

Urgent Motion Under Circuit Rule 27-3(b)

Consolidated Case Nos. 18-36068, 18-36069, 19-35036, 19-35064, 19-35099

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

INDIGENOUS ENVIRONMENTAL NETWORK, ET AL.,
Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF STATE, ET AL.,
Defendants,

and

TRANSCANADA KEYSTONE PIPELINE, LP, ET AL.,
Intervenor-Defendants-Appellants.

On Appeal from the United States District Court for the District of Montana
No. 4-17:cv-00029-BMM

**OPPOSITION OF INDIGENOUS ENVIRONMENTAL NETWORK,
ET AL., TO TRANSCANADA KEYSTONE PIPELINE, LP, ET AL.'S
MOTION FOR STAY OF PENDING APPEAL
URGENT MOTION UNDER CIRCUIT RULE 27-3(b)
Action Requested by March 15, 2019**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Indigenous Environmental Network and North Coast Rivers Alliance make the following disclosures:

Indigenous Environmental Network is a non-profit public benefit corporation organized as the Indigenous Educational Network of Turtle Island and incorporated under the laws of Minnesota.

North Coast Rivers Alliance is a non-profit unincorporated association of conservation leaders from the western and northern United States and Canada.

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INTRODUCTION

Ignoring settled law and undisputed facts, TransCanada Keystone Pipeline LP, et al. (collectively, “TransCanada”) asks this Court to unleash widespread irreparable harm to natural and cultural resources across 875 miles over three states by an unlawful fossil fuel project that the district court permanently enjoined. Agreeing with plaintiffs Indigenous Environmental Network (“IEN”) and North Coast Rivers Alliance (“NCRA;” collectively, plaintiffs”), the district court ruled that TransCanada’s Keystone XL Pipeline Project (“Keystone”) violated the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 et seq., the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 et seq. and the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2)(A), (D). TransCanada Appendix (“TCAppx”) 1, 32, 53, 107.

Each of the district court’s orders should be affirmed. Its carefully-crafted injunctive relief properly applies the governing four-factor test for injunctive relief, and correctly finds (1) Keystone was unlawfully approved, (2) Keystone would cause severe irreparable harm to environmental and cultural resources, and (3) the balance of hardships strongly favors, and (4) the public interest clearly supports, the injunction.

Accordingly, TransCanada’s motion for stay pending appeal (“Motion”)

should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

After five years of environmental study and review of over 4 million public comments, on November 3, 2015, former Secretary of State John Kerry issued a detailed Record of Decision and National Interest Determination (“ROD/NID”) finding “that issuance of a permit to TransCanada . . . to construct . . . operate, and maintain facilities . . . for the transport of crude oil from Canada to the United States . . . would not serve the national interest.” TCApx185-216.

But on March 23, 2017 the Department of State (“State”) abruptly reversed course and issued a second ROD/NID and Presidential Permit allowing TransCanada to construct and operate Keystone over its entire 875-mile length between Morgan, Montana and Steele City, Nebraska. TCApx179-183. In doing so, State ignored Section 6.3 of its 2015 ROD/NID, entitled “Climate Change-Related Foreign Policy Considerations.” TCApx086, 178-182, 210-213. As the district court found, “Section 6.3 . . . determined that the United States’s climate change leadership provided a significant basis for denying the permit.” TCApx086. “The Department [2015 ROD/NID] acknowledged science supporting a need to keep global temperature below two degrees Celsius above pre-industrial levels . . . [and] recognized the scientific evidence that human

activity represents a dominant cause of climate change.” *Id.* “The Department cited transboundary impacts including storm surges and intense droughts [and] accepted the United States’s impact as the world’s . . . second-largest greenhouse gas emitter.” *Id.*

Although State’s “2017 ROD initially tracked the 2015 ROD nearly word-for-word,” “without explanation or acknowledgment, [it] omitted entirely a parallel section discussing “Climate Change-Related Foreign Policy Considerations,” and “ignore[d] the 2015 ROD’s conclusion that 2015 represented a critical time for action on climate change.” *Id.* But, as the district court determined, “[a]n agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.” *Id.*, quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 573 (2009), and *Organized Village of Kake v. U.S. Department of Agriculture* (795 F.3d 956, 968 (9th Cir. 2015)).

On March 27, 2017, IEN and NCRA filed suit challenging State’s ROD/NID and Presidential Permit allowing TransCanada to construct and operate Keystone, and its Supplemental Environmental Impact Statement (“SEIS”) thereon. Other plaintiffs sued on March 30, 2017; on October 4, 2017, the actions were consolidated for briefing and hearing. ECF 82.

Following argument (IENAppx1), on November 22, 2017 the district court denied motions to dismiss filed by TransCanada and the Department of State (“State”) claiming plaintiffs challenged Presidential action not reviewable under the APA. TCApx120. After State lodged its Administrative Record (ECF111), the parties filed cross-motions for summary judgment. ECF 145-154, 176-178.

On August 15, 2018, the district court granted partial summary judgment to plaintiffs, and ordered State to supplement its NEPA review to analyze Keystone’s revised “Main Line Alternative” route through Nebraska. TCApx107. That review is ongoing.

On November 8, 2018, the district court decided the remaining claims, ruling for plaintiffs on some and vacating State’s ROD/NID and permanently enjoining State and TransCanada “from engaging in any activity in furtherance of the construction or operation of Keystone and associated facilities” until specified supplemental reviews are completed and State renders a new ROD/NID. TCApx53.

TransCanada then moved the district court to allow “preconstruction activities” (ECF 221), plaintiffs filed opposition (ECF229), and on December 7, 2018, the district court allowed some activities. TCApx32.

On December 21, 2018 TransCanada filed below its Notice of Appeal and

Motion for Stay Pending Appeal (ECF233-235), plaintiffs filed opposition (IENAppx104-141), TransCanada filed its “Status Update; Declaration of Norris Ramsay” (ECF241) 17 days late, and plaintiffs objected (IENAppx142-146).

After argument (TCApx217), on February 15, 2019 the district court issued its Supplemental Order Regarding Motion to Stay allowing construction and use of pipeline storage yards outside Keystone’s right-of-way. TCApx1.

On February 21, 2019, TransCanada filed its Motion for Stay Pending Appeal (“Motion”).

STANDARD OF REVIEW

A four-factor test governs TransCanada’s Motion: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 434 (2009). TransCanada must show all four factors favor the stay. *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012). Because it has not done so, its Motion must be denied.

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ARGUMENT

I. TRANSCANADA IS UNLIKELY TO SUCCEED ON THE MERITS.

TransCanada argues it will succeed on the merits because (1) State's Presidential Permit is not reviewable under the APA; (2) even if APA review exists, the Permit was "entirely discretionary and thus unreviewable;" and (3) the district court's injunction is "impermissibly overbroad." All three arguments fail, as shown below.

A. STATE'S PRESIDENTIAL PERMIT IS SUBJECT TO REVIEW UNDER THE APA.

State's Presidential Permit is subject to APA review for five reasons. First, it is "final" "agency action.". Second, Executive Order ("EO") 13337 requires that presidential permits "compl[y] with applicable laws and regulations." Third, the President had no role in the final permitting decisions. Fourth, Congress required State to comply with NEPA and other environmental laws before taking action. Fifth, the cases TransCanada cites are inapposite, unlike the decisions the district court correctly followed.

1. Plaintiffs Challenge Final Agency Action.

The APA contains "a waiver of sovereign immunity in suits seeking judicial review of agency actions where judicial review has not been expressly authorized

by statute.” *Parola v. Weinberger*, 848 F.2d 956, 958 (9th Cir. 1988). To be reviewable, agency action must be “final” in that it (1) “mark[s] the consummation of the agency’s decisionmaking process” and (2) is an action “by which rights or obligations have been determined, or from which legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997) (citations omitted).

Both tests are met. State’s ROD/NID “consummat[ed]” its review of TransCanada’s application. *Id.*; TCAppx128. And, the ROD/NID is a decision “from which legal consequences will flow” because it enables TransCanada “to construct, . . . operate, and maintain pipeline facilities. . . .” *Id.*; ECF44-8; *Bennett*, 520 U.S. at 178.

State’s NEPA regulations recognize that a presidential permit is a “major Departmental action” subject to NEPA. 22 C.F.R. §§ 161.7, 161.7(c)(1). (“Issuance of permits for construction of international . . . pipeline[s]” “normally requir[es] [at least] environmental assessments”). Accordingly, State prepared an EIS, and later a Final Supplemental EIS (“FSEIS”), for Keystone *pursuant to NEPA*. TCAppx155, 157-182 (FSEIS was issued after “having considered the environmental effects of the proposed action *consistent with [NEPA]*”) (emphasis added); 82 Fed.Reg. 8663 (January 24, 2017 Presidential Memorandum, stating: “To the maximum extent *permitted by law*, the [FSEIS] issued by . . .

State . . . regarding . . . Keystone . . . shall be considered by . . . State to satisfy . . .

(A) all applicable requirements of [NEPA]”) (emphasis added).

Yet now, TransCanada claims this Court is powerless to decide whether State actually *complied* with NEPA’s mandates, arguing the agency’s “Departmental action[s]” were not actually “agency action” subject to the APA. Instead, TransCanada contends the Presidential Permit, ROD/NID and FSEIS were “Presidential actions.” Motion:10-15. Wrong. TransCanada ignores (1) Congress’ parallel authority over foreign and domestic commerce, (2) State’s regulations applying NEPA to transboundary projects, and (3) the President’s failure to exercise decisionmaking power over Keystone.

By approving the Keystone Presidential Permit, ROD/NID and FSEIS, State therefore took “agency action” subject to the APA.

2. Executive Order 13337 Requires “Compliance With Applicable Laws and Regulations” Including State’s NEPA Regulations.

TransCanada’s claim that State’s permitting decisions pursuant to EO 13337 “involve presidential action not subject to APA review” (Motion:10) ignores this Executive Order’s plain language. EO 13337 does not express pure presidential power. Instead, it acknowledges Congress’ parallel authority to regulate international commerce.

In its first section, EO 13337 recognizes its derivation from *both* “the authority vested in me as President by the Constitution *and* the laws of the United States, including Section 301 of Title 3, United States Code.” *Id.* (emphasis added). In section 301, Congress exercised its correlative legislative power to “authorize[]” the President “to designate and empower the head of any department or agency . . . or any official thereof who is required to be appointed by and with the advice and consent of the Senate, to perform . . . any function which is vested in the President by law Provided, ... any “[s]uch designation and authorization shall be in writing, [and] shall be published in the Federal Register” *Id.*

In section 5, EO 13337 expressly subordinates the president’s authority to the legislative power exercised by Congress:

Nothing contained in this order shall be construed to affect the authority of any department or agency of the United States Government, or to supersede or replace the requirements established under any other provision of law, or to relieve a person from any requirement to obtain authorization from any other department or agency of the United States Government in compliance with applicable laws and regulations subject to the jurisdiction of that

department or agency.”

Id. (emphasis added).

EO 13337 thus preserves, and mandates “compliance with,” other requirements established by law, including the three laws the district court ruled were violated here: NEPA, the ESA, and the APA. TCApx055-056.

