

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

STATE OF TEXAS, et al.,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR., in his official
capacity as President of the United
States, et al.,

Defendants.

Civ. Action No. 3:21-cv-00065

**BRIEF OF AMICUS CURIAE THE PROVINCE OF ALBERTA, CANADA
IN SUPPORT OF PLAINTIFFS**

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	Page(s)
Other Authorities	
Alberta Press Release, https://www.alberta.ca/keystone-xl-pipeline-project.aspx#jumplinks-0	7, 23
BMO Capital Markets, “Survivor Canada: The Unparalleled Position of Canadian Oil in a Transition Challenge”, June 2021, https://research-ca.bmocapitalmarkets.com/documents/6252713E-D2A4-482B-A9A2-B99FE0A4F4AF.PDF	17
Energy Information Administration, “Crude Imports of all grades to total U.S. 2019,” September 7, 2021, https://www.eia.gov/petroleum/imports/browser/#/?d=0&dt=RP&od=o&vs=PET_IMPORTS.WORLD-US-ALL.A	14
Executive Order 13390, titled “Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,” 86 Fed. Reg. 7037 (Jan. 25, 2021).....	2, 6, 23
Final Supplemental Environmental Impact Statement for the Keystone XL Project, 4.10-2 (Jan. 2014), https://2012-keystonepipeline-xl.state.gov/documents/organization/221186.pdf	9
Final Supplemental Environmental Impact Statement for the Keystone XL Project, Executive Summary, ES-9 (Jan. 2014), https://2012-keystonepipeline-xl.state.gov/documents/organization/221135.pdf	22
Final Supplemental Environmental Impact Statement for the Keystone XL Project, Executive Summary, ES-19 to -20 (Jan. 2014), https://2012-keystonepipeline-xl.state.gov/documents/organization/221135.pdf	9
Final Supplemental Environmental Impact Statement for the Keystone XL Project, S-4 to S-5 (Dec. 2019), https://www.energy.gov/sites/prod/files/2019/12/f70/final-seis-eis-0433-s3-keystone-xl-pipeline-2019-12-vol-1_0.pdf	13

Final Supplemental Environmental Impact Statement for the Keystone XL Project, at 1-1 (Dec. 2019),
https://www.energy.gov/sites/prod/files/2019/12/f70/final-seis-eis-0433-s3-keystone-xl-pipeline-2019-12-vol-1_0.pdf5

Government of Alberta, “Cutting methane and creating jobs,” (news release), September 25, 2020,
<https://www.alberta.ca/release.cfm?xID=73318C6591C57-0E3B-1147-1811898B8A0131A5>.....18

Government of Alberta, “Nebraska and Alberta: Strong Partners, Trusted Neighbours,” Fall 2018,
<https://open.alberta.ca/dataset/3a7ca696-e3a4-4822-8250-936dbe93c3f2/resource/9c6a808d-18d0-4192-be22-b17029db3e1f/download/nebraska-factsheet.pdf>4, 22

Government of Alberta, “South Dakota and Alberta: Strong Partners, Trusted Neighbours,” Fall 2018,
<https://open.alberta.ca/dataset/3a7ca696-e3a4-4822-8250-936dbe93c3f2/resource/0cdcaeac-a1e5-493c-b1ac-b98e7cb1fd5f/download/south-dakota-factsheet.pdf>4, 22

Government of Canada, United States-Mexico-Canada Agreement, Energy Side Letter, November 30, 2018,
<https://www.international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusma-aceum/letter-energy.pdf>21

IHS Markit, “Canadian Oil Sands Production Exceeds Pre-Pandemic Levels, But Lingering COVID Impacts and Other Factors Trim Long-Term Growth” (news release), June 23, 2021,
https://news.ihsmarkit.com/prviewer/release_only/id/4762644.....11, 15

Meredith, Sam, “Oil demand to return to pre-pandemic levels by 2022, Goldman says, but unlikely to peak this decade,” *CNBC Markets*, July 2, 2020,
https://www.cnbc.com/2020/07/02/goldman-sachs-oil-demand-to-return-to-pre-pandemic-levels-by-2022.html?__source=sharebar|email&par=sharebar13

PetroLMI, Employment+Labour Data, Highlights July 2020,
<https://careersinoilandgas.com/what-is-lmi/employment-labour-data>.....8

Presidential Permit of March 29, 2019, Authorizing TransCanada
 Keystone Pipeline, L.P., To Construct, Connect, Operate, and
 Maintain Pipeline Facilities at the International Border Between
 the United States and Canada, 84 Fed. Reg. 13101 (Apr. 3, 2019).....2, 6

Reuters, Keystone XL Project Fact Check (March 12, 2021),
<https://www.reuters.com/article/factcheck-keystonepipeline-xl-builtandpai/fact-check-though-keystone-xl-pipeline-had-secured-most-of-its-funding-it-was-only-8-constructed-idUSL1N2LA2SQ>.....22

