of the review of Keystone's application, but still did not make a decision. Finally, on November 3, 2015, Secretary Kerry signed the ROD/NID, which concluded that the pipeline was not in the U.S. national interest. The White House and the State Department announced the denial of Keystone's permit application on November 6, 2015. The timing of the decision was designed for maximum political impact, coming as it did just weeks before the December 2015 climate negotiations in Paris.⁸⁴

55. FERC Commissioner Tony Clark summed up the process as follows: “[T]he idea of having linear infrastructure sit around as a matter of politics and not be decided for seven years...is not how the industries we deal with can move forward.... Exactly how you do not want infrastructure development to happen is how the Keystone XL permitting process went through at the State Department.”⁸⁵

D. THE STATE DEPARTMENT'S STATED REASONS FOR DENYING THE APPLICATION

56. Throughout the more than seven years that the State Department reviewed Keystone's application, the focus of the public debate, the Administration's statements, and the State Department's discussions with TransCanada had been on the merits of the proposed pipeline. While the specific inquiry had once been the environmental impact of the route in Nebraska, upon resolution of that particular issue, the concern shifted to the question of whether the pipeline would lead to increased GHG emissions. As stated in the ROD, “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.’”⁸⁶ Yet, at least since the State Department issued the DEIS in April 2010, the Administration had known that the pipeline would have no significant impact on

⁸³ See *Thompson v. Heineman*, 289 Neb. 798, 802 (2015) (Exhibit C-069).

⁸⁴ See Department of State Record of Decision and National Interest Determination, TransCanada Keystone Pipeline, L.P. Application for Presidential Permit, November 3, 2015 (“ROD”), p. 31 (stating that a decision to approve the pipeline “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”) (Exhibit C-088).

⁸⁵ “Clark: Independent Regulatory Model Attacked,” *Gas Daily*, November 11, 2015, p. 6 (Exhibit C-089).

⁸⁶ ROD at p. 31 (Exhibit C-088).

climate change. As noted, the State Department reached that same conclusion five times over seven years, but still continued to delay a decision on Keystone’s application. In the end, the merits did not matter, and the “net effects of the pipeline’s impact on our climate” played no role in the Administration’s decision.

57. During the November 6, 2015 press conference announcing the denial of the permit, President Obama admitted that politics had disrupted the review process, stating that, “for years, the Keystone Pipeline has occupied what I, frankly, consider an overinflated role in our political discourse.”⁸⁷ The State Department explained that President Obama was referring to the “over-inflated perception” regarding “the extent of material impact on emissions, among other things that this pipeline would entail.”⁸⁸

58. Secretary Kerry was even clearer that the pipeline would not have a significant impact on GHG emissions. According to his November 6, 2015 press statement, “[T]he proposed project by itself is unlikely to significantly impact the level of crude extraction or the continued demand for heavy crude oil at refineries in the United States.”⁸⁹ Thus, at the same time it issued the denial, the Administration stated for the **sixth time** that the Keystone XL Pipeline would not have a significant impact on climate change. In its November 6, 2015 Background Briefing, a State Department official explained:

We actually – in our analysis, we do not conclude that this project denial will impact, on its own, production in Alberta or in Canada. The production increases that are already scheduled to occur are likely to continue, and future decisions on investment in that area for production are like – are more – are going to be more reliant on global oil markets, global oil prices, and the condition of the individual companies and their ability to make those investments. Because – what we’ve said before: because there are alternative methods of transportation and an ability to get to the U.S. market and

⁸⁷ Statement by the President on the Keystone XL Pipeline, November 6, 2015, *available at* <https://www.whitehouse.gov/the-press-office/2015/11/06/statement-president-keystone-xl-pipeline> (Exhibit C-090).

⁸⁸ U.S. Department of State, Background Briefing on the Keystone XL Pipeline, Special Briefing, November 6, 2015, *available at* <http://www.state.gov/r/pa/prs/ps/2015/11/249266.htm> (Exhibit C-091).