Confirming that Keystone is subject to these laws, State conceded it had to conduct the environmental reviews they require. TCApx126-128. Consistent with EO 13337’s express recognition that it does not “supersede or replace” the laws governing approval of transboundary pipelines such as Keystone, State adopted NEPA regulations that acknowledge that State must comply with NEPA when it issues pipeline permits. In 22 C.F.R. § 161.7(c), for example, State directed that “[a]ctions normally requiring environmental assessments” include “[i]ssuance of permits for construction of international bridges and pipeline.” Significantly, this regulation specifically references “Executive Order 11423” – the predecessor to EO 13337 – that President Lyndon Johnson issued in 1968 to create a permit process for transboundary pipelines that President George W. Bush further refined in 2004 by issuing EO 13337. 33 Fed.Reg. 11741 (8/16/68); 69 Fed.Reg. 25299 (5/5/04).

The fact that State – the agency charged with implementing both EO 11423

and EO 13337 – (1) adopted a regulation requiring transboundary pipelines to comply with NEPA, and (2), interpreted EO 13337 to require its NEPA review for Keystone – is entitled to “great deference” in construing EO 13337. *Udall v. Tallman*, 380 U.S. 1, 16 (1965). It follows, as the district court correctly ruled, that State’s issuance of its Permit for Keystone was subject to NEPA. Indeed, the Environmental Protection Agency – which is charged with overseeing NEPA compliance – reviewed the Keystone SEIS and found it inadequate. IENAppx147-153.

NEPA shows how Congress constrains agency decisions regarding foreign and domestic commerce, notwithstanding that the President also exercises authority over foreign affairs. Denis Binder, *The Spending Clause As a Positive Source of Environmental Protection: A Primer*, 4 Chap.L.Rev. 147, 147-148 (2001).

The district court properly followed cases holding agency-issued presidential permits are “final agency action[s] reviewable . . . under the APA.” *Sierra Club v. Clinton*, 689 F.Supp.2d 1147, 1157 (D.Minn. 2010) (State-issued presidential permit under EO 13337 for U.S.-Canada oil pipeline subject to APA review); *Border Power Plant Working Group v. Department of Energy*, 260 F.Supp.2d 997, 1018 (S.D.Cal. 2003) (“An agency’s decision not to prepare an

EIS under NEPA” for a presidential permit “is a final administrative decision reviewable under the [APA]”); *Protect Our Communities Fdn. v. Chu*, No. 12cv3062L(BGS), 2014 WL 1289444 *5 (S.D.Cal. Mar. 27, 2014) (“*Chu*”) (court has APA jurisdiction over “issuance of a Presidential permit by an agency, based on its own EIS that was created to comply with NEPA”).

Here, State’s Keystone approvals are final agency actions reviewable under the APA because, as shown below, (1) the President relinquished his “ultimate authority” over the approvals, and (2) Congress, through NEPA and other environmental statutes, curtailed State’s discretionary approval power.

3. The Project Approvals Are Not Presidential Actions Because the President Had No Role in the Final Permitting Decision.

Although EO 13337 gives State broad authority regarding whether to issue presidential permits, section 1(i) requires State to consult with other officials who may object to State’s proposed decision. 69 Fed.Reg. 25300. If the dispute is not resolved, State must “refer the application . . . to the President for . . . a final decision.” *Id.* The “President [may thus] chose to retain ultimate authority to settle any interagency dispute.” *NRDC v. State*, 658 F.Supp.2d 105, 111 (D.D.C. 2009).

But here, President Trump *expressly relinquished* that authority by directing

that the “agency notification and fifteen-day delay requirements of sections 1(g), 1(h) and 1(i) of Executive Order 13337 are *hereby waived*,” thus forfeiting authority over State’s permitting decision. TCAppx156; 82 Fed.Reg. 8663-8664 (emphasis added). This *express* relinquishment dispatches TransCanada’s Motion.

4. The Project Approvals Are Not Presidential Actions Because Congress Required That State Comply with NEPA and Other Environmental Laws Before Taking Action.

“[I]t is ‘error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.’” *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 229-30 (1986) (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1969)). Rather, regulation of transboundary facilities is a “zone of twilight in which [the President] and Congress . . . have concurrent authority.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636 (1952). Contrary to TransCanada’s claims, Congress has constitutional authority over both foreign and domestic commerce. U.S. Const. art. I, § 8, cl. 3 (Congress has authority to “regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes”). And Congress has exercised that power by requiring that *all* “major Federal actions,” including transboundary permits, comply with NEPA. 42 U.S.C. § 4332(2)(C). Congress also restricted State’s discretion through the Endangered Species Act (“ESA”). 16 U.S.C. § 1531 *et seq.*

State's own regulations recognize that a presidential permit is a "major Departmental action" subject to NEPA. 22 C.F.R. §§ 161.7, 161.7(c)(1). Here, "State . . . concluded that . . . the Presidential Permit would constitute a major Federal action that may have a significant effect upon the environment" and "[f]or this reason, . . . prepare[d] an EIS to address [Keystone's] . . . impacts . . . and alternatives." 74 Fed.Reg. 5019. The President acknowledged State's attempted compliance with NEPA and the ESA before approving Keystone:

"To the maximum extent *permitted by law*, the [FSEIS] . . . regarding . . . Keystone . . . shall be considered by the Secretary of State to satisfy . . . (A) all applicable requirements of [NEPA]; and (B) any other provision of law that requires executive department consultation or review (including . . . under section 7(a) of [ESA])."

82 Fed.Reg. 8663 (emphasis added).

State's reviews under NEPA and the ESA were inextricably intertwined with its Keystone approval. As the Permit recites, State only issued it after "having considered the environmental effects of the proposed action consistent with [NEPA], Section 7 of the [ESA] . . . , and other statutes relating to environmental concerns." 82 Fed.Reg. 16467.

Because Congress so substantially “curtail[ed]” State’s authority, State’s approvals are *agency* – not presidential – actions subject to APA review. *Franklin v. Massachusetts*, 505 U.S. 788, 799 (1992). As the *Chu* Court explained, “issuance of a Presidential permit by an agency, based on its own EIS that was created to comply with NEPA,” is subject to APA review. 2014 WL 1289444, at *6.

Even if the Presidential Permit remained “presidential action” despite Congress’ constraints, State’s ROD/NID and FSEIS are nonetheless independently reviewable under the APA. *Oregon Natural Desert Association v. BLM*, 625 F.3d 1092, 1118 (9th Cir. 2008) (“Once an EIS’s analysis has been solidified in a ROD, an agency has taken final agency action, reviewable under § 706(2)(A)”); *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1173 (11th Cir. 2006) (“It is well settled that a ‘final EIS or the record of decision issued thereon constitutes final agency action;’” quoting *Southwest Williamson County Community Association v. Slater*, 173 F.3d 1033, 1036 (6th Cir. 1999)).

5. TransCanada’s Cases Are Inapposite.

The three out-of-circuit cases TransCanada cites (Motion:10-11) ignore EO 13337’s plain language and Congress’ authority over foreign commerce.

In *NRDC v. State*, the court wrongly held that the “President’s authority to

issue permits for cross-border pipelines” under EO 13337 “is completely discretionary and is not subject to any statutory limitation, including NEPA’s impact statement requirement.” 658 F.Supp.2d at 113. The court presumed incorrectly that State’s authority over transboundary pipelines derived solely from the “President’s inherent constitutional authority over foreign affairs;” and “[n]o statute curtails the President’s authority to direct whether . . . State . . . issues a presidential permit.” *Id.* at 109, 111.

Wrong. As shown, EO 13337 expressly recognizes that the President shares authority over transboundary commerce with Congress, which has constitutional power over foreign and domestic commerce. And, Congress has substantially curtailed executive power in that realm by requiring all agencies – including State – to comply with NEPA and the ESA when approving major Federal actions such as transboundary permits.

Furthermore, *NRDC v. State* is distinguishable because there the President “chose to retain ultimate authority to settle any interagency dispute” as a referee under section 1(i) of EO 13337, which “signal[ed] his belief that the issuance of presidential permits is ultimately a presidential action.” 658 F.Supp.2d at 111. Here, as shown, the President *expressly relinquished* that authority. 82 Fed.Reg. 8663.

Sisseton-Wahpeton Oyate v. U.S. Department of State, 659 F.Supp.2d 1071 (D.S.D. 2009) involved the same Presidential Permit as *NRDC v. State* and is similarly flawed. It held plaintiffs' NEPA claims were not reviewable under the APA because State's "actions taken pursuant to Executive Order 13337 [were] presidential in nature." *Id.* at 1082. But, the court rested its "presidential action" determination entirely on the fact that "the President [was] the final actor" because he "retain[ed] the authority to issue a final decision on whether or not to issue the Presidential permit." *Id.* at 1081. Here, as discussed, he *relinquished* that authority. 82 Fed.Reg. 8663.

Sisseton-Wahpeton, like *NRDC v. State*, similarly ignores EO 13337's express reliance on and subordination to Congress' laws, and State's adoption of regulations that enforce NEPA. 659 F.Supp.2d at 1081 ("Here, the President was not acting under statutory authority"). Contrary to this Circuit's precedent noted above, it also fails to recognize that State's ROD/NID and underlying EIS are agency actions in their own right, distinct from the Presidential Permit.

White Earth Nation v. Kerry, Civ. No. 14-4726, 2015 WL 8483278 (D.Minn. 2015), is even more inapposite because it involved State's mere *interpretation* – not issuance – of a Presidential Permit – an action *not* subject to NEPA. 2015 WL 8483278 at *7 (distinguishing *Sierra Club v. Clinton*, 689

F.Supp.2d at 1157, because it “did not decide the issue of whether [State’s] actions pursuant to the Presidential Permits at issue here are Presidential in nature”).

B. TRANSCANADA’S ALTERNATE CLAIM THAT STATE’S ACTION WAS COMMITTED TO AGENCY DISCRETION BY LAW IS UNSUPPORTABLE.

TransCanada also argues that plaintiffs’ claims are unreviewable because they are committed to agency discretion. Motion:15-17 (*citing* 5 U.S.C. § 701(a)(2)). Wrong. State’s procedural discretion is constrained, since its regulations *mandate* NEPA compliance. 22 C.F.R. §§ 161.3, 161.5. NEPA contains specific requirements that agencies *must* follow *before they can issue discretionary approvals*, and courts have consistently enforced those requirements. 42 U.S.C. §4332(2)(C); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). TransCanada’s reliance on cases deferring to “the Executive Branch’s exercise of . . . authority over foreign affairs and national security” – in the absence of the NEPA compliance that is mandated here – is therefore inapt. Motion:15-17.

NEPA is not “drawn in such broad terms that in a given case there is no law to apply.” *Overton Park*, 401 U.S. at 410; *ASSE v. Kerry*, 803 F.3d 1059, 1068 (9th Cir. 2015). NEPA and State’s implementing regulations provide an amply “meaningful standard against which to judge the agency’s exercise of discretion.”

Heckler v. Chaney, 470 U.S. 821, 830 (1985); 22 C.F.R. §§ 161.1-161.12. NEPA places specific limits on “the agency’s discretion to act in the manner which is challenged.” *City of Santa Clara v. Andrus*, 572 F.2d 660, 666 (9th Cir. 1978). Here, State promulgated specific regulations making NEPA compliance *mandatory* for presidential permits. 22 C.F.R. §§ 161.3, 161.5.

That State has broad discretion whether to issue presidential permits “based on the ‘national interest’” under EO 13337 in no way exempts such decisions from NEPA review. To the contrary, “[t]he primary purpose of the impact statement is to compel federal agencies to give serious weight to environmental factors in making *discretionary choices*.” *Monroe County Conservation Council v. Volpe*, 472 F.2d 693, 697 (2nd Cir. 1972) (emphasis added); *RESTORE: The North Woods v. U.S.D.A.*, 968 F.Supp. 168, 175 (D.Vt. 1997) (“Because the case . . . involves a major federal action, where the [governing statute] does not expressly prohibit NEPA analysis, where the agency’s role is not . . . purely ministerial, and where it has discretion . . . to approve or disapprove the transaction, [it] is not exempt from NEPA”).