Statement by National Security Advisor Jake Sullivan on the Need for
 Reliable and Stable Global Energy Markets (Aug. 11, 2021),
<https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/11/statement-by-national-security-advisor-jake-sullivan-on-the-need-for-reliable-and-stable-global-energy-markets/>.....16

Takahashi, Paul, “U.S. lost more than 100,000 oil and gas jobs in
 coronavirus-driven bust,” *Houston Chronicle*, June 12, 2020,
<https://www.houstonchronicle.com/business/energy/article/U-S-lost-more-than-100-000-oil-and-gas-jobs-in-15336253.php>.....8

U.S. Energy Information Administration Short-Term Energy Outlook
 – August 2021
https://www.eia.gov/outlooks/steo/data/browser/#/?v=6&f=Q&s=0&start=201701&end=202204&ctype=linechart&maptype=0&linechart=PAPR_OECD.....13

Zerpa, Fabiola, “Venezuelan Crude Output Falls for Sixth Month,
 Deepening Crisis,” *Bloomberg*, June 30, 2020,
<https://www.bloomberg.com/news/articles/2020-06-30/venezuelan-crude-output-falls-for-sixth-month-deepening-crisis>.....15

Statement of Identity and Interest of the *Amicus Curiae*

The *amicus curiae* is the Province of Alberta, Canada (“Alberta”). Alberta shares a 185-mile long border with the United States, all of it along the U.S. State of Montana. With the rest of Canada, Alberta enjoys a long and mutually beneficial history of cross-border infrastructure projects with the United States, including a pipeline from Cut Bank, Montana to Alberta, authorized by an executive order from President John F. Kennedy in 1962, and a separate pipeline from Toole County, Montana to Alberta, authorized by an executive order from President Lyndon B. Johnson in 1966. The Keystone XL pipeline (“KXLP”) was proposed as another instance of such cross-border cooperation, one in which Alberta has a vital interest.

As a matter of Canadian constitutional law, Alberta owns the mineral rights (including for crude oil and natural gas resources) underlying approximately 81% of Albert’s land area. Because it is a land-locked province, oil recovered from Alberta lands initially requires transport to crude oil markets via pipeline, train, or truck. The KXLP would provide Alberta with increased pipeline capacity to transport this oil and greater access to international crude oil markets, including the U.S. Gulf Coast.

In addition to relying on the KXLP to transport crucial crude oil supplies and to provide increased market access, Alberta also invested in the KXLP. Pursuant to an agreement with TransCanada Pipelines Limited, a wholly-owned subsidiary of TC Energy Corporation (“TC Energy”), Alberta (through its statutory agent Alberta

Petroleum Marketing Commission) agreed to contribute up to C\$1.5 billion in equity to the KXLP in 2020 and to provide C\$6 billion in loan guarantees in support of project financing for the KXLP commencing in January 2021.

On January 20, 2021, President Biden issued Executive Order 13390, titled “Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,” 86 Fed. Reg. 7037 (Jan. 25, 2021) (“Executive Order 13390”), which revoked the presidential permit that President Trump had issued for the KXLP almost two years earlier. *See* Presidential Permit of March 29, 2019, Authorizing TransCanada Keystone Pipeline, L.P., To Construct, Connect, Operate, and Maintain Pipeline Facilities at the International Border Between the United States and Canada, 84 Fed. Reg. 13101 (Apr. 3, 2019) (“Presidential Permit”). The revocation of the Presidential Permit has caused Alberta to incur damages exceeding C\$1.0 billion.

Summary of the Argument

Alberta submits this brief to advise the Court of its significant, strategic interest in the KXLP, and to explain why a ruling from this Court on the merits of Plaintiffs’ claims would be important to the KXLP’s future construction and operation. Alberta does not take a position on the merits of the legal issues that the Defendants raise in their Motion to Dismiss (ECF No. 98) or that the Plaintiffs raise

in their opposition to that motion (ECF No. 107), including specifically whether the Plaintiffs' claims in this case are moot.

If authorized to proceed, the KXLP would be a pivotal part of Alberta's post-pandemic recovery efforts. It would enlarge Alberta's crude oil infrastructure, expand Alberta's access to international crude oil markets, and allow Alberta to deliver much-needed heavy crude oil to U.S. Gulf Coast refineries. The KXLP would further support Alberta's economic recovery by creating thousands of jobs for Alberta's citizens, boosting revenue for local businesses, and expanding Alberta's gross domestic product (GDP).