⁸⁹ U.S. Department of State, Press Statement of Secretary of State John Kerry, Keystone XL Pipeline Determination, November 6, 2015, *available at* <http://www.state.gov/secretary/remarks/2015/11/249249.htm> (Exhibit C-092).

U.S. refineries, we don't believe that this project denial will affect production.⁹⁰

59. Similarly, the ROD, which provided the formal reasons for the State Department's conclusion that the Keystone XL Pipeline was not in the national interest, recognized that the January 2014 Supplemental EIS found that the Keystone XL Pipeline "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."⁹¹ The ROD went on to conclude that, "[u]nder most market conditions, alternative transportation infrastructure would allow growing oil sands production to reach markets irrespective of the proposed Project."⁹² The ROD even concluded that the Keystone XL Pipeline would be *less* GHG intensive than alternative means of transporting oil from Alberta to the Gulf Coast, and would reduce the risk of oil spills compared to rail transportation.⁹³

60. The State Department decided to deny the permit nonetheless. That decision was based not on the Keystone XL Pipeline's actual or anticipated impact on the environment, but on the desire to prove U.S. leadership credentials to environmental activists and foreign governments who supposedly believed, incorrectly, that the pipeline actually would result in greater GHG emissions. As the ROD explained, "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."⁹⁴ Secretary Kerry reiterated this sentiment in his November 6, 2015 press statement, where he stated that "[t]he reality is that this decision could not be made solely on the numbers – jobs that would be created, dirty fuel that would be

⁹⁰ U.S. Department of State, Background Briefing on the Keystone XL Pipeline, November 6, 2015, *available at* <http://www.state.gov/r/pa/prs/ps/2015/11/249266.htm> (Exhibit C-091).

⁹¹ ROD at p. 11 (Exhibit C-088).

⁹² ROD at p. 11 (Exhibit C-088).

⁹³ *See* ROD at p. 23 ("Annual GHG emissions (direct and indirect) attributed to the No Action transportation scenarios would be greater than for the proposed [Keystone XL Pipeline] 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 trucks 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.") (Exhibit C-088).

⁹⁴ ROD at p. 29 (emphasis added) (Exhibit C-088).

transported here, or carbon pollution that would ultimately be unleashed.”⁹⁵ In other words, the decision would *not* be made based on objective considerations of the anticipated benefits and costs of the proposed Keystone XL Pipeline; it would be made on a very different basis. While the President and the State Department raised various other points,⁹⁶ Secretary Kerry concluded that “[t]he critical factor in my determination was this: moving forward with this project would significantly undermine our ability to continue leading the world in combating climate change.”⁹⁷

⁹⁵ Press Statement of Secretary of State John Kerry, Keystone XL Pipeline Determination, November 6, 2015, available at <http://www.state.gov/secretary/remarks/2015/11/249249.htm> (Exhibit C-092).

⁹⁶ Secretary Kerry’s November 6, 2015 press statement summarized these other points as: (1) “The proposed project has a negligible impact on our energy security”; (2) “The proposed project would not lead to lower gas prices for American consumers”; (3) “The proposed project’s long-term contribution to our economy would be marginal”; (4) “The proposed project raises a range of concerns about the impact on local communities, water supplies, and cultural heritage sites”; and (5) “The proposed project would facilitate transportation into our country of a particularly dirty source of fuel.” Press Statement of Secretary of State John Kerry, Keystone XL Pipeline Determination, November 6, 2015, available at <http://www.state.gov/secretary/remarks/2015/11/249249.htm> (Exhibit C-092). However, the impact on gas prices would have been no different with the proposed Keystone XL Pipeline than with other pipelines that the State Department has approved. Similarly, the impact on communities, water, etc. would have been no different with the proposed Keystone XL Pipeline than with other pipelines, and, indeed, the ROD explains that Keystone agreed to mitigate those effects. See ROD at pp. 17-20 (Exhibit C-088). Point (3) in Secretary Kerry’s statement conflicts with the ROD, which concluded that spending on the Keystone XL Pipeline project would support approximately 42,100 jobs up to a two-year construction period (see ROD at p. 15 (Exhibit C-088)); the “proposed Project would also generate tax revenue for communities in the pipeline’s path” (ROD at p. 30 (Exhibit C-088)); “pipeline activity would contribute .02 percent to the national G.D.P. based on 2012 statistics” (ROD at p. 30 (Exhibit C-088)); and the “economic benefits [of the pipeline] are meaningful” (ROD at p. 30 (Exhibit C-088)). The relevance of point (5) is unclear given that that ROD concluded that “[t]he Supplemental EIS indicates that in most scenarios the proposed Project is unlikely to change significantly the pattern of U.S. crude oil consumption” (ROD at p. 24 (Exhibit C-088)); “[i]n 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” (ROD at pp. 24-25 (Exhibit C-088)); “[u]nder most market conditions, alternative transportation infrastructure would allow growing oil sands production to reach markets irrespective of the proposed Project” (ROD at p. 11 (Exhibit C-088)); and “[u]nder 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” (ROD at p. 12 (Exhibit C-088)).