TransCanada’s reliance on *Jensen v. National Marine Fisheries Service*, 512 F.2d 1189, 1190-1191 (9th Cir. 1975) is misplaced because plaintiffs here are not challenging *regulations*. As *Chu* explained, 2014 WL 1289444, *8, *Jensen* is

distinguishable because “[p]laintiffs do not challenge the Secretary of State’s approval of a regulation” By contrast here, plaintiffs *enforce* State’s NEPA regulations. Furthermore, *Jensen* expressly *assumed* that the challenged action was *not* final. Here, it clearly was. Also, the *Jensen* plaintiffs’ claims were “hypothetical;” here, they are not. *Id.*

C. THE FEDERAL DEFENDANTS’ APPROVALS ARE SUBJECT TO REVIEW UNDER THE ESA.

The district court correctly ruled that plaintiffs could challenge State’s actions under the ESA’s citizen-suit provision (16 U.S.C. § 1540(g)), contrary to TransCanada’s assertions. Motion:17. Section 1540(g)(1)(A) authorizes any person to bring suit “to enjoin *any person*, including the *United States*” for violating the ESA (emphasis added). “Any person” is defined in section 1532(13) to include “any officer, employee, agent, department, or instrumentality of the Federal Government.” That intentionally broad definition encompasses both State (a “department”) and the President (an “instrumentality of the Federal Government”).

TransCanada does not dispute that the ESA’s citizen-suit provision waives sovereign immunity. And it cites no authority interpreting the ESA’s “any person” language to exclude the President. Nor would it matter if it had. State’s actions

here were not presidential actions, as shown.

D. THE DISTRICT COURT’S INJUNCTION IS FULLY WARRANTED.

TransCanada contends the district court’s authority extends no farther than State’s permitting authority. Motion:18 (citing *Save Our Sonoran, Inc. v. Flowers* (“*Save Our Sonoran*”), 408 F.3d 1113, 1123 (9th Cir. 2005)). It argues the permit only authorizes Project activities within 1.2-miles of the U.S.-Canadian border, and thus the court lacked jurisdiction to enjoin any construction outside that corridor. Motion:18 (quoting TCApx183). TransCanada is doubly wrong.

First, State’s permitting authority is not limited to the 1.2 miles of pipeline closest to the border. State has authority to “permit” transboundary pipelines under *any* “such terms and conditions as the national interest may in the Secretary’s judgment require.” 69 Fed.Reg. 29300 (EO 13337). It therefore has authority to constrain construction activities *anywhere* along the *entirety* of the United States portion of the Project.

Indeed, State exercised that broad authority. Its ROD/NID directed that “[n]o actions shall be taken by TransCanada . . . pursuant to this authorization prior to Keystone’s acquisition of all other necessary federal, state, and local permits” regarding the full Project. TCApx183. State also protected the United

States from any “liability arising out of construction, connection, operation, or maintenance” of all Project “facilities, including but not limited to environmental contamination.” 82 Fed.Reg 16468.

Second, State would still have permitting authority over the entire project even if EO 13337 did not already so provide. The purpose of Keystone is to transport oil from Canadian tar sands to the United States, as TransCanada admitted in its 2017 permit application. IENAppx160-161 (proposed Project is an “international project designed to transport Canadian crude oil . . . to refinery markets in the U.S. Gulf Coast region”). Without the border crossing, no Project facilities would be built anywhere in the United States.

As TransCanada conceded in its application, the “border crossing facilities are . . . an integral part of the proposed Project.” IENAppx160. That is why State’s FSEIS describes and analyzes the Project as the construction and operation of “approximately 875 miles of new 36-inch-diameter pipeline and related facilities for the transport of” primarily Canadian crude oil from the international border “to existing pipeline facilities near Steele City, Nebraska.” IENAppx188. TransCanada’s construction and preconstruction activities in the U.S. are thus “so interrelated and functionally interdependent” with the 1.2-mile cross-border corridor “as to bring the entire project within” State’s – and thus this Court’s –

“jurisdiction.” *Stewart v. Potts*, 996 F.Supp.668, 683 (S.D. Tex. 1998) (quoted with approval in *Save Our Sonoran*, 408 F.3d at 1124).

Save Our Sonoran supports this conclusion. There, this Court affirmed an injunction against an *entire* large-scale residential development despite the fact that federal waters under the permitting jurisdiction of the Army Corps of Engineers – the defendant agency – only covered “about 5% of the site.” 408 F.3d at 1118. The district court had found that “any development” of the project site “would impact jurisdictional waters” because of the “interconnected nature of the [desert] washes and the surrounding area.” *Id.* at 1123-24. Because of that interconnection, this Court held that the “whole of the property falls under the Corps’ permitting authority and the [district] court’s authority to enjoin development.” *Id.*

Here, the entire Project is so functionally “interconnected” with the cross-border component that State’s permitting authority extends to the entire Project. No “project designed to transport Canadian crude oil . . . to refinery markets in the U.S. Gulf Coast region” could be built without the international border crossing. IENAppx160-161. The district court thus had authority to enjoin construction (or related preconstruction) activities along any Project segment in the United States.

TransCanada argues that the district court’s injunction is still overbroad

“even if the Court’s injunctive authority reached” beyond the 1.2-mile segment closest to the international border. Motion:19. It contends that any injunction must be “tethered to harms attributable to the statutory violations that the district court found,” and that there is no justification for enjoining Project construction outside the alternative Nebraska route and the 1,038 acres of land that have been surveyed for cultural resource impacts. *Id.* Not so.

TransCanada is wrong about the standard for issuing an injunction in NEPA and ESA cases. Plaintiffs do not need to “tether” their harms to the specific statutory violations found by the court to justify an injunction under *Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 156-165 (U.S. 2010). Plaintiffs need only show that allowing the Project to proceed before State rectifies its NEPA and ESA violations would cause irreparable environmental injury of some type related to their interests. Even though harm is not presumed from procedural violations of NEPA or ESA, “establishing irreparable harm should not be an onerous task for plaintiffs,” as this Court noted in the ESA context in the very case TransCanada relies on. *Cottonwood Environmental Law Center v. U.S. Forest Service*, 789 F.3d 1075, 1091 (9th Cir. 2015).

This is not a case where it is “unclear whether [the project proponent] will actually take any action that would affect the environment around the project site

in the near future.” *Pacificans for a Scenic Coast v. California Department of Transportation*, 204 F.Supp.3d 1075, 1094 (N.D. Cal. 2016). Here, TransCanada is champing at the bit to construct the Project as soon as possible. Motion:2 (TransCanada “request[ed] that it be allowed to proceed, at its own risk and expense, with the preconstruction activities and construction of the pipeline”). Plaintiffs have repeatedly demonstrated that they and the environment would be irreparably harmed by the Project. IENAppx136-139, 233-250.

Allowing Project construction and preconstruction could further harm plaintiffs by “skew[ing] the [State] Department’s future analysis and decision-making regarding the project,” as the district court held. TCApx41 (quote), 26-27. This rationale is grounded in the “practical fact that bureaucratic decision-makers . . . are less likely to tear down a nearly completed project than a barely started one.” *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989) (quote); *Western Watersheds Project v. Zinke*, 336 F.Supp.3d 1204, 1239-1240 (same); *Colorado Wild, Inc. v. U.S. Forest Service*, 523 F.Supp.2d 1213, 1221 (D.Colo. 2007) (same). It is not grounded on the assumption that “government agencies will not comply with their NEPA obligations in later stages of development,” as TransCanada asserts. Motion:21 (quoting *Conner v. Burford*, 848 F.2d 1441, 1448 (9th Cir. 1988)).

Conner addressed an entirely different issue – whether an agency’s sale of no-surface-occupancy leases for oil and gas development required an EIS. The district court had required an EIS because the lease could be modified to allow surface disturbance without future NEPA review. 848 F.2d at 1447. This Court disagreed, noting that removing the no-surface-occupancy provision would certainly require an EIS, and the agency could not ignore NEPA. *Id.* at 1448.

Here, by contrast, the risk is not that State would ignore its duty to prepare an EIS for some future Project modification requiring discretionary approval. The risk is that if TransCanada is allowed to build the Project *before State complies with NEPA*, the Project will *cause* the very impacts that State has yet to study. That *per se* prejudices State’s future analysis.

It also prejudices State’s national interest decisionmaking. State considered both economic and environmental impacts in making its 2017 ROD/NID. TCApx179-182. If TransCanada is allowed to build the Project now, all the construction-related environmental impacts would occur *before* State makes its next national interest determination, reducing the importance of environmental impacts in State’s decisionmaking. There would also be a large economic cost associated with removing the Project or even idling it. Those two factors alone could tip the national interest balance in favor of Project approval.

For these reasons, the district court's injunction is not overbroad.

II. THE BALANCE OF HARDSHIPS FAVORS THE INJUNCTION.

The district court correctly ruled that the balance of hardships clearly favors the injunction. TCApx020-028. "The proper remedy for substantial procedural violations of NEPA and the ESA is an injunction." *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1230 (9th Cir. 1988).

As plaintiffs demonstrated below, TransCanada's claimed economic harms are (1) speculative (IENAppx133-134), (2) at most temporary, not irreparable (IENAppx134-135, citing *League of Wilderness Defenders v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014), (3) self-inflicted (IENAppx135, citing *Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 997 (8th Cir. 2011), and (4) based on the erroneous premise that Keystone was lawfully approved (IENAppx135-136).

The cases TransCanada cites are inapposite. In *Alaska Survival v. Surface Transportation Board*, 704 F.3d 615, 616 (9th Cir. 2012), the court considered defendant's economic harms only in deciding whether to dissolve the stay after *first* determining that the agency had complied with NEPA. Here, by contrast, Keystone's approval was unlawful. In *James River Flood Control Association v. Watt*, 680 F.2d 543, 544 (8th Cir. 1982), there was no "factual basis" for the

plaintiff's claims of irreparable harm.

Here, the record shows substantial and irreparable environmental harm including “[p]ermanent loss of wetlands.” IENAppx136. TransCanada plans to mow 11,666 acres along its right-of-way, and clear 1,916 to 2,316 acres, including 479 acres for contractor yards and between 400 and 800 acres for construction camps. (IENAppx136.) As the district court correctly ruled, State failed to perform cultural resource surveys on over 1,000 acres that Keystone’s construction may irreparably harm. TCApx028. Plaintiffs demonstrated below that the cultural resources that Keystone threatens include “vulnerable unmarked graves of [plaintiffs’] ancestors and other cultural sites such as the camp of Chief Big Foot before he led our people south, only to be massacred by the United States Army at Wounded Knee.” IENAppx256-258 (quote), 259-310. Destruction of these irreplaceable cultural resources – unlike TransCanada’s speculative claims of delayed profits – is indisputably irreparable.

III. THE PUBLIC INTEREST FAVORS THE INJUNCTION.

The district court properly found that the public interest favors the injunction. TCApx028-029. TransCanada’s contrary argument relies on State’s ROD/NID findings that the district court *set aside*, ruling correctly that State failed to analyze Keystone’s cumulative climate impacts and arbitrarily ignored the 2015

ROD/NID finding that Keystone was *not* in the national interest. TCApx028-030. TransCanada impermissibly bootstraps its arguments based on unlawful agency conduct.