Importantly, the KXLP's benefits would not be limited to Alberta and its citizens. The KXLP's construction would create tens of thousands of new jobs in Plaintiff states, millions of dollars in state and local tax revenue within those states, and substantial income for local businesses along the pipeline's route. Further, the KXLP would provide the United States with essential crude oil supplies for producing transportation fuel and other life-enhancing products and supporting the United States' long-term energy security. In delivering these benefits, the KXLP would further strengthen the integrated and mutually beneficial trading relationship between Canada and the United States. Canada is Nebraska's largest foreign export

market overall,¹ and South Dakota exports more goods to Canada than its next four largest foreign markets combined.²

A decision on the merits of this case is important to the KXLP's future construction and operation, and obtaining its benefits. Billions of dollars will be required to construct the KXLP. Commitments of this magnitude require reasonable assurance that essential project permits (such as the Presidential Permit) will remain effective during the project's life. A decision from this Court finding that President Biden unlawfully revoked the KXLP's Presidential Permit would provide this assurance and support project financing and the KXLP's ultimate construction. Conversely, without such a decision, continued uncertainty in the KXLP's permit status and the risk that a future U.S. president would unilaterally revoke the project's key permits would caution against investment in the project and its construction.

For these reasons, and as discussed below, Alberta respectfully submits this brief in support of Plaintiffs and urges the Court to rule in a manner that would allow the KXLP to proceed.

¹ Government of Alberta, "Nebraska and Alberta: Strong Partners, Trusted Neighbours," Fall 2018, <https://open.alberta.ca/dataset/3a7ca696-e3a4-4822-8250-936dbe93c3f2/resource/9c6a808d-18d0-4192-be22-b17029db3e1f/download/nebraska-factsheet.pdf>.

² Government of Alberta, "South Dakota and Alberta: Strong Partners, Trusted Neighbours," Fall 2018, <https://open.alberta.ca/dataset/3a7ca696-e3a4-4822-8250-936dbe93c3f2/resource/0cdcaec-a1e5-493c-b1ac-b98e7cb1fd5f/download/south-dakota-factsheet.pdf>.

Background

The KXLP is a proposed pipeline system and ancillary facilities (e.g., access roads, pump stations and construction camps) that would transport Western Canadian Sedimentary Basin heavy crude oil from its existing facilities in Hardisty, Alberta, Canada, and Bakken crude oil from an on-ramp in Baker, Montana, to Steele City, Nebraska.³ The proposed pipeline would connect to the existing Keystone Cushing Extension pipeline, which extends from Steele City, Nebraska, to Cushing, Oklahoma.⁴ Existing pipeline facilities would transport the crude oil from Cushing to U.S. Gulf Coast refiners to meet critical needs for transportation fuel and other life-enhancing products.

In total, the KXLP would include approximately 1,209 miles of new, 36-inch-diameter pipeline, with approximately 327 miles of pipeline in Canada and approximately 882 miles in the United States.⁵ The Project would cross the international border near Morgan, Montana, and would include a pipeline generally within a 110-foot-wide temporary construction right-of-way and a 50-foot-wide permanent right-of-way in Montana, South Dakota and Nebraska.⁶

³ Final Supplemental Environmental Impact Statement for the Keystone XL Project, at 1-1 (Dec. 2019), https://www.energy.gov/sites/prod/files/2019/12/f70/final-seis-eis-0433-s3-keystone-xl-pipeline-2019-12-vol-1_0.pdf

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

On March 29, 2019, President Trump issued the KXLP's Presidential Permit granting TransCanada Keystone Pipeline, L.P ("TransCanada") permission "to construct, connect, operate, and maintain pipeline facilities at the international border of the United States and Canada at Phillips County, Montana, for the import of oil from Canada to the United States." 84 Fed. Reg. at 13101. Relying on this permit, TransCanada began constructing the KXLP's border crossing segment on April 4, 2020, and completed the work in the spring 2020. Through 2020, TransCanada made significant strides in KXLP construction and preconstruction activity in Montana, South Dakota, and Nebraska with construction on pump stations, workforce camps and road improvements.

On January 20, 2021, President Biden revoked the Presidential Permit, finding the KXLP "disserves the U.S. national interest." Executive Order 13390, § 6(d), 86 Fed. Reg. at 7041. The Executive Order does not identify any noncompliance by TransCanada with the Presidential Permit or with any applicable laws. No hearing or other administrative or judicial process was conducted to support the Presidential Permit's revocation.

On June 9, 2021, TC Energy announced that construction activities to advance the KXLP were suspended following the revocation of the Presidential Permit, and

that it had terminated the KXLP. Due to the KXLP's termination, final costs to Alberta are expected to exceed C\$1.0 billion.⁷

Argument

I. A Decision on the Merits of Plaintiffs' Claims Will Have Significant, Practical Consequences for the KXLP, Plaintiffs, and Alberta.

Defendants' Motion to Dismiss contends this case is moot because TC Energy has "made clear" it "will not construct or operate the Keystone XL Pipeline." (ECF No. 98, at 15). Alberta does not here express a position on the mootness doctrine or this Court's jurisdiction to decide the Plaintiffs' claims. Alberta does submit this brief to advise the Court that the KXLP is of significant, strategic importance to Alberta, and to explain why this Court's decision on the merits of Plaintiffs' claims is important to the KXLP's future construction and operation. This decision would have significant, practical consequences for Alberta and the Plaintiffs.