⁹⁷ Press Statement of Secretary of State John Kerry, Keystone XL Pipeline Determination, November 6, 2015, available at <http://www.state.gov/secretary/remarks/2015/11/249249.htm> (Exhibit C-092). See also Background Briefing on the Keystone XL Pipeline, November 6, 2015, available at <http://www.state.gov/r/pa/prs/ps/2015/11/249266.htm> (“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. The decision to approve the proposed project would have been *viewed* internationally as inconsistent with the broader U.S. effort to transition to less polluting forms of energy; it would have undercut the credibility and influence of United States in urging other countries to put forward ambitious actions and implement efforts to combat climate change”; “it’s absolutely true that the *perception* of U.S. leadership on climate change, the *perception* of what this President and this Administration have been doing, and the resolve that they have been *showing* over the course of the last number of years has been enormously important to the U.S. posture internationally”) (emphases added) (Exhibit C-091).

President Obama concluded that, “[f]rankly, approving this project would have undercut that global leadership...and that’s the biggest risk we face.”⁹⁸

61. Concerns over “perceptions” and “understandings” of the international community, and the way the decision would be “viewed,” permeate the ROD, even though those perceptions and understandings are incorrect.⁹⁹ According to the ROD, “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.”¹⁰⁰ In his November 6, 2015 press statement, Secretary Kerry summed up the Administration’s position with the conclusion that

⁹⁸ Statement by the President on the Keystone XL Pipeline, November 6, 2015, *available at* <https://www.whitehouse.gov/the-press-office/2015/11/06/statement-president-keystone-xl-pipeline> (Exhibit C-090).

⁹⁹ See ROD at pp. 30-31 (“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”) (emphases added) (Exhibit C-088); ROD at pp. 26-27 (“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”) (emphasis added) (Exhibit C-088); ROD at p. 28 (“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.”) (emphases added) (Exhibit C-088); ROD at p. 28 (“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.”) (emphases added) (Exhibit C-088); ROD at p. 28 (“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”) (Exhibit C-088); ROD at pp. 28-29 (“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.”) (Exhibit C-088).

¹⁰⁰ ROD at p. 31 (Exhibit C-088).

“[t]he United States cannot ask other nations to make tough choices to address climate change if we are unwilling to make them ourselves. Denying the Keystone XL Pipeline is one of those tough choices....”¹⁰¹

62. This, then, was the basis of the Administration’s reasoning: Keystone’s application should be denied so that the United States could show leadership on climate change by (i) appeasing those who held a view on the environmental impact of the Keystone XL Pipeline that the Administration itself concluded on six different occasions was wholly unsubstantiated; and (ii) making a “tough choice” to deny Keystone a Presidential Permit for the Keystone XL Pipeline, even though denying the permit would, based on the Administration’s own analysis, have no beneficial impact on the environment. In short, the decision was driven by perceptions and symbolism that conflicted with reality. The State Department abandoned its traditional review criteria to appease environmental activists and their false beliefs—the hallmark of a decision driven by politics.