CONCLUSION

For the foregoing reasons, TransCanada's Motion should be denied.

Dated: March 4, 2019

Respectfully submitted,

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STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

Date: March 4, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,600 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft WordPerfect 12, Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2019, a copy of the foregoing
**OPPOSITION OF INDIGENOUS ENVIRONMENTAL NETWORK, ET
AL., TO TRANSCANADA KEYSTONE PIPELINE, LP, ET AL.'S
MOTION FOR STAY OF PENDING APPEAL** was electronically served on all
counsel of record via the Court's CM/ECF system.

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APPENDIX

1

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**IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF MONTANA
 GREAT FALLS DIVISION**

INDIGENOUS ENVIRONMENTAL NETWORK
 and NORTH COAST RIVER ALLIANCE, and
 NORTHERN PLAINS RESOURCE COUNCIL,
 et al.,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF STATE,
 et al.,

Defendants,

and

TRANSCANADA KEYSTONE PIPELINE and
 TRANSCANADA CORPORATION,

Defendant-Intervenors.

CV 17-29-GF-BMM
 CV 17-31-GF-BMM

**TRANSCRIPT OF HEARING
 ON MOTIONS**

**BEFORE THE HONORABLE BRIAN MORRIS
 UNITED STATES DISTRICT COURT JUDGE
 FOR THE DISTRICT OF MONTANA**

Missouri River Federal Courthouse
 125 Central Avenue West
 Great Falls, Montana 59404
 Wednesday, October 11, 2017
 1:27 p.m. to 4:17 p.m.

Proceedings recorded by machine shorthand
 Transcript produced by computer-assisted transcription

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PROCEEDINGS

(Open court.)

THE COURT: Please be seated.

Madam Clerk, please call the next case on the Court's calendar.

THE CLERK: This Court will now conduct a motion hearing and a preliminary pretrial conference in the consolidated Case Numbers CV 17-29-GF-BMM, Indigenous Environmental Network, et al., v. United States Department of State, et al., and CV 17-31-GF-BMM, Northern Plains Resource Council, et al., v. Thomas A. Shannon, et al.

THE COURT: Good afternoon.

(Counsel replied.)

THE COURT: I'm feeling a little outnumbered here. Could we have appearances for the record, first, for counsel for the Indigenous Environmental Network.

MR. STEPHAN VOLKER: Good afternoon, Your Honor. Stephan Volker at counsel table for Indigenous Environmental Network and North Coast Rivers Alliance. With me are local counsel James Andy Patten from Billings to my left; and to my right two associates with my firm, Stephanie Clarke to my far right and Jamey Volker to my immediate right.

THE COURT: Welcome.

For Northern Plains Resource Council.

MR. BECHTOLD: Good morning, Your Honor. I mean,

1 good afternoon, Your Honor. Tim Bechtold on behalf of the
2 plaintiffs and Doug Hayes, Jared Margolis, Cecilia Segal, and
3 Amy Atwood.

4 THE COURT: Welcome.

5 For the federal defendants.

6 MR. HAJEK: Good afternoon, Your Honor. Luke Hajek,
7 on behalf of the federal defendants, with the Department of
8 Justice. Also with me from the Department of Justice is
9 Bridget McNeil; and from the State Department, Ted Kill.

10 THE COURT: Okay. And for TransCanada.

11 MR. OVEN: Good afternoon, Your Honor. Jeff Oven on
12 behalf of TransCanada, and with me is Lauren Freeman and
13 Peter Steenland.

14 THE COURT: All right. Well, welcome.

15 So we have two consolidated cases. As I understand
16 it, Indigenous Environmental Network has three causes of
17 action: NEPA violations by all defendants, Endangered Species
18 Act -- its procedural violations by the Fish and Wildlife
19 Service, Endangered Species Act, and Administrative Procedure
20 Act violations by the remaining defendants.

21 Is that correct?

22 MR. STEPHAN VOLKER: Yes, Your Honor.

23 THE COURT: All right. And then, Mr. Bechtold, I
24 think we have five claims from Northern Plains: NEPA and APA
25 violations by the State Department; NEPA and APA violations by

1 the Department of Interior, Bureau of Land Management,
2 Secretary Zinke; NEPA and APA violations by the State
3 Department, Undersecretary of State Shannon, based upon the
4 reversal of the decision -- previous decision to deny the
5 pipeline permit; Endangered Species Act and APA violations by
6 the Interior Department, Fish and Wildlife Service, and
7 Secretary Zinke; Endangered Species Act and APA violations by
8 the State Department and Undersecretary Shannon.

9 Does that cover it?

10 MR. BECHTOLD: That is correct, Your Honor.

11 THE COURT: All right. Then, today, we have a motion
12 to dismiss for lack of jurisdiction filed by the federal
13 defendants and a similar motion filed by TransCanada, as well
14 as a supplemental motion to dismiss -- to address Endangered
15 Species Act claims filed by the federal defendants and a
16 similar motion by TransCanada.

17 Does that cover it, Mr. -- I'm sorry. Is it "Hajek"?

18 MR. HAJEK: "Hajek."

19 THE COURT: "Hajek."

20 Mr. Hajek, does that cover your motions?

21 MR. HAJEK: Yes.

22 THE COURT: All right. Mr. Oven?

23 MR. STEENLAND: Pete Steenland.

24 THE COURT: Oh, Pete Steenland.

25 MR. STEENLAND: That's correct, Your Honor.

1 THE COURT: All right. So we're going to argue --
2 first, I'll have the motion to dismiss and the supplement
3 motion to dismiss argued by the federal defendants. And then
4 we'll follow up with TransCanada's argument in favor of the
5 same two motions; followed by a response from, first,
6 Indigenous Environmental Network and then a response by
7 Northern Plains; and, if time permits, a brief rebuttal by each
8 of the moving parties.

9 Any questions before I proceed?

10 (No response.)

11 THE COURT: All right. Who is going to argue for the
12 federal defendants? Mr. Hajek.

13 MR. HAJEK: I will, Your Honor.

14 THE COURT: All right. Come up, please.

15 (Complied with request.)

16 MR. HAJEK: Good afternoon, Your Honor, and may it
17 please the Court. Just to be clear, I will address all of the
18 arguments that we made in both of our motions to dismiss and
19 both of the supplemental motions to dismiss.

20 THE COURT: All right. I hope I was clear in giving
21 you those instructions. So go ahead.

22 MR. HAJEK: Your Honor, the plaintiffs challenge
23 Undersecretary Shannon's decision to issue a presidential
24 permit for the Keystone XL pipeline. Their claims should be
25 dismissed for lack of jurisdiction. The only authority for the

1 undersecretary's decision to issue the presidential permit was
2 the President's inherent authority over foreign affairs and
3 national security.

4 In these circumstances, the undersecretary was acting
5 directly pursuant to the President's delegated constitutional
6 authority, and his action was presidential action and is,
7 therefore, not reviewable under the Administrative Procedure
8 Act.

9 In addition, the undersecretary's decision was guided
10 only by the instructions in Executive Order 13337, that the
11 issuance of the permit be in the national interest. Given the
12 broad wording of the executive order and the fact that the only
13 source of authority for the President's -- for the decision was
14 the President's constitutional authority in the area of foreign
15 affairs, the decision also was committed to agency discretion
16 by law.

17 In addition, because the undersecretary was
18 exercising the President's --

19 THE COURT: Well, Mr. Hajek, if that's the case, then
20 the President can do what they want in foreign affairs. Is
21 that what you are telling me?

22 MR. HAJEK: No. In fact, the fact that it's a
23 decision in the area of foreign affairs is really only a small
24 part of our argument. We're not arguing that all decisions
25 that may touch on the area of foreign affairs are committed to

1 agency discretion by law or are presidential action.

2 But this specific decision in the absence of any --
3 or any statutory authority, exercised pursuant solely to the
4 President's delegated constitutional authority and under the
5 executive order is both presidential action and is committed to
6 the secretary of --

7 THE COURT: Well, let me ask you: If that's the
8 case, why did the State Department go through the trouble of
9 preparing an environmental impact statement and obtaining a
10 biological opinion for the Fish and Wildlife Service?

11 MR. HAJEK: As explained in the record of decision,
12 it did so as a voluntary measure to obtain input from the
13 public, to conduct a thorough environment and legal --

14 THE COURT: If it's voluntary -- if you look at the
15 President's memorandum on January 24th, 2017, in Section 3,
16 Subparagraph 2, the President directs the Secretary of State to
17 the maximum extent permitted by law to rely upon the prior
18 environmental impact statement and the biological opinion.

19 Doesn't that, "to the maximum extent permitted by
20 law," imply that there's some restriction imposed by the law
21 and ability to do so?

22 MR. HAJEK: We disagree, Your Honor. Just as the
23 Court read from that document, the memo did not say that NEPA
24 applies. It simply said that to the extent -- to the maximum
25 extent permitted by law, this final supplemental environmental

1 impact statement shall be considered to be sufficient to comply
2 with all applicable requirements. But it did not state one way
3 or another that NEPA was applied.

4 And the memo was a clear direction to the secretary
5 to make a decision within 60 days of the submission of the
6 application. So that was the -- that was the primary reason
7 for the memorandum.

8 The other parts of it were to ensure that the State
9 Department completed whatever process it was doing and did not
10 conduct additional processes that were unnecessary.

11 THE COURT: Well, if you look at the memorandum, we
12 have in Section 3, Subsection 2, directing the Secretary of
13 State to rely upon the earlier environmental analysis to the
14 extent permitted by law, to satisfy the NEPA requirements, to
15 satisfy the Endangered Species Act consultation review -- why
16 is this all voluntary? Where does it say this is all --

17 MR. HAJEK: Well --

18 THE COURT: -- "I'm doing this out of the goodness of
19 my heart"? Isn't the President doing this because he's
20 required by law to do it?

21 MR. HAJEK: It simply says, "to the maximum extent
22 permitted by law, the analysis that was already done shall be
23 deemed sufficient" --

24 THE COURT: But why was the analysis already done if
25 the President can just say, "I want to issue this permit"?

1 MR. HAJEK: It was done to allow the public to
2 participate in the environmental review of the process, to
3 ensure that tribes had input into the process as well, and to
4 ensure that there was consideration of environmental factors.

5 THE COURT: So doesn't NEPA ensure the consideration
6 of environmental factors? That's the whole point of this.

7 MR. HAJEK: Yes, that's true, Your Honor, but the
8 first question and the question that we're putting before the
9 Court is whether there's even jurisdiction under the APA to
10 review this decision to grant the presidential permit.

11 THE COURT: Well, I understand that. And, typically,
12 you have a final agency action, the record of decision, and
13 then it's subject to judicial review. Why is this different?

14 MR. HAJEK: Because --

15 THE COURT: Because I have environmental reviews
16 undertaken. I have a record of decision. Why wouldn't this be
17 your typical boilerplate agency action subject to judicial
18 review to follow the procedural requirements of NEPA?

19 MR. HAJEK: Well, the EIS itself is not a final
20 agency action. For that, the Court can look at the Rattlesnake
21 Coalition case in the Ninth Circuit, as well as the Supreme
22 Court decision of *Bennett v. Spear*, which says that an agency
23 action is not final unless it's the consummation of the
24 agency's decision-making process and it's an action from which
25 rights and obligations will flow. And that is not the EIS. So

1 the Court cannot go directly and say --

2 THE COURT: We have a record of decision as well,
3 don't we?

4 MR. HAJEK: The record of decision was a decision
5 made directly pursuant to the President's constitutional
6 authority. In typical cases under the APA, there's a statute.