As set forth below, the KXLP is a viable, international pipeline project that Alberta strongly supports, and would produce substantial economic benefits for Albertans and the Plaintiffs if it proceeds. The KXLP also would provide substantial benefits to the United States and its citizens by way of affordable oil supplies, long-term energy security, and reduced environmental risk in the transport of such supplies. Moreover, as set forth below, a decision from this Court that President

⁷ Alberta Press Release, <https://www.alberta.ca/keystone-xl-pipeline-project.aspx#jumplinks-0>.

Biden unlawfully revoked the KXLP's Presidential Permit would likely impact future decisions to undertake or fund the KXLP's construction and operation. Without such a decision, the lack of a permit would create uncertainty and discourage against any future investment in the project and its construction. For these reasons, a decision on the merits of this case would have concrete, practical consequences for Alberta and the Plaintiffs.

A. The KXLP Will Produce Substantial Economic Benefits for Albertans and Plaintiffs If It Proceeds.

In June 2020, Rystad Energy reported that the United States lost more than 100,000 oil and gas jobs during the COVID-19 pandemic.⁸ In Canada, oil and gas employment was down 15 per cent, or 28,800 jobs in July 2020 compared to July 2019.⁹ When the KXLP was cancelled in January 2021, TC Energy announced that more than 1,000 direct jobs were immediately lost in Alberta. This loss does not account for the thousands of indirect jobs that may have been affected in towns along the Alberta segment of the pipeline route, such as Oyen, which were supporting construction activities and personnel.

⁸ Takahashi, Paul, "U.S. lost more than 100,000 oil and gas jobs in coronavirus-driven bust," *Houston Chronicle*, June 12, 2020, <https://www.houstonchronicle.com/business/energy/article/U-S-lost-more-than-100-000-oil-and-gas-jobs-in-15336253.php>.

⁹ PetroLMI, Employment+Labour Data, Highlights July 2020, <https://careersinoilandgas.com/what-is-lmi/employment-labour-data>.

If the KXLP proceeds, it would contribute substantially to mitigating these losses. When Alberta announced its investment in the project in March 2020, it estimated that the KXLP would create 1,400 direct and 5,400 indirect jobs in Alberta. When the KXLP's construction began in July 2020, the population of Oyen doubled as workers in numerous trades strung hundreds of kilometers of pipe along the KXLP right-of-way. Workers received steady pay checks and spent them in local businesses, boosting revenues in hotels, restaurants and retail stores. TC Energy estimated employment income during construction was to be C\$1.6 billion in Canada, while construction was expected to contribute C\$2.4 billion to Canada's GDP and approximately C\$1.2 billion to Alberta's GDP.

In the United States, the project was expected to support the creation of 42,000 family-sustaining jobs, including about 12,000 jobs in Montana, South Dakota, Nebraska, and Kansas.¹⁰ TC Energy anticipated that the project would include at least US\$1.6 billion in jobs for the six major union contractors across three states in the United States. Further, the KXLP's construction would contribute approximately US\$3.4 billion to the U.S. GDP.¹¹ The millions of dollars spent on housing and

¹⁰ Final Supplemental Environmental Impact Statement for the Keystone XL Project, Executive Summary, ES-19 to -20 (Jan. 2014), <https://2012-keystonepipeline-xl.state.gov/documents/organization/221135.pdf>.

¹¹ Final Supplemental Environmental Impact Statement for the Keystone XL Project, 4.10-2 (Jan. 2014), <https://2012-keystonepipeline-xl.state.gov/documents/organization/221186.pdf>

services throughout the construction period will help support local businesses along the pipeline route, while the taxes paid on those goods and services would provide a boost to state and local tax reserves. According to TC Energy's projections, the total estimated property tax from the project in the first full year of operations would be about US\$55.6 million, spread across 27 counties in three states.¹² In South Dakota, estimated property tax from the project in the first full year of operations would be US\$17.85 million.¹³ In Nebraska, estimates were US\$11.78 million.¹⁴ Local infrastructure and services, such as hospitals, schools, and community infrastructure projects all benefit from the investment provided by the KXLP, making lives better during these uncertain times.

B. The Business Case for the KXLP Is Strong.

There is unwavering commercial support for the KXLP. Prior to the Presidential Permit's revocation, the majority of the KXLP's available capacity was contracted over a 20-year term by strong, credit-worthy oil producers. The KXLP provided a relatively more economical way for refiners on the U.S. Gulf Coast to receive oil from Canada. Alberta estimated that the KXLP would provide shippers with a netback uplift of between US\$8 and US\$11 per barrel shipped on that line.¹⁵

¹² *Id.* at 4.10-33.