E. RESPONDENT’S ACTIONS WERE UNJUSTIFIED

1. Respondent Unjustifiably Delayed Processing Keystone’s Applications for a Presidential Permit for the Keystone XL Pipeline

63. The United States delayed its decision on the Presidential Permit for the Keystone XL Pipeline for seven years—far longer than average¹⁰²—before finally announcing the denial of Keystone’s second application on November 6, 2015. Throughout its consideration of Keystone’s applications, the Administration asserted that the delays were due to, *e.g.*, the need to collect additional technical information, conduct additional analysis of the environmental impact of the proposal, or allow state-level procedures regarding the routing of the pipeline to run their course. Those excuses were arbitrary and contrived. In fact, none of that technical analysis or legal wrangling was material to the Administration’s final decision. Instead, the rejection was symbolic, and based merely on the desire to make the U.S. *appear* strong on climate change, even though the State Department had itself concluded that denial would have no significant impact on the environment.

¹⁰¹ Press Statement of Secretary of State John Kerry, Keystone XL Pipeline Determination, November 6, 2015, available at <http://www.state.gov/secretary/remarks/2015/11/249249.htm> (Exhibit C-092).

¹⁰² See Josh Lederman, “Keystone XL Review Drags on 5 Times Longer than Average,” *Associated Press*, August 12, 2015 (Exhibit C-093).

64. It is difficult to understand why the State Department needed seven years to make that determination, but the chronology of events provides helpful insight. The symbolic rationale used to deny the application was never legitimate, even at the end. But the fact is that, if the State Department had decided Keystone's application within the typical time period of two years or less, such rationale would, even on its own terms, have been even more absurd. The pipeline was not particularly controversial at the start. Indeed, as noted, two other similar pipelines were approved around the same time as the Keystone XL application. It was the Administration's own negligent delays that allowed the application to become a political symbol. The politicization which, by the end, had so fixated the Administration, was largely of the Administration's own making, as its delayed decision allowed the controversy over the pipeline to fester and become ever more virulent over the course of seven years. In the end, the Administration opportunistically seized on the symbolism of the pipeline as a basis to deny the application, all in an effort to bolster the Administration's environmental credentials.

65. The State Department's delays have had serious consequences for Claimants, even apart from the revenues that they lost due to the inability to begin operations in a reasonably timely fashion. As with any pipeline of this type, construction of the Keystone XL Pipeline could not begin until after a substantial amount of advance work had been completed, and it was critical to begin that work while the application for the Presidential Permit was pending. The preparatory work for building a pipeline typically takes many years, particularly with large scale projects like the Keystone XL Pipeline, because there are a number of long lead time items. Throughout the more than seven-year delay, Claimants and Claimants' U.S. enterprises had no choice but to continue making capital expenditures, and investing in land easements, pipe, materials, equipment, etc. so that it would be in a position to start construction as soon as possible after the permit was granted. These investments were undertaken with the State Department's knowledge. Indeed, Claimants' actions were consistent with the review process' objective to "accelerate the completion of energy production and transmission projects...."¹⁰³

66. The decision the Administration eventually made—*i.e.*, that the Keystone XL Pipeline was not in the U.S. national interest because approving the pipeline would hurt the perception of the

¹⁰³ EO 13337 at Preamble (Exhibit C-025).

United States as a leader on climate change—could, if it had any legitimacy, have been made immediately after Keystone submitted its application. For political reasons, however, the State Department delayed its decision for seven years, with full knowledge that TransCanada was continuing to invest billions of dollars in the pipeline project in the legitimate but ultimately false belief—a belief that had been based on the Administration’s assurance—that the Administration would decide Keystone’s application based on the merits. The delay thus resulted in significant damage to Claimants.