7 THE COURT: By whom? The record of decision made by
8 the State Department in this case; right?

9 MR. HAJEK: It was made by the undersecretary and not
10 the State Department, Brent Marsh. There was a delegation to
11 the secretary of the President's constitutional authority, and
12 that was subdelegated to the undersecretary.

13 THE COURT: By whom?

14 MR. HAJEK: He alone -- the Secretary of State
15 subdelegated to the undersecretary, and that delegation was --

16 THE COURT: "Subdelegated," is that a term of art?

17 MR. HAJEK: No. It's an official State Department
18 delegation that's written and allows functions to be
19 subdelegated within the State Department.

20 THE COURT: All right. And how does that differ from
21 the Secretary of Agriculture subdelegating to a regional
22 forester decision about whether to approve a timber sale?

23 MR. HAJEK: If there were a decision by the Secretary
24 of Agriculture that was made solely pursuant to the President's
25 constitutional authority, that would be the situation that's

1 analogous here, not a situation under some statute that's
2 applicable to the Department of Agriculture.

3 That's what is so unusual about this case, and I
4 would point to the Jensen case as an example. It's a very
5 similar example. There, the President delegated his
6 constitutional authority to the Secretary of State in an
7 executive order that did not reserve any specific rights or
8 decision-making authority to the President. And in reviewing
9 that, the Jensen court said that for purposes of APA review,
10 the actions of the secretary in approving the regulations are
11 those of the President; and, therefore, the challenge to the
12 regulations was not reviewable under the APA.

13 And that's just what we're saying here. There needs
14 to be a waiver of sovereign immunity, which is in the APA, and
15 the plaintiffs don't dispute that. Their claims are broad
16 pursuant to the APA.

17 There are also -- it's also undisputed that if the
18 President acts under the Supreme Court decisions in Franklin
19 and Dalton, it's a presidential action that's not reviewable
20 under the APA, and that brings us to the Jensen case, which
21 says that for purposes of the --

22 THE COURT: Are there any limits on the President's
23 authority to act?

24 MR. HAJEK: No. No. Absolutely not. I mean, going
25 back to Presidents -- President Grant and the issuance of

1 several kinds of presidential permits since then and up through
2 1968, those presidential permits were handled directly by the
3 President himself, until President Johnson delegated that
4 authority.

5 But, no, in the absence of action by Congress, there
6 is no other authority that governs the President's
7 decision-making.

8 THE COURT: Well, Congress enacted NEPA. Congress
9 enacted the Endangered Species Act. Why did the President
10 prepare that analysis if it's all simply window dressing?

11 MR. HAJEK: Well, and, yeah, it may be prepared as a
12 matter of good policy. There's the Olmsted Citizens case in
13 the Eighth Circuit, which says that if an EIS is prepared as a
14 voluntary measure, that doesn't mean it's reviewable.

15 But, here, again, the fundamental question is APA
16 review. And this is the error that the Chu court made, the
17 California decision regarding the presidential permits for
18 electrical transmission lines. It jumped ahead to the NEPA
19 claim, but NEPA contains no --

20 THE COURT: You called Chu a mistake, and that's the
21 Ninth Circuit ruling.

22 MR. HAJEK: No, no. That's Southern District
23 of California.

24 THE COURT: Oh, I'm sorry. Okay.

25 Let's talk about the Jensen case. You brought that

1 up. In Jensen, the secretary enacted regulations regarding
2 halibut fishing; correct?

3 MR. HAJEK: The secretary did, yes.

4 THE COURT: Yes. All right. And the Court
5 determined that those regulations were not subject -- the
6 decision to adopt the regulation wasn't subject to judicial
7 review.

8 MR. HAJEK: That's right.

9 THE COURT: All right. How is that analogous here?

10 MR. HAJEK: Well, I guess I don't understand how it
11 is not analogous. The plaintiffs have tried to say it's
12 different for a couple of reasons; one, because it involved
13 regulations. Here, it's a permit. Both were decisions made
14 pursuant to the President's delegated constitutional authority,
15 delegated, to the Secretary of State, an executive order.

16 There's no difference between one regulation, when
17 conducted by an agency pursuant to statutory authority, would
18 be the kind of action that would be reviewable under the APA.
19 But because it was not done pursuant to any statutory
20 authority, it was not reviewable on Jensen, and it's not
21 reviewable here.

22 A permit is the same way. Agencies may issue all
23 kinds of permits under statutory authority, but no such
24 statutory authority is at issue here; and, therefore, it is
25 akin to the Jensen case.

1 Another thing that the plaintiffs have said is,
2 "Well, it doesn't involve an APA jurisdictional issue." But it
3 absolutely does. The Court said that under the APA it's not
4 reviewable because it's committed to agency discretion by law.

5 THE COURT: You brought up the Chu decision. Where
6 do you believe the Court went wrong in Chu?

7 MR. HAJEK: Because it didn't address the fundamental
8 question of APA review. It talked about a lot of decisions in
9 which NEPA was reviewed but in those instances that they flowed
10 from a decision that was made pursuant to statutory authority.

11 The Court, in fact, never really addressed our
12 presidential action argument. It tried to distinguish Jensen
13 for the reasons that I gave, that these were regulations, and
14 they tried to say that it wasn't actually an APA jurisdictional
15 issue, but that's not the case. And, instead, they simply
16 looked at NEPA to determine whether they could review a NEPA
17 claim.

18 And in many kinds of cases, a Court can review a NEPA
19 claim, but that's assuming that we get past the jurisdictional
20 hurdle of a decision that's actually reviewable under the APA.

21 THE COURT: So in your view the State Department
22 prepared an environmental impact statement here not to comply
23 with NEPA but simply as a matter of good policy?

24 MR. HAJEK: Yes. In fact --

25 THE COURT: All right. So in following what you

1 describe as good policy, is there any criteria that the
2 environmental impact statement must address, or is it just
3 whatever the President thinks is appropriate?

4 MR. HAJEK: I think it was left to the
5 undersecretary's discretion to conduct that analysis. In fact,
6 the executive order just -- it asked the secretary to consider
7 environmental factors, and it's left to the undersecretary as
8 to how to do that, and the way he did that here was to go
9 through a NEPA process.

10 But the underlying decision itself is still the
11 President's delegated decision, and there's a statute that's
12 referenced in the executive order, 3 USC 301. It says that the
13 President may delegate a function to an agency head that the
14 President otherwise would perform, but that function still
15 remains the responsibility of the President.

16 And if you look at the case law, there's really no --
17 we are not aware of decisions out there that have said when the
18 President delegates his authority to an agency head, that it's
19 reviewable under the APA. We have the four district court
20 decisions that decided in our favor, as well as some of the
21 cases that are cited in those cases; a Supreme Court case in
22 the Second Circuit that we've cited in our briefing for the
23 general principle that when an action is delegated from the
24 President in the area of foreign affairs, it doesn't render
25 that decision judicially reviewable.

1 So this is a sound principle that was applied in the
2 Jensen case. The plaintiffs want to overcome the Ninth
3 Circuit's decision in Jensen, but they've come up with no sound
4 reasons for doing so.

5 I would also mention the Sierra Club case. That was
6 a case decided in a district court in Minnesota that involved a
7 pipeline. And before I get there I would just mention that, as
8 I briefly did, there were two cases involving the original
9 Keystone pipeline: the NRDC case in DC, as well as the
10 Sisseton-Wahpeton case in South Dakota. And both of those
11 courts agreed with us that this was a delegated presidential
12 action that did not render this type of action reviewable under
13 the APA.

14 And, likewise, in the White Earth Nation case also in
15 the District of Minnesota, it found that the State Department
16 interpretation of prior, previously issued presidential permits
17 for pipeline did not render those, that action, reviewable
18 under the APA.

19 But I want to get back to the Sierra Club case
20 because that was another case involving a pipeline. Really, of
21 the four previously decided, this was the only one that didn't
22 find that the issues of a presidential permit for an oil
23 pipeline was not reviewable, but the Court never squarely
24 addressed the issue. Instead, it decided, based on Eighth
25 Circuit law, that the EIS itself was a final agency action,

1 which we've discussed.

2 Even under Eighth Circuit law, the case that the
3 Sierra Club decision relied on involved a finding of no
4 significant impact, and there is law which says that if you
5 make a finding of no significant impact, that's a decision
6 point and can be considered a final agency action under the
7 APA.

8 But an EIS, an environment analysis, for the reasons
9 stated in Bennett v. Spear, there are no rights or obligations
10 from the flow from that. So in our view the district court of
11 Minnesota should not have decided that the EIS itself was a
12 final agency action. But in any case there's no Ninth Circuit
13 case that would hold that way either. So the Court should not
14 follow the reasoning of the Sierra Club case.

15 Excuse me, Your Honor.

16 And just going back to the Chu decision, that was
17 similar in that it jumped ahead to the NEPA claim before
18 considering the threshold APA questions, and it expressed the
19 concern that an agency can shield itself from judicial review
20 of all types of actions because the agency could say they are
21 presidential.

22 And one thing that I wanted to emphasize here is that
23 is absolutely not what we're saying. This is -- the
24 presidential permit issued by the undersecretary is for a
25 1.2-mile-long segment at the border of the United States.

1 That's it. It allows the border crossing and nothing more.

2 The Bureau of Land Management is considering,
3 pursuant to statutory authorities, whether to grant a
4 right-of-way, and that would be a decision. It would not be a
5 presidential action. There might be other defenses that we
6 could potentially raise, but --

7 THE COURT: That decision is pending right now.

8 MR. HAJEK: Yes, it's pending.

9 THE COURT: When is a final decision expected?

10 MR. HAJEK: We don't know exactly, Your Honor. We
11 think it may be sometime later this year.

12 But the point I was making is we're not saying
13 everything related to Keystone XL is not reviewable, not in
14 this motion. We're making a very specific argument about the
15 action by the undersecretary regarding the border crossing for
16 a mile-long crossing at the border.

17 THE COURT: So how does that relate to the rest of
18 the claims, then?

19 MR. HAJEK: It doesn't really. If --

20 THE COURT: Does that resolve the case, in your view,
21 the whole thing?

22 MR. HAJEK: Well, here's the reason I don't think it
23 will. If the Court grants our motions to dismiss, there's
24 still will likely be a decision by the Bureau of Land
25 Management, and that likely will be challenged. It would be

1 likely that we'll rely at least to some extent on the EIS that
2 the State Department prepared. And so, in all likelihood,
3 there could be a NEPA claim relating to this EIS based on the
4 Bureau of Land Management's decision.

5 THE COURT: What about the Endangered Species Act
6 claims?

7 MR. HAJEK: I don't know if those Endangered Species
8 Act claims would apply to BLM, and I'll get to the -- they
9 first have to demonstrate that they have standing for those
10 claims.

11 We discussed that the President's memorandum -- oh,
12 one other point that I didn't mention earlier is the fact that
13 the President issued this memorandum, you know, quite a few
14 years after Executive Order 13337 indicates that the President
15 can at any time step in to alter the process or even to alter
16 the result if he so chose to do so. He in no way relinquished
17 his control over this process by stepping in at the last part
18 of the process.

19 THE COURT: Isn't that true with regard to any change
20 in the administration? You have a new director -- excuse me --
21 a new Secretary of Interior. Hasn't the new administration
22 taught us that, "Well, we're going to change our mind about
23 this particular project," whether it's, you know, a timber sale
24 or some land or oil and gas deal on some land or something? As
25 long as we have the environmental documents completed, NEPA is

1 satisfied, the administration can change its mind, can't they?