¹³ *Id.*

¹⁴ *Id.* at 4.10-33 to 4.10-34.

¹⁵ Estimates are rounded and based on: cost to ship crude by rail to the U.S Gulf Coast (US\$20 per barrel), T.C Energy Keystone Tolls to the U.S Gulf Coast

Moreover, there is currently insufficient pipeline infrastructure in place to accommodate un-curtailed Alberta production, which impedes Alberta's ability to deliver much-needed heavy crude oil to refineries in the U.S. Gulf Coast. This deficiency in pipeline infrastructure could be further exacerbated if oil prices continue to recover and more oil production comes online. Indeed there are signs of this becoming reality: IHS Markit's 10-year production forecast estimates that, despite short- and medium-term impacts from COVID-19, Canadian crude supply is still expected to grow by nearly 900,000 barrels per day from 2020 to 2030.¹⁶ Without the KXLP, crude oil would need to be delivered from Alberta using higher cost transportation methods, which may erode the profitability of U.S. Gulf Coast refineries.

Alberta made a historic C\$1.5 billion equity investment in KXLP in 2020, and a C\$6 billion loan guarantee in 2021 because it, too, had confidence in the economic benefits of the project and believed the project is critical to North American energy security and economic prosperity. Alberta's investment contributed substantially to advancing the KXLP's construction in both Canada and the United States. Prior to

(U.S.\$8.75 per barrel) and Altex Energy's estimate of TC Energy's Keystone XL tolls to the U.S Gulf Coast (US\$12.05 per barrel). No public toll data is available for Keystone XL.

¹⁶ IHS Markit, "Canadian Oil Sands Production Exceeds Pre-Pandemic Levels, But Lingering COVID Impacts and Other Factors Trim Long-Term Growth" (news release), June 23, 2021, https://news.ihsmarkit.com/prviewer/release_only/id/4762644.

the Presidential Permit's revocation, survey staking, topsoil stripping, and grading were on target in Alberta. Pipe stringing activities also commenced. In addition, the KXLP's cross-border segment was completed in May 2020. Once operational, the KXLP would have provided North America with a stable, secure supply of crude oil. Canadian oil transported on a North American pipeline presents a more reliable and safer option to meet American energy needs than obtaining oil from more distant and less stable countries.

C. Alberta heavy oil remains in high demand.

Of the 5.9 million barrels per day (mbpd) of crude oil imported to the United States in 2020, 3.8 mbpd, or 64 per cent, was heavy crude. Of this imported volume, 2.6 mbpd, or 68 per cent, was heavy crude from Canada. Most of the Canadian heavy crude imports went to the U.S. Midwest (Petroleum Administration for Defense District ("PADD") II) and the U.S. Gulf Coast (PADD III), where refineries have made significant investments in technology to process heavy crude. In recent years, however, global markets have become increasingly short of heavy crude oil due to a combination of declining reserves and geopolitical developments. Gulf Coast refineries require larger volumes of heavy crude oil from Canada, specifically

Alberta, to make up for the loss from traditional sources of crude, such as Mexico and Venezuela.¹⁷

Although the combined impact of COVID-19 and the price war between Russia and Saudi Arabia caused historic lows in oil demand, the short-term decrease in demand does not negate the need for additional export pipelines out of western Canada and into the United States in the long term. Every credible forecast of future world energy consumption sees oil and gas continuing to dominate the supply mix for the next several decades. Global oil demand has now recovered to 96 per cent of what it was before the pandemic, according to the U.S. Energy Information Administration's ("EIA") August short-term energy outlook.¹⁸ The EIA expects demand to fully recover to the pre-pandemic level by the second quarter of 2022.¹⁹ In July 2020, analysts at Goldman Sachs predicted that oil demand will not peak before 2030,²⁰ making the KXLP vital infrastructure to transport Canadian oil and meet the rising energy demands of Americans.

¹⁷ Final Supplemental Environmental Impact Statement for the Keystone XL Project, S-4 to S-5 (Dec. 2019), https://www.energy.gov/sites/prod/files/2019/12/f70/final-seis-eis-0433-s3-keystone-xl-pipeline-2019-12-vol-1_0.pdf

¹⁸ U.S. Energy Information Administration Short-Term Energy Outlook – August 2021

https://www.eia.gov/outlooks/steo/data/browser/#/?v=6&f=Q&s=0&start=201701&end=202204&ctype=linechart&maptype=0&linechart=PAPR_OECD

¹⁹ *Id.*

²⁰ Meredith, Sam, "Oil demand to return to pre-pandemic levels by 2022, Goldman says, but unlikely to peak this decade," *CNBC Markets*, July 2, 2020,

D. Alberta Provides Reliable, Secure Supplies Compared to Other Heavy Oil-Producing Regions, Such as Mexico, Venezuela, and the Middle East.