2. Respondent Unjustifiably Denied Keystone’s Application for a Presidential Permit for the Keystone XL Pipeline

67. Under the procedures established through EO 11423, EO 13212, EO 13337, and Public Notice 6590, and the State Department’s past policies and practices, the State Department should grant an application for a Presidential Permit unless the proposed pipeline raises serious safety, public health, or environmental concerns. For example, in March 2008, the State Department approved Keystone’s application for the Keystone I pipeline based on its finding that the pipeline would (i) increase the diversity of U.S. energy supplies; (ii) shorten the transportation pathway for a portion of U.S. crude imports; (iii) increase crude supplies from a stable and reliable trading partner; (iv) provide additional supplies to make up for the continued decline in imports from several other major U.S. suppliers; and (v) have limited adverse environmental impacts.¹⁰⁴

68. The State Department, under the Obama administration, relied on similar factors when it approved the permit to construct the Alberta Clipper pipeline in August 2009. While the State Department noted that some comments had raised concerns that the Alberta Clipper pipeline might result in higher GHG emissions, it also noted that (i) the United States and Canada were cooperating on environmental issues; (ii) construction of the pipeline would send a positive economic signal in a difficult economic period about the reliability and availability of energy; (iii) the project would provide construction jobs in the immediate term; and (iv) concerns regarding GHG emissions would be best addressed in other fora rather than through the permit process.¹⁰⁵

¹⁰⁴ See Department of State Record of Decision and National Interest Determination, TransCanada Keystone Pipeline, LP Application for Presidential Permit, February 28, 2008, p. 22 (Exhibit C-094).

¹⁰⁵ See Action Memo for Deputy Secretary Steinberg, Enbridge Energy Alberta Clipper Pipeline Permit Record of Decision, August 3, 2009, pp. 25-27 (Exhibit C-095).

69. Moreover, Respondent's actions otherwise supported increased North American fossil fuel production, as illustrated by President Obama's Memorandum expediting review of domestic oil pipelines, and the August 17, 2015 permit it granted to Royal Dutch Shell to drill for oil in the environmentally sensitive Arctic Ocean.¹⁰⁶ In addition, the State Department correctly decided not to conduct an environmental assessment of Kinder Morgan's decision to reverse the flow of the Cochin Pipeline to transport condensate from the United States to Canada (to facilitate the transportation of oil sands oil).

70. The stated purpose of EO 13337, and the State Department's handling of the previous applications for Presidential Permits to construct international pipelines, informed Keystone's expectations about how the State Department would handle Keystone's application for a Presidential Permit for the Keystone XL Pipeline. If the State Department had followed the same approach in assessing Keystone's application for the Keystone XL Pipeline that it had followed in reviewing earlier applications, and had based its decision on objective evidence rather than symbolic and political factors, there is no question that the State Department would have approved the Presidential Permit. Instead, the State Department radically altered its approach, and based its decision on factors that had never before served as the basis to deny an application—the erroneous perceptions of third parties.

71. Secretary Kerry used his authority under EO 13337 to block the Keystone XL Pipeline despite the fact that the State Department, itself, concluded on multiple occasions that the pipeline would not raise any significant safety, public health, and environmental concerns that could not be mitigated. Secretary Kerry's decision was not based on the merits of Keystone's application, but rather on how the international community might react to an approval in light of its erroneous perception that the pipeline would result in higher GHG emissions. The Administration's unjustified denial of Keystone's application significantly damaged Claimants.

3. Respondent Unjustifiably Discriminated Against Keystone

72. To Claimants' knowledge, the State Department had never denied an application for a Presidential Permit for a cross-border pipeline until it denied Keystone's application for the

¹⁰⁶ See Timothy Gardner, "U.S. gives Shell final nod to drill for oil in Arctic," *Reuters*, August 17, 2015 (Exhibit C-096).

Keystone XL Pipeline. The United States has previously approved pipelines from other investors, including from the United States and Mexico, based on factors that, if applied to Keystone's application, would have resulted in approval of the application.¹⁰⁷ The United States had also approved those other applications in a significantly shorter period of time than it took the United States to review, and ultimately deny, Keystone's application. The United States also allows the import and domestic transportation of hydrocarbons via other modes of transportation without any review of GHG emissions (or perceptions thereof) associated with those products. By delaying the processing of Keystone's application for the Keystone XL Pipeline, and applying new and arbitrary criteria in deciding to deny the application, the United States discriminated against, and significantly damaged, Claimants.