2 MR. HAJEK: Yeah, they could potentially. I'm not
3 sure I follow where that takes us.

4 THE COURT: Well, you were saying you had the
5 President getting involved and changing the outcome. That
6 happens routinely.

7 MR. HAJEK: Right.

8 THE COURT: But that doesn't necessarily relieve the
9 agency from following the requirements set by Congress from
10 NEPA or the Endangered Species Act, does it?

11 MR. HAJEK: Right. Right. Well, I need to back up
12 just a bit. What the plaintiffs have said is that this
13 memorandum has diminished the President's authority. The
14 previous cases that were decided just based on Executive
15 Order 13337, those were different because we didn't have this
16 2017 memorandum.

17 They claim that in this memorandum the President
18 waived his authority over the presidential permitting process,
19 but that's absolutely not the case. He stepped in to assert
20 the role of the President and actually to change the process so
21 that it would be completed more quickly than it otherwise
22 would. It shortened a process that would have allowed agency
23 heads to weigh in on the decision. Those agency heads had
24 already provided input earlier. So the President determined
25 that it was unnecessary to do that again, and, thereby, it

1 removed this provision where the President would step in to
2 resolve those interagency disputes.

3 But the purpose of doing that was to avoid wasting
4 time and energy. And the fact that the President didn't
5 reserve a specific role for himself does not matter legally
6 because the executive order at issue in the Jensen case was
7 similar in that he delegated the function of approving the
8 regulations to the secretary without the approval or
9 ratification of the President.

10 So it's the same thing. The President need not
11 expressly state a role for himself in an executive order in
12 order to make that not a presidential action.

13 THE COURT: I want to get back to your claims about
14 the unique nature of the presidential authority with respect to
15 foreign affairs.

16 MR. HAJEK: Right.

17 THE COURT: How do you distinguish the case in front
18 of us from the Kerry decision of the Ninth Circuit, ASSE
19 International?

20 MR. HAJEK: Well, if I'm remembering correctly, that
21 was a visa program from the State Department, and it was -- it
22 was a statute that enabled this program to occur, and the State
23 Department argued that it was not reviewable because this was a
24 discretionary decision in the area of foreign affairs. And the
25 Court found that it was. It found that it could apply

1 specific, substantive regulations that the State Department had
2 enacted.

3 I don't think the cases are all that similar. The
4 only relevance here is that the Kerry decision states, you
5 know, the general standard, which is an agency action is
6 committed to agency discretion by law if the statute leaves no
7 meaningful standard for review.

8 There was a statute at issue, I think, that
9 distinguishes that case from this one, and we also are not
10 arguing that just because it's in the area of foreign affairs
11 that it's not reviewable. It is a specific function of the
12 President's constitutional authority that was delegated to the
13 secretary. There is no statute that applies, and --

14 THE COURT: And that's because of the small stretch
15 of the pipeline at the border?

16 MR. HAJEK: Right. Right.

17 THE COURT: But there's the language in Kerry that
18 talks about a weak connection to foreign policy is not enough
19 to commit an agency action to the agency's discretion.

20 MR. HAJEK: Right. And I agree. Simply because
21 there's some connection to foreign policy would not make the
22 decision unreviewable, but it's the fact that the executive
23 order delegates that authority and says to the Secretary of
24 State, "Make this decision in the national interest."

25 Similar --

1 THE COURT: Is this 13337?

2 MR. HAJEK: Yes, 13337.

3 THE COURT: Okay.

4 MR. HAJEK: Yep. And similar language in Webster v.
5 Doe that the decision to fire a CIA employee based on what is
6 necessary or advisable in the interest of the United States,
7 that's discretionary language. That's imbued the secretary
8 with the sole authority to make that decision, and it's the
9 type of language that the Supreme Court has said has committed
10 that decision to the agency's discretion by law. And, here,
11 there were no statutory factors for the undersecretary to
12 consider.

13 THE COURT: All right. So the cases that have
14 interpreted 13337 --

15 MR. HAJEK: Right.

16 THE COURT: -- you've got the Eighth Circuit district
17 court cases, and then the Ninth Circuit district court cases.

18 MR. HAJEK: I may have --

19 THE COURT: I'm sorry. There's two -- there's one
20 from the District of Columbia and two from district courts in
21 the Eighth Circuit.

22 MR. HAJEK: No. I misspoke if I had that across.
23 There's the NRDC decision in the District of Columbia. That
24 involves a Keystone pipeline. There's the South Dakota
25 district court decision.

1 THE COURT: Right.

2 MR. HAJEK: That involved a Keystone pipeline. There
3 was the interpretation of the permits. That was district
4 court, Minnesota. And then we had another District Court
5 Minnesota case involving other Enbridge pipelines, and that's
6 the one where the Court relied on an Eighth Circuit case,
7 which it said --

8 THE COURT: Well, they were district court decisions.

9 MR. HAJEK: They are district court decisions.
10 That's right.

11 THE COURT: All right. Those are the cases that have
12 triggered 13337 in your favor?

13 MR. HAJEK: Yes. I mean, except for the Sierra Club
14 decision, which didn't really address that issue, and it just
15 said that it could review the NEPA.

16 THE COURT: All right.

17 MR. HAJEK: Yeah. I'd also like to talk a little bit
18 more about "committed to agency discretion by law." I think
19 it's an important alternative ground for granting our motion.
20 The only standard was the national interest standard in the
21 executive order. The factors that the undersecretary chose
22 were solely of his own choosing.

23 THE COURT: Well, let's back up for a second. What
24 is the phrase, "committed to agency discretion by law"? How do
25 I interpret that?

1 MR. HAJEK: Well --

2 THE COURT: Committed by Congress to agency
3 discretion?

4 MR. HAJEK: It can be, and most of the courts
5 interpreting it have interpreted it as statute, and the case
6 law has reasoned in such a way to say that it's a statute that
7 commits discretion.

8 THE COURT: Wait, hold on. Hold on. So Congress,
9 through affirmative conduct, commits the action to agency
10 discretion. They pass a statute. "Agency, you work out the
11 details on how it gets implemented."

12 MR. HAJEK: Well, I wanted to back up because the APA
13 itself just says "committed to agency discretion by law." It
14 does not say a statute. Virtually, all of the cases have dealt
15 with particular statutes. But in this instance it's in an
16 executive order. It's the President's constitutional
17 authority, and there's no reason the Court couldn't find that
18 that was committed to agency discretion.

19 THE COURT: It is the President's executive authority
20 because the border crossing here?

21 MR. HAJEK: Well, because it's the constitutional
22 authority over the border crossing and because of this
23 language, "the national interest." When courts have
24 interpreted these statutes, if they are statutes that say it's
25 in the public interest or the national interest or advisable in

1 the interest of the United States, those are the kinds of
2 actions that courts have said --

3 THE COURT: Are there limits on that authority?

4 MR. HAJEK: Well, the Court has to make a decision.
5 If the Court views the language in the statute or, in this
6 instance, an executive order as committing the decision to
7 agency discretion by law, then it's unreviewable under the APA.

8 So as far as the limits, that is the limit. There's
9 an initial determination that the Court makes. And in Webster
10 v. Doe, the Court said, "Once the Court makes that decision,
11 the decision is unreviewable." Statutory claims are --

12 THE COURT: So if the President says to the Secretary
13 of Energy, "We need to find a storage facility for nuclear
14 waste; you pick one; I'm giving you ultimate authority to do
15 that; find one for me and get that stuff stored away," is that
16 subject to judicial review?

17 MR. HAJEK: I would want to do the research and see
18 if similar statutory language would match up with what Your
19 Honor described. But if the language said that the Secretary
20 of Energy is to determine within its discretion whether a
21 nuclear storage facility is in the national interest, yes, I
22 would say absolutely, and his decision would not be reviewable
23 under the APA.

24 THE COURT: Would not be reviewable?

25 MR. HAJEK: Right. Right.

1 THE COURT: Same thing if we need to -- the President
2 decides we need to move people and materials quicker and
3 directs the Secretary of Transportation to come up with a route
4 for a bullet train from Seattle to Miami? "You pick it. Grant
5 permits. It's up to you."

6 MR. HAJEK: Well, I want to make sure that I made
7 myself clear. In a situation with the bullet train, there are
8 going to be other, you know, Department of Transportation
9 statutes and regulations that would apply. And so I would
10 imagine that the agency would do NEPA and follow the --

11 THE COURT: Why would they have to if the President
12 said, "I'm committed to your authority"?

13 MR. HAJEK: Because when an action is committed to
14 agency discretion by law, you look at what the action is.

15 A statute could, for example, instruct, you know, an
16 agency head to consider the approval of a bullet train and put
17 all of these procedural and substantive requirements for the
18 agency head to look at, and then say, "Your selection of the
19 route shall be within the agency head's discretion." Then,
20 only that little part of the decision would not be reviewable,
21 but that wouldn't render the whole action unreviewable.

22 What's different here is that there's only one source
23 of authority, and all it says is that it is to do this in the
24 national interest. It's not a statutory scheme where you might
25 have other interweaving substantive or procedural requirements.

1 This is it. That's all that the undersecretary was instructed
2 to do. And so in that particular type of situation, it's not
3 reviewable.

4 And it's similar in many ways to what the Court said
5 about a statutory scheme in Webster v. Doe. Making a
6 determination as to what's advisable or necessary in the
7 interest of the United States, if that's the only factor for
8 the agency to consider, then it's committed to agency
9 discretion.

10 THE COURT: But assume that the oil at issue here
11 were located in Washington State and the President wants to
12 build a pipeline from Seattle to Houston as quickly as possible
13 to get this oil to refineries and out to where it needs to go.
14 No border crossings involved. Can the President issue a
15 memorandum that delegates that authority to the Department of
16 Energy and get that thing done?

17 MR. HAJEK: Well, in that particular instance, the
18 President would have no particular authority to delegate. The
19 President's authority here is over the border crossing. For a
20 domestic pipeline, the President generally plays no role. He
21 might issue an executive order instructing the agents
22 to expedite --

23 THE COURT: Well, I want to clear about this.

24 MR. HAJEK: Yeah.

25 THE COURT: The President's authority only goes to

1 the border crossing?

2 MR. HAJEK: Yeah.

3 THE COURT: What about NEPA or Endangered Species Act
4 claims regarding the rest of the pipeline here?

5 MR. HAJEK: Those could apply to a domestic pipeline,
6 but there would first be some substantive underlying action of
7 the federal government that would occur in order for a case to
8 be reviewable.

9 THE COURT: Right. So --

10 MR. HAJEK: There might be a right-of-way. There
11 might be core permits. There might be other --

12 THE COURT: So the route, as I understand it, goes
13 from the border down to Nebraska --

14 MR. HAJEK: Right.

15 THE COURT: -- and it crosses some federal lands
16 along the way.

17 MR. HAJEK: Right.

18 THE COURT: So there would be decisions by federal
19 land managers regarding the pipe's effect on those federal
20 lands?

21 MR. HAJEK: For the Keystone XL pipeline, there will
22 have to be a decision by BLM regarding a right-of-way. So
23 there will be at some point. It just hasn't happened yet. The
24 only decision thus far is the delegated decision regarding the
25 presidential permit.

1 THE COURT: That affects only the border section?

2 MR. HAJEK: That's right. That's right.

3 And the Court asked about a domestic pipeline. I
4 think it's worth looking at the Western District of
5 Washington's decision, No Oilport! v. Carter, which we
6 discussed in our briefing.