From 2009 to 2020, United States heavy crude imports from Mexico and Venezuela, combined, declined by 1.3 mbpd.²¹ Canada, in comparison to these countries, has long been a stable energy trading partner. For decades, Canada, primarily Alberta, has been the largest crude oil exporter to the United States, making Canada a dependable provider of crude oil for the American fleet of heavy oil refineries. With the capacity to move 830,000 bpd of heavy crude, the KXLP would have: (i) provided American refiners the ability to replace a majority of the volumes that have been lost from Mexico and Venezuela, (ii) strengthened the trade relationship between the United States and Canada, and (iii) assured the United States of a continued reliable source of energy.

Canadian imports of heavy crude to the Gulf Coast have continued to grow and, being a reliable source of crude oil, these imports are expected to grow with more pipeline access. Despite 2020 marking the single largest production drop in the history of Alberta's oil production, IHS Markit announced in June 2021 that

https://www.cnbc.com/2020/07/02/goldman-sachs-oil-demand-to-return-to-pre-pandemic-levels-by-2022.html?__source=sharebar|email&par=sharebar.

²¹ Energy Information Administration, "Crude Imports of all grades to total U.S. 2019," September 7, 2021,

https://www.eia.gov/petroleum/imports/browser/#/?d=0&dt=RP&od=o&vs=PET_IMPORTS.WORLD-US-ALL.A.

Canadian oil sands production had fully recovered from last year's "COVID-19 Shock" and had exceeded pre-pandemic levels. The company's analysis predicts Canadian oil sands production to reach 3.6 million barrels per day in 2030, an increase of 650,000 barrels per day compared to 2021 levels (900,000 bpd from 2020).²² The previous IHS Markit forecast expected production to reach 3.8 mbd in 2030. This production is a stark contrast to Venezuela, whose crude oil production fell by nearly 200,000 bpd in June 2020 (totalling 422,400 bpd) as compared to May 2020.²³

It is also worth noting that the United States imported \$5.6 billion worth of heavy oil from OPEC in 2019. The KXLP would have reduced the United States' reliance on OPEC oil by providing a reliable source of fuel from a stable neighbouring country that shares America's values, and thereby strengthened North American energy security. The importance of reducing the United States' reliance on OPEC oil, and doing so through Canadian production, is illustrated by the recent statement of U.S. National Security Advisor Jake Sullivan cautioning that OPEC+'s

²² IHS Markit, "Canadian Oil Sands Production Exceeds Pre-Pandemic Levels, But Lingering COVID Impacts and Other Factors Trim Long-Term Growth" (news release), June 23, 2021,

https://news.ihsmarkit.com/prviewer/release_only/id/4762644.

²³ Zerpa, Fabiola, "Venezuelan Crude Output Falls for Sixth Month, Deepening Crisis," *Bloomberg*, June 30, 2020,

<https://www.bloomberg.com/news/articles/2020-06-30/venezuelan-crude-output-falls-for-sixth-month-deepening-crisis>.

response to escalating, potentially harmful gasoline costs was “simply not enough,” and that OPEC+ “must do more to support the [ongoing global] recovery.”²⁴ Further, the KXLP would have provided options to the Gulf Coast refineries when other pipelines were under maintenance, and reduced reliance on more expensive crudes during this period.

As the price of oil slowly improved and pandemic measures were relaxed, much of Alberta’s shut in volumes were restored in July 2021. According to the Alberta Energy Regulator, as of July 2021, 287,000 bpd had come back online and production is expected to continue to increase over the summer. The outlook for Alberta’s production growth remains strong despite the impact of COVID-19 on oil demand and prices. Canada is clearly a far more dependable energy partner than other countries.

E. Canada Develops Its Natural Resources According to Market Principles in a Democracy That Respects Human Rights, Labor Standards, and Environmental Commitments.

Based on aggregated environmental, social, governance (“ESG”) performance from the Yale Environmental Performance Index, Social Progress Index, and World Bank Governance Index, Canada is third behind Norway and Denmark in ESG

²⁴ Statement by National Security Advisor Jake Sullivan on the Need for Reliable and Stable Global Energy Markets (Aug. 11, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/11/statement-by-national-security-advisor-jake-sullivan-on-the-need-for-reliable-and-stable-global-energy-markets/>

performance. This rating is a direct reflection of the importance that Canada, Alberta, and their oil producers place on improving environmental performance and governance, investment in technology and innovation, and open and strong stakeholder and Indigenous relations.