IV. JURISDICTION

73. The jurisdiction of ICSID over this dispute is established under Chapter 11, Section B of the NAFTA and Article 25 of the ICSID Convention.

A. THE JURISDICTIONAL REQUIREMENTS UNDER THE NAFTA ARE MET

74. All jurisdictional requirements of the NAFTA are met. Claimants have also complied with all procedural requirements of the NAFTA for submission of a claim to arbitration.

75. Claimants are "investor[s] of a Party" authorized to submit a claim to arbitration under NAFTA Articles 1116(1) and 1117(1). As defined in NAFTA Article 1139, an "investor of a Party" means "a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment." NAFTA Article 1139 further defines "enterprise of a Party" as including "an enterprise constituted or organized under the law of a Party...." Claimants are enterprises of Canada, because Claimants TransCanada Corporation and TransCanada PipeLines Limited are both constituted in and organized under the laws of Canada.¹⁰⁸

¹⁰⁷ This includes both oil pipelines approved under the "national interest" standard in EO 13337 and gas pipelines approved under the "public interest" standard in Executive Order 10485. *See generally* Congressional Research Service, Presidential Permit Review for Cross-Border Pipelines and Electric Transmission, Report No. R44140, August 6, 2015, p. 2 (Exhibit C-029).

¹⁰⁸ *See* paragraph 4 and footnote 5, above.

76. Claimants have also made investments in the United States. Claimants directly and indirectly own assets that qualify as U.S. investments under subsections (a)-(h) of the definition of “investment” under NAFTA Article 1139, including, *inter alia*, enterprises; equity and other interests in enterprises; tangible and intangible property; loans; pipelines; contractual rights; equipment; and an array of land easements.¹⁰⁹ Documentation proving ownership of these specific investments will be provided in due course.

77. NAFTA Articles 1116(1) and 1117(1) permit an investor of a Party to submit to arbitration a claim that another Party has breached an obligation under, *inter alia*, Chapter 11, Section A of the NAFTA, and that the investor, or the enterprise on whose behalf the investor is submitting a claim under NAFTA Article 1117(1), as applicable, “has incurred loss or damage by reason of, or arising out of, that breach.” Claimants’ claims concern breaches of Respondent’s obligations under Chapter 11, Section A of the NAFTA.¹¹⁰ Furthermore, Claimants, and Claimants’ U.S. enterprises, have incurred loss or damage by reason of, or arising out of, those breaches.

78. Claimants’ submission of their claims to arbitration is also timely under NAFTA Articles 1116(2), 1117(2), 1119, and 1120(1). NAFTA Article 1116(2) provides “[a]n investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.” NAFTA Article 1117(2) further provides that “[a]n investor may not make a claim on behalf of an enterprise described in [NAFTA Article 1117(1)] if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.” Claimants’ claims are timely under NAFTA Articles 1116(2) and 1117(2) as no more than three years have elapsed since Claimants, or Claimants’ U.S. enterprises, first acquired knowledge of the breaches, and knowledge that Claimants, or Claimants’ U.S. enterprises, respectively, had incurred loss or damage.

79. Under NAFTA Article 1119, an investor must deliver to the disputing Party a written Notice of Intent to Submit a Claim to Arbitration more than 90 days before submitting the claim to

¹⁰⁹ See, e.g., paragraph 6 and footnote 7, above.

¹¹⁰ See Section V, below.

arbitration. Claimants delivered their Notice of Intent to the United States on January 6, 2016, which is more than 90 days prior to the date of this Request for Arbitration. Additionally, under NAFTA Article 1120(1), an investor may submit a claim to arbitration only after six months have elapsed since the events giving rise to the claim. Claimants' claims arise out of the denial of the Presidential Permit for the Keystone XL Pipeline on November 6, 2015, and Respondent's actions leading to that denial, which took place more than six months before the date of this Request for Arbitration.