7 Now, unlike the Keystone XL pipeline, it was not a
8 cross-border pipeline, and it didn't require a presidential
9 permit. But like the executive order here, there was a
10 special -- well, there is a statute that required the President
11 to make a determination as to whether a pipeline route was in
12 the national interest. The President made that decision, and
13 the Court noted that it was based on foreign policy national
14 security concerns and found that it was committed to the agency
15 discretion by law and was not reviewable. So in many
16 respects --

17 THE COURT: That was from Alaska to Minnesota; right?

18 MR. HAJEK: Yeah, I think it connected somewhere on
19 the West Coast and then went to the Midwest.

20 THE COURT: How do you get from the north of Alaska
21 to Minnesota without crossing a boundary?

22 MR. HAJEK: They may have shipped it south to
23 California and then gone across.

24 THE COURT: Shipped it south?

25 MR. HAJEK: Yes, I believe what they did is they --

1 there were ships that -- or tankers that took it from Alaska to
2 the West Coast and then had this east-west pipeline.

3 THE COURT: What decision? The decision to choose
4 the route?

5 MR. HAJEK: Yes. So the statute required two things
6 to happen. The President had to select a route and find that
7 it was in the national interest, and then there was also a
8 federal right-of-way that I believe was issued by BLM. And for
9 that the agency prepared a NEPA analysis; and, ultimately, the
10 Court did review that NEPA analysis. But the substantive
11 decision --

12 THE COURT: Why did the agency prepare a NEPA
13 analysis?

14 MR. HAJEK: Because it was both for the -- it was for
15 the right-of-way. Similar to this case, the decision by BLM,
16 which we haven't gotten to, but crossing federal land was the
17 hook that required the NEPA analysis and --

18 THE COURT: I thought in No Oilport! the President's
19 determination that the pipeline and the particular route were
20 in the national interest was beyond judicial review.

21 MR. HAJEK: That's right.

22 THE COURT: The selection of the particular route?

23 MR. HAJEK: Right. And that was the President's
24 decision. But the statute also required BLM's approval of a
25 right-of-way, and that was found to be reviewable, and the

1 Court reviewed the NEPA analysis.

2 THE COURT: Was the NEPA analysis prepared solely for
3 the BLM portion?

4 MR. HAJEK: They did it all together, and they didn't
5 have much time to do it. So I don't know how that EIS would
6 read. But the reason it was reviewable is it was prepared for
7 the right-of-way.

8 THE COURT: All right. Anything else?

9 MR. HAJEK: I'm sorry?

10 THE COURT: Anything else?

11 MR. HAJEK: Well, I do have -- I'd like to talk a
12 little bit about redressability, and there's also --

13 THE COURT: All right. We have a lot of people to
14 talk to today.

15 MR. HAJEK: All right. Understood, Your Honor.

16 Just briefly, on redressability, the Salmon Spawning
17 case, the Ninth Circuit found that Endangered Species Act
18 claims regarding a treaty were not redressable because the
19 Court could not order the renegotiation of the treaty. That
20 was a decision within the authority of the President, and the
21 same is true here.

22 The plaintiffs have pointed to the more recent Mattis
23 decision, which found that a National Historic Preservation Act
24 claim regarding a military base was redressable. But the
25 reason the Court found it to be redressable was that the

1 plaintiffs were not looking to upset the decision to site the
2 base. It was only forward-looking. Whereas here, the
3 plaintiffs are --

4 THE COURT: What case was that? Mattis?

5 MR. HAJEK: Yeah, that is the Center for Biological
6 Diversity v. Mattis.

7 THE COURT: So, wait. They were only looking
8 forward?

9 MR. HAJEK: Right. The Ninth Circuit has
10 distinguished between actions that attempt to undo a decision,
11 like the siting of a military base or a treaty, which are
12 clearly within the executive branch discretion, which would not
13 be redressable. And forward-looking actions, they would seek
14 to require some other kinds of relief. But, here, the
15 plaintiffs clearly are seeking to vacate the permit.

16 THE COURT: The decision has already been made. So
17 you can't undo it?

18 MR. HAJEK: Right.

19 THE COURT: Okay.

20 MR. HAJEK: Right.

21 I would just like to touch on the ESA citizen suit
22 claim. Our arguments are largely the same. It's a
23 presidential action; and, therefore, it's not reviewable. The
24 difference is that the claim relies on the ESA citizen suit
25 provision for its waiver or sovereign immunity and not the APA,

1 but the same principle applies. The ESA citizen suit provision
2 does not expressly mention the President. And as the Supreme
3 Court has stated in Franklin, out of respect for the separation
4 of powers and the unique constitutional position of the
5 President, the silence on this issue is not enough to presume
6 judicial review. So the same standard would apply to EPA as to
7 the citizen suit provision.

8 THE COURT: It has to be expressly provided.

9 MR. HAJEK: Exactly. Exactly.

10 The NEPA claim against BLM, we've discussed that
11 briefly. There's no decision that's been made. It should be
12 dismissed, for lack of a final agency action.

13 And briefly on the standing for the claims against
14 the Fish and Wildlife Service, even at the pleadings stage, the
15 plaintiffs have to plead injuries that are actual and imminent,
16 not conjectural or hypothetical. These general allegations are
17 insufficient to survive.

18 The Northern Plains plaintiffs allege an interest in
19 three particular bird species that they say they have observed
20 and plan to observe these species somewhere in certain states,
21 but they don't say that will be in the actual project area.

22 THE COURT: Well, have you provided a route for the
23 public yet?

24 MR. HAJEK: There is a route that's been analyzed. I
25 think it's discussed in the --

1 THE COURT: Is that part of the administrative record
2 in this case?

3 MR. HAJEK: It's discussed in the supplemental EIS,
4 yeah.

5 THE COURT: Okay.

6 MR. HAJEK: And just briefly with respect to the
7 Indigenous Environmental Network plaintiffs, they allege an
8 interest of no particular species. They allege that they are
9 interested in all of the species that are listed in the
10 biological opinion, but they don't come up with specifics. And
11 those allegations are simply too general to survive the
12 pleading stage.

13 I would just like to leave the Court with a few
14 thoughts, some of which I have already mentioned, but the
15 issuance of the presidential permit is not a typical action.
16 It's a very specific action related to the border crossing, and
17 it derives from the President's delegated constitutional
18 authority.

19 And this is not a typical APA action. Over the past
20 ten years, there have been a handful of these cases regarding
21 presidential permits. But prior to ten years ago, there were
22 no such challenges to presidential permits for oil pipelines,
23 and plaintiffs are seeking to normalize this sort of lawsuit.

24 We request that the Court carefully consider our
25 arguments and dismiss the case for lack of jurisdiction.

1 THE COURT: All right. Thank you, Mr. Hajek.

2 Mr. Steenland. Did I say that correctly?

3 MR. STEENLAND: Yes, sir.

4 Good afternoon, Your Honor. May it please the Court.

5 I'm Peter Steenland on behalf of TransCanada, the intervenor

6 here. We thank the Court for intervention and for directing

7 our motion to appear here.

8 This is the first time I've ever been in this

9 courthouse. It is possibly one of the most beautiful

10 courthouses I've ever seen in my career.

11 THE COURT: Well, welcome.

12 MR. STEENLAND: But I have to say that, even though

13 it's very spectacular, there's one thing that all federal

14 courthouses share in common, and that is that the key to the

15 courthouse is the same in every situation. That's the

16 Administrative Procedure Act. It's the only way you get into

17 any federal court, here or anywhere else.

18 And what we know about the APA -- let's take the

19 basics. First of all, there's no private right of action under

20 NEPA. The Ninth Circuit has said so. We know that for sure.

21 Plaintiffs don't disagree.

22 Number 2, it's the APA that provides the private

23 right of action under NEPA. That's how you bring a case, a

24 NEPA case, in any federal court.

25 Number 3, we know from the Supreme Court that the

1 President is not an agency for purposes of NEPA. Franklin says
2 so expressly, Franklin v. Massachusetts, and other courts have
3 followed, including the Ninth Circuit.

4 And so, therefore, if the key of the courthouse is
5 the APA and the presidential actions are not agency actions
6 subject to the APA, you have got to find another way to
7 challenge a presidential action because you can't just walk in
8 and say, "I disagree with what the President did."

9 Now, if you have a constitutional claim, that's
10 different, but we're not there today. That's not what we're
11 talking about.

12 Here, the plaintiffs, Your Honor, have very carefully
13 structured their argument to get into the courthouse using that
14 APA key by saying, "It wasn't the President. It was the State
15 Department." And, "This wasn't presidential action. This was
16 agency action."

17 Now, what do we know? We know that until the early
18 1970s, these permits were actually signed by the President.
19 I've got a couple of my files where we see Dwight Eisenhower's
20 signature and other people. Lyndon Johnson said he was going
21 to delegate that authority. And, most recently, Executive
22 Order 13337 expressly says that for projects like this the
23 State Department has been given the President's power. That's
24 the executive order.

25 What's interesting about this, Your Honor, is that

1 unlike other executive orders, there is no statute. And this
2 goes against another background which is that when it comes to
3 oil pipelines -- probably thanks to Lyndon Johnson,
4 Sam Rayburn, and a bunch of other people -- there's no federal
5 control. It's not like a natural gas pipeline. There's no
6 grand scheme to license oil pipelines.

7 If you or I wanted to build an oil pipeline that
8 never crossed a federal piece of property, that never crossed
9 the wetland, and that never had any other federal impact, you
10 would never see a federal person anywhere because there's no
11 federal control.

12 In this case, this pipeline crosses the Canadian
13 border. And what does that do? That triggers what kind of
14 authority? Inherent constitutional authority of the President
15 over foreign policy. How far back does it go? It goes back to
16 the 19th century when the President decided not to allow
17 foreign corporations to run telegraph lines into the United
18 States because they were monopolies, and they weren't giving US
19 companies a chance to compete.

20 More recently, ever since Executive Order 13337, we
21 have had delegation by the President to the Secretary of State
22 to decide, what kind of issue? The question of whether it's in
23 the national interest. What do we know? We know that the
24 Jensen case says that when the President delegates his inherent
25 foreign policy, the action remains presidential and is not

1 reviewable. It's presidential action.

2 Now, if the only power, Your Honor, comes from an
3 executive order, if there's no statute, then there can be no,
4 quote, "agency action." Because under the APA, "agency action"
5 is defined as whole or part of the an agency rule, an order, a
6 license, a sanction. Well, how do you issue rules, orders,
7 licenses, or sanctions? Congress gives you the power to do so
8 when Congress writes a law.

9 I think this whole case could be disposed of --
10 (clap) -- like that, if you simply said you need a statute to
11 justify agency action. Otherwise, what the agency is doing is
12 ultra vires.

13 And so if the President says, "I want a pipeline from
14 the State of Washington to Georgia," the Department of Energy
15 is going to respond by saying, "Mr. President, you'd better go
16 to Congress and get me a statute that empowers me to spend the
17 resources and commit the staff and make the decisions and hold
18 the meetings and then decide this. Because unless and until
19 you do, I have no power. It's ultra vires."

20 And in this case what's particularly ironic -- and
21 here's where I have a little friction with the federal
22 government. The federal government decided that although its
23 authority over the border crossings was 1.2 miles, they would
24 do an environmental impact statement for the whole project.
25 Why? This was the question you asked Mr. Hajek 15 minutes ago.