The achievements of Canada's oil industry include:

- Canada's oil sands producers have now invested \$11 billion in research and development over the past decade, including a record \$1.6 billion in 2019, much higher than other global majors on a per-barrel basis.²⁵
- Emissions intensity from Alberta's oil sands production has decreased by 22 per cent since 2010.²⁶
- The average corporate reported emissions intensity of large oil sands producers has fallen approximately 27 per cent since 2013 versus 13 per cent for other global majors and 15 per cent for legacy American oil producers.²⁷

In addition to these achievements, Alberta's Technology Innovation and Emissions Reduction (TIER) system is now in effect. TIER implements Alberta's industrial carbon pricing and emissions trading system, and helps Alberta's industrial facilities find innovative ways to reduce emissions and invest in clean technology to stay competitive. The regulation applies to facilities that emit more

²⁵ BMO Capital Markets, "Survivor Canada: The Unparalleled Position of Canadian Oil in a Transition Challenge", at 52, June 2021, <https://research-ca.bmocapitalmarkets.com/documents/6252713E-D2A4-482B-A9A2-B99FE0A4F4AF.PDF>.

²⁶ *Id.* at 17.

²⁷ *Id.*

than 100,000 tonnes of carbon dioxide, but facilities that emit less than the threshold may opt in to the regulation. Regulated facilities must provide annual compliance reports. Facilities that emit more than 1 million tonnes of carbon dioxide must also provide a yearly forecasting report, reinforcing Alberta's commitment to governance.

The TIER regulation makes use of both facility-specific and high performance benchmarks. Facilities can reduce their emissions or use emission performance credits, emission offsets or pay into the regulated fund. The TIER compliance fund is then used to fund projects to reduce emissions, furthering Alberta's position as a leader in technology-driven environmentally responsible development. Alberta estimates that spending through TIER will result in about 6 million tonnes of emissions reductions per year, or 120 million tonnes of emissions reductions over 20 years.

Over three years, Alberta is spending up to \$750 million from the TIER fund and other public funding to drive emissions reductions. This investment includes \$52 million for methane programs, which the province estimates will cut about 1.5 megatonnes of emissions.²⁸ Alberta was the first province or state in North America to set an upstream oil and gas methane reduction target (to reduce methane emissions from upstream oil and gas by 45 per cent from 2014 levels by 2025), in alignment

²⁸ Government of Alberta, "Cutting methane and creating jobs," (news release), September 25, 2020, <https://www.alberta.ca/release.cfm?xID=73318C6591C57-0E3B-1147-1811898B8A0131A5>.

with international best practices. Details of Alberta's system have since been published in case studies by organizations such as The Climate Group and the United Nations Economic Commission for Europe.

Alberta also believes in working respectfully with its Indigenous partners in resource development. To that end, Alberta has established the Alberta Indigenous Opportunities Corporation to provide Indigenous communities with access to up to C\$1 billion in financial support and loan guarantees for participation in the equity ownership of natural resource projects. The project provided an equity interest opportunity for a coalition of five Indigenous groups from Alberta and Saskatchewan. The economic opportunities for these Indigenous groups, and potentially other Indigenous American Tribes along the U.S. pipeline route, will no longer be realized with the cancellation of the project.

As the world moves to a greener economy, Canada should be the supplier of choice. Without responsibly produced Canadian oil and reliable and safe energy infrastructure like the KXLP, the world, including the United States, will have to rely on countries who do not share these same environmental and social values, commitments, and achievements.

F. The KXLP Is a Safer, More Environmentally Sustainable Option to Transport Energy to the U.S.

The KXLP incorporates measures that minimize its environmental impact, including:

- horizontal directional drills and horizontal bores ensure rivers and streams are not impacted by construction;
- dry crossing techniques isolate water flow from construction activities;
- limits on construction in small streams to 24 to 48 hours minimize construction time in the water body; and
- carbon emissions are limited by operating the pipeline with net-zero emissions throughout its lifecycle by buying renewable energy from electricity providers, and if not available, by purchasing renewable energy credits or carbon offsets.

U.S. scientists and trained field workers thoroughly reviewed the KXLP through extensive field studies and vigorous research. Environmental studies over the past ten years have shown that the KXLP can be built and operated safely and responsibly. As has been established by industry experts, pipelines are the safest method of oil transportation. Alternate options, like trains, trucks and tankers, produce far greater greenhouse gas emissions. As long as there is demand for oil, a safe, reliable network of inter-jurisdictional energy infrastructure, with strict regulatory oversight, is the best method of oil transportation.

G. The KXLP Strengthens North American Energy Interdependence and U.S.-Canada Relations.

Canada and the United States share a highly interconnected energy economy. Even without the KXLP, the United States relies on Canada for more than half of its imported oil. The United States imports about 3.9 million bpd from Canada, and analysts expect this amount to increase to up to 4.4 million bpd over the next few years. According to the Canada Energy Regulator, Canada currently has enough

capacity to export more than 4 million bpd. Transportation capacity must keep pace with demand.