80. Claimants have also satisfied the conditions precedent to the submission of a claim to arbitration under the NAFTA. Pursuant to Article 1121(1) and (2) of the NAFTA, Claimants and Claimants' U.S. enterprises consent to arbitration in accordance with the procedures set out in the NAFTA. Claimants and Claimants' U.S. enterprises also waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the U.S. measures that are alleged to be a breach referred to in Articles 1116 or 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the United States. The written consent and waivers required by NAFTA Article 1121 are included with this Request as Exhibits C-103 to C-112¹¹¹ and shall be delivered to the United States.

81. Furthermore, the exercise of the Centre's jurisdiction is proper under Article 1120(1)(a) of the NAFTA, which allows a disputing investor to submit a claim to arbitration under the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the ICSID Convention. The United States became a Contracting State to the ICSID Convention on October 14, 1966. Canada became a Contracting State to the ICSID Convention on December 1,

¹¹¹ See Consent and Waiver for TransCanada Corporation (Exhibit C-102); Consent and Waiver for TransCanada PipeLines Limited (Exhibit C-103); Consent and Waiver for TransCanada PipeLine USA Ltd. (Exhibit C-104); Consent and Waiver for TC Oil Pipeline Holdings Inc. (Exhibit C-105); Consent and Waiver for TC Oil Pipeline Operations Inc. (Exhibit C-106); Consent and Waiver for TransCanada Oil Pipelines Inc. (Exhibit C-107); Consent and Waiver for Marketlink, LLC (Exhibit C-108); Consent and Waiver for TC Terminals LLC (Exhibit C-109); Consent and Waiver for TransCanada Keystone Pipeline, LLC (Exhibit C-110); Consent and Waiver for TransCanada Keystone Pipeline GP, LLC (Exhibit C-111); Consent and Waiver for TransCanada Keystone Pipeline, LP (Exhibit C-112).

2013.¹¹² Accordingly, under NAFTA Article 1120(1)(a), Claimants may properly submit their claims to arbitration under the ICSID Convention.

82. Finally, Claimants have sought to settle their claims by consultation or negotiation, as directed by NAFTA Article 1118. At Claimants' initiative,¹¹³ representatives of Claimants and Respondent met on April 26, 2016 at the U.S. Department of State for the purpose of settlement negotiations. Unfortunately, notwithstanding Claimants' good faith efforts to settle their dispute with Respondent, they have been unable to do so.

B. THE JURISDICTIONAL REQUIREMENTS UNDER THE ICSID CONVENTION ARE MET

83. All jurisdictional requirements under the ICSID Convention are also met. Article 25(1) of the Convention states:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State...and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

84. This dispute involves "a Contracting State" and "national[s] of another Contracting State." The United States and Canada are both Contracting States to the ICSID Convention.¹¹⁴ Article 25(2) states that "national of another Contracting State" means "any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration." Claimants are, and at all times have been, nationals of Canada because they are juridical persons incorporated in Canada in accordance with Canadian law and have their primary place of business in Canada.¹¹⁵

85. Claimants also have "investments" within the meaning of Article 25(1) of the Convention. Although Article 25 does not itself provide a definition of "investment," Claimants' interests in the

¹¹² See ICSID, List of Contracting States and Other Signatories of the Convention (as of April 12, 2016), Doc. No. ICSID/3, available at <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf> (Exhibit C-097).

¹¹³ See paragraph 2, above.

¹¹⁴ See paragraph 81, above.

¹¹⁵ See paragraph 4 and footnote 5, above.

Keystone XL Pipeline project, as well as direct and indirect ownership of assets including equity and other interests in enterprises, tangible and intangible property, loans, pipelines, contractual rights, equipment, and land easements in the United States constitute investments under any reasonable definition.

86. Furthermore, as required under Article 25(1) of the ICSID Convention, there exists a legal dispute that arises directly out of Claimants' investments in the United States, as described more fully in Sections III and V. The legal dispute described in this Request for Arbitration directly concerns Claimants' U.S. investments.