The recent United States-Mexico-Canada Agreement emphasizes the Canada/U.S. energy trade relationship and each country's respective commitment to energy co-operation. Specifically, Canada and the United States have agreed to recognize the importance of enhancing the integration of North American energy markets, including open trade, and to support North American energy competitiveness, security, and independence.²⁹ The KXLP is vital to achieving these principles. Yet, President Biden, mere months after cancelling the project, asked OPEC and its allies to increase oil production as a means to combat rising gasoline prices in the United States. This request defies logic, particularly as it comes on the heels of 2019's oil price war between Saudi Arabia and Russia, which resulted in widespread price volatility not only in North American markets but globally. Had it not been cancelled, KXLP – transporting Canadian crude – provided the means to supply Americans with the stable and affordable oil supply President Biden seeks.

Strong trade ties mean more economic growth and good-paying jobs in both the United States and Canada. In Nebraska, for example, 6,480 jobs are supported

²⁹ Government of Canada, United States-Mexico-Canada Agreement, Energy Side Letter, November 30, 2018, <https://www.international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusma-aceum/letter-energy.pdf>.

by trade with Alberta, and 57,400 jobs are supported by trade with Canada overall.³⁰ In South Dakota, 2,795 jobs are supported by trade with Alberta, and 28,600 South Dakota jobs result from trade with Canada overall.³¹ These statistics, combined with the expected job creation of the KXLP, are indicative of the importance of the trade partnership between the United States and Canada.

H. This Court Should Rule in a Manner That Would Allow the KXLP to Proceed.

A decision on the merits of this case is important to the KXLP's future construction and operation. Billions of dollars will be required to construct the KXLP. In 2014, the United States portion of the KXLP was estimated to cost approximately \$3.3 billion.³² According to a March 2020 TC Energy press release, the estimated cost of the project was to be \$8 billion.³³ Commitments of this

³⁰ Government of Alberta, "Nebraska and Alberta: Strong Partners, Trusted Neighbours," Fall 2018, <https://open.alberta.ca/dataset/3a7ca696-e3a4-4822-8250-936dbe93c3f2/resource/9c6a808d-18d0-4192-be22-b17029db3e1f/downloadinebraska-factsheet.pdf>.

³¹ Government of Alberta, "South Dakota and Alberta: Strong Partners, Trusted Neighbours," Fall 2018, <https://open.alberta.ca/dataset/3a7ca696-e3a4-4822-8250-936dbe93c3f2/resource/Ocdcaeac-a1e5-493c-b1ac-b98e7cb1fd5f/download/south-dakota-factsheet.pdf>.

³² Final Supplemental Environmental Impact Statement for the Keystone XL Project, Executive Summary, ES-9 (Jan. 2014), <https://2012-keystonepipeline-xl.state.gov/documents/organization/221135.pdf>.

³³ Reuters, Keystone XL Project Fact Check (March 12, 2021), <https://www.reuters.com/article/factcheck-keystonepipelinexl-builtandpai/fact-check-though-keystone-xl-pipeline-had-secured-most-of-its-funding-it-was-only-8-constructed-idUSL1N2LA2SQ>

magnitude require reasonable assurance that essential project permits will remain effective during the project's life.

Moreover, without a dispositive ruling from this Court on the merits of the Plaintiffs' claims, not only will the KXLP remain terminated and an unacceptable destination for investment, there will remain substantial uncertainty over the viability of any new presidential permit that President Biden or a future United States President may issue future cross-border pipelines like KXLP. President Biden revoked the KXLP's Presidential Permit in his "sole discretion" and without any finding that TC Energy had violated the permit's terms or applicable law. Executive Order 13990, § 6(a), 86 Fed. Reg. at 7041. Absent a decision from this Court, this same unchecked power could be invoked to unilaterally terminate, without process or warning, any future presidential permit. This uncertainty would caution against future investment in the KXLP or any other cross-border pipeline.

Further supporting a decision on the merits of the Plaintiffs' claims is the substantial financial loss that an operator or investor could incur through permit revocation. For example, due to the KXLP's termination, final costs to Alberta are expected to exceed C\$1.0 billion.³⁴

³⁴ Alberta Press Release, <https://www.alberta.ca/keystone-xl-pipeline-project.aspx#jumplinks-0>.

Conclusion

This Court's decision on the merits of this case would have significant practical consequences for KXLP, Alberta and Plaintiffs. The Court's decision is important to the KXLP's future construction and operation, and the substantial economic and other benefits that the project would deliver. A decision finding that President Biden unlawfully revoked the KXLP's Presidential Permit would provide reasonable assurance that such permit cannot be unilaterally and arbitrarily revoked, and would support project financing and the KXLP's ultimate construction. Conversely, without such a decision, the KXLP will remain terminated and uncertainty in the KXLP's permit status would discourage investment in the project and its construction. The substantial benefits of the project would be lost.

For the above reasons, Alberta respectfully urges the Court to rule in a manner which would allow the KXLP to proceed.

Dated: September 16, 2021

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*Motions for admission *pro hac vice*
forthcoming

CERTIFICATE OF SERVICE

I certify that on September 16, 2021, this document was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Tricia W. Macaluso

Tricia W. Macaluso