87. Finally, the parties to the dispute have consented in writing to submit this dispute to arbitration before the Centre. Respondent's consent in writing to submit investment disputes to ICSID Convention arbitration is contained in Article 1122(1) of the NAFTA. Claimants hereby provide their written consent to submit this dispute to arbitration under the ICSID Convention, as contained in the written expressions of consent included with this Request as Exhibits C-102 and C-103.¹¹⁶ As provided in NAFTA Article 1122(2), Respondent's written expression of consent in NAFTA Article 1122(1), and Claimants' submission of their claims to arbitration in accordance with the procedures set out in the NAFTA, satisfy the requirement under Article 25(1) of the ICSID Convention for written consent of the parties. Accordingly, the date of consent, as defined in ICSID Institution Rule 2(3), is the date of this Request, in which Claimants submit their claims to arbitration before the Centre.

88. Therefore, all procedural requirements of the Centre have been met. Claimants have provided in this Request for Arbitration the information and materials specified in ICSID Institution Rules 2 and 3. Pursuant to ICSID Institution Rule 2(1)(f), Claimants affirm that they have taken all internal actions necessary to authorize this Request for Arbitration. Attached as Exhibits C-113 and C-114 are signed letters of authority from Claimants TransCanada Corporation and TransCanada PipeLines Limited, respectively.¹¹⁷ Claimants have also paid the US \$25,000 filing fee required under ICSID Administrative and Financial Regulation 16. A copy of the wire

¹¹⁶ See Consent and Waiver for TransCanada Corporation (Exhibit C-102); Consent and Waiver for TransCanada PipeLines Limited (Exhibit C-103).

¹¹⁷ See Letter of Authority from TransCanada Corporation, June 20, 2016 (Exhibit C-113); Letter of Authority from TransCanada PipeLines Limited, June 20, 2016 (Exhibit C-114).

transfer order is attached as Exhibit C-041.¹¹⁸ Accordingly, all procedural requirements under the ICSID Convention and ICSID Institution Rules are met.

V. RESPONDENT’S BREACHES OF THE NAFTA

89. Respondent’s actions with respect to Claimants and their investments in the United States (described in Section III, above) breached Respondent’s obligations under Chapter 11, Section A of the NAFTA. In particular, Respondent breached its obligations under Articles 1102 (National Treatment), 1103 (Most-Favored-Nation Treatment), 1105 (Minimum Standard of Treatment) and 1110 (Expropriation and Compensation) of the NAFTA.

90. Claimants reserve the right to raise claims of additional breaches by Respondent.

VI. RELIEF REQUESTED

91. Claimants respectfully request an award of damages arising from Respondent’s breaches of its NAFTA obligations in an amount of more than US \$15 billion, together with interest calculated from the date of breach until the date of payment, and the costs of this arbitration including, without limitation, attorney’s fees and other expenses.

92. Claimants reserve the right to adjust the relief requested during the course of the arbitration.

VII. CONSTITUTION OF THE TRIBUNAL

93. Having regard to the agreement of the parties expressed in NAFTA Articles 1123 and 1124, Claimants request the constitution of a Tribunal in accordance with Article 37(2)(a) of the ICSID Convention. The Tribunal shall be comprised of three arbitrators, with one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the parties. If the Tribunal has not been constituted within 90 days from the date of the receipt of this Request by the Secretary-General, the procedures set out in NAFTA Article 1124(2) and (3) shall apply.

94. Pursuant to Article 1125 of the NAFTA, for the purposes of Article 39 of the ICSID Convention, and without prejudice to an objection to an arbitrator based on Article 1124(3) of the

¹¹⁸ See Transaction Details of Claimants’ Wire Transfer to ICSID, June 22, 2016 (Exhibit C-041).

NAFTA or on a ground other than nationality, Claimants and Claimants' U.S. enterprises hereby agree to the appointment of each individual member of the Tribunal.

Respectfully submitted,



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