1 Why are you doing this? Why are you writing a massive EIS?
2 Why did you hold us up for four years with drafts and finals
3 and supplements and everything if you didn't need to do it?

4 The answer to that is found expressly in the State
5 Department's record of decision, national interest
6 determination, part of the record, page 4. They said, "The
7 purpose of preparing an environmental impact statement and
8 undertaking the other statutory processes was to produce a
9 comprehensive review to inform decision-makers and the relevant
10 executive branch agencies about the potential environmental
11 impacts of the program of the proposed project."

12 In other words, "Because we wanted to, because we
13 could, and we did it almost as a matter of grace." They didn't
14 use the word "grace." They said "policy." But it's basically
15 the same concept.

16 And what that means is that this was not standard
17 NEPA agency action. This was a decision by the President
18 delegated to the State Department. How do we know it's not
19 NEPA? Go to the ESA. Very simple. Because NEPA is
20 triggered -- 1022(c) of NEPA says, "You shall prepare a report
21 on every proposal or proposed federal action." Here we go.
22 Here's that word again, "action." In other words, unless you
23 have something that an agency is doing as part of its organic
24 mission, there's no NEPA duty. It's that obligation to act --
25 whether it's a permit or to do this or to do that -- that

1 triggers NEPA.

2 And if the President is not subject to NEPA and if
3 the President is not an agency, then when the President directs
4 the State Department to do NEPA, it's an act of grace.

5 Plaintiffs don't like that. What plaintiffs say is,
6 "No, no, no. Now, that doesn't work because what you did was
7 you signed this memorandum on January 24th. You gave away the
8 story. You basically abdicated. And so somehow that
9 memorandum transmuted a presidential action into an agency
10 action. And that's how we get into the courthouse because now
11 it's APA time. We can open the door."

12 Not so fast. The reason is because that doesn't
13 follow with regard to the language of that memorandum. If you
14 look at that memorandum, there is no cession of authority. The
15 January 24th memorandum, there is nothing in there about
16 relinquishing power or anything like that. If there's
17 anything, it's, "Hurry up. I'm changing some of the processes
18 because they are necessary and a waste of time."

19 Furthermore, what is this business about somehow
20 using an executive order or, in this case, a presidential
21 memorandum that could imbue the State Department with organic
22 authority to act as an agency? That doesn't work. That
23 concept doesn't fly. The President can't say, "Well, I'm going
24 to give you new duties that are statutorily based, executive
25 action."

1 And when I was looking at this, we were -- we found a
2 case by Justice Frankfurter, a 1948 case that directly answers
3 this. In 1795, Congress passes a statute called the Alien
4 Exclusion Act, 1795. They said, "If the United States declares
5 war and there are any citizens in this county -- if there are
6 any people in this county who are citizens of the country
7 against whom we declare war, you are out of here." That's back
8 a long way.

9 Now, President Roosevelt changed that. What
10 President Roosevelt did was he issued an executive order and he
11 said, "This statute applies to people to whom the attorney
12 general makes a finding that they are dangerous."

13 And one of those people who was subject to that
14 finding sued to challenge his expulsion, and he said, "This is
15 reviewable because it's not the full panoply of presidential
16 powers."

17 And in this decision, which is *Ludecke v. Watkins* and
18 cited in our brief, the Court says that just because you're
19 using less power than was given you, doesn't mean that the
20 action is not reviewable. I think that makes perfect sense.
21 It certainly suggests to me that there's no way this simple act
22 of accelerating the decision-making process changed the
23 fundamental nature of what we're doing here. And that's at the
24 heart of this. I mean, somehow the plaintiffs have to persuade
25 you that this transformed what was presidential action.

1 Now, you also asked the question about the statement
2 by the President on January 24th, which has to do with the
3 maximum extent permitted by law and all of that. My response
4 is a little different from the Department of Justice. I recall
5 that on maybe the second or third day when I was on a job, I
6 said or did some things that I would prefer to have rewritten
7 later to make slightly more clear and slightly more explicit.

8 I'm not disavowing this, but what I am saying is that
9 what this is intended to do in my perspective is to say,
10 "Whatever is out there that might slow you down, to the maximum
11 extent you possibly can, this is okay if we need it." It's
12 almost a belt-and-suspenders approach.

13 But when you take that statement and then you match
14 it up against what the State Department said in the exercise of
15 presidential powers when issuing the permit, the record of
16 decision, the State Department said, "This determination is
17 presidential action made through the exercise of delegated
18 authorities; and, therefore, the requirements of NEPA, the ESA,
19 and other similar laws that do not apply to presidential
20 actions are inapplicable here." That's page 4 of the record of
21 decision signed by the secretary.

22 That tells me that the State Department knew exactly
23 what it was doing. The State Department knew exactly what the
24 basis for its actions were; and, therefore, this is not
25 reviewable.

1 Now, there are a couple other arguments that
2 plaintiffs make that I want to dispose of very quickly.
3 Number 1, they said that the State Department agreed that NEPA
4 applied. No, it didn't. Statement Department just said this
5 right here. The State Department has customarily prepared
6 environmental impact statements. They did one for the original
7 Keystone case. They did one for the Alberta Clipper. And they
8 have done them on each occasion because they think this is
9 going to inform the decision-maker.

10 THE COURT: All acts of grace.

11 MR. STEENLAND: Yes, Your Honor, exactly.

12 THE COURT: People in Montana are not accustomed to
13 receiving grace from Washington.

14 MR. STEENLAND: You know, I think that there are more
15 people than just in Montana who are a bit surprised by grace
16 from Washington.

17 But, you know, there are any number of actions that,
18 when taken, trigger a statutory duty, and that's the
19 difference. For example, as Mr. Hajek was saying, the fact
20 that our pipeline proposes to cross less than 30 acres of
21 federal land in Montana, BLM land, and the fact that the
22 President is issuing a permit, that doesn't change the BLM
23 decision. That doesn't impact the Mineral Leasing Act. The
24 Mineral Leasing Act is BLM's job, and they are going to do that
25 for a domestic pipe or an international pipe. And that

1 triggers their NEPA duty. It triggers their ESA duty. But as
2 you said earlier, or asked, if this pipe were a domestic pipe,
3 the State Department would have no role. It would have no role
4 at all.

5 Now, let me talk briefly about these district court
6 decisions.

7 THE COURT: Well, before you do that, let me just
8 understand your rationale.

9 MR. STEENLAND: Yes, sir.

10 THE COURT: You mentioned the Alien Exclusion Act,
11 1795. So the President directs that if the US declares war and
12 there is a citizen of the foreign hostile power living in the
13 United States, they can be excluded.

14 MR. STEENLAND: That's right.

15 THE COURT: Now, fast-forward to World War II, and
16 President Roosevelt directs the attorney general to exclude not
17 noncitizens but to round up citizens that the attorney general
18 deems to be --

19 MR. STEENLAND: Dangerous.

20 THE COURT: -- dangerous. Right.

21 MR. STEENLAND: Deemed by the AG to be dangerous.
22 That's right, Your Honor.

23 THE COURT: And the Court allowed that to happen.

24 MR. STEENLAND: No. What the Court said was that
25 decision was not reviewable. The person about to be excluded

1 said, "Well, what you have done is you've changed the authority
2 to make it susceptible to judicial review." And here's the
3 sentence: "It's a war power of the President not subject to
4 judicial review," which it wasn't. It's not transmuted into a
5 judicially reviewable action because the President chooses to
6 have that power exercised with narrower limits than Congress
7 authorized. That's my point.

8 THE COURT: And that policy worked out well.

9 MR. STEENLAND: Yes, indeed. Yes, indeed. Now --

10 THE COURT: And Congress ended up paying reparations
11 for those acts.

12 MR. STEENLAND: Congress authorized this in 1795,
13 and --

14 THE COURT: Well, my point was if we had judicial
15 review in 1945, we might not have ended up with the --

16 MR. STEENLAND: You didn't have judicial review in
17 '45, and you didn't have it --

18 THE COURT: Maybe that was a mistake the Court made
19 in '45.

20 MR. STEENLAND: You know, I -- I am not going to get
21 into --

22 THE COURT: Congress stepped in to reward reparations
23 to persons who were placed in internment camps.

24 MR. STEENLAND: That's different. That's internment.
25 This is exclusions of noncitizens.

1 THE COURT: Noncitizens, okay.

2 MR. STEENLAND: Noncitizens, Your Honor. We're not
3 going there. No, no, no. I'm not talking about that at all.
4 These are noncitizens living in the United States. Very
5 different situation.

6 Now, you asked the question, "Well, can the President
7 do anything he wants?" My answer is, "It all depends. It all
8 depends on what he's doing." Obviously, there are certain
9 areas in foreign policy that are reviewable.

10 Supreme Court case, Japan Whaling, there too the
11 State Department says, "Oh, foreign policy, you can't touch it.
12 Don't look at it." But the Supreme Court said, "No, no, no.
13 We have standards there, and you have a duty. Congress
14 created -- congress wrote a law and gave you specific
15 authority. Whether it makes our allies uncomfortable or not,
16 it doesn't matter." We've got the key to the courthouse.
17 There's action there. It's not inherent presidential action.

18 And so what we are arguing today, it's the same thing
19 we argued to Judge Leon. It's the same thing we argued to
20 Judge Kornmann in -- South Dakota. It's a very narrow
21 approach, which is that when the President does something
22 exercising his inherent constitutional authority, that that
23 action is susceptible of delegation and is not judicially
24 reviewable because it's not agency action under the APA.

25 THE COURT: So how do you distinguish and synthesize

1 the district court decisions?

2 MR. STEENLAND: I think the district court
3 decisions -- I've got two answers. Number 1, they are not
4 nearly as well reasoned. We think Judge Leon just nailed it.
5 He's got the correct analysis.

6 As Mr. Hajek said, if you follow the decisions in the
7 other cases, what you see is two errors. Error Number 1,
8 somebody said that, "Oh, well, I'm just reviewing the EIS.
9 That's reviewable." That's not the law in this court. It is
10 certainly not the law in the Ninth Circuit.

11 An EIS -- and I don't want to go off into a long
12 discussion on NEPA, but an EIS is not reviewable. And what the
13 district judge in *Sierra Club v. Clinton* in Minnesota was
14 saying was based not on EIS but on a decision to approve an
15 environmental assessment and a finding of no significant
16 impact, which is a green light to get ahead. It's totally
17 different.

18 If, for example -- and let me just take a minute to
19 explain this because it's important. If the federal highway
20 department decides to change a ramp on I-15, it's going to
21 spend some money, it's going to trigger NEPA, and maybe what
22 they are going to do is an environmental assessment, which
23 concludes with a finding of no significant impact, the FONSI.

24 Now, if they do an EA and a FONSI, what that means is
25 it's a green light to build the ramp. We're done. So that is

1 arguably reviewable.

2 But if the federal highway and Montana highway
3 concludes that this ramp is going to have such impact that
4 they've got to do an EIS, that EIS is not reviewable because
5 it's a study. It's a report. It's one more government report
6 on the shelf. And until somebody comes along and makes a
7 decision to build or not build a ramp, the EIS is of no
8 consequence, which is why the Ninth Circuit has said that in
9 NEPA, an EIS is not judicially reviewable. The judge in
10 Minnesota got it wrong for that reason.

11 Number 2, he relied on a Supreme Court case that
12 people have misinterpreted. Ohio Forestry, Judge Breyer just
13 got a little sloppy with dicta. There have been a number of
14 cases clearing it up. We cite the cases in our brief that
15 clarify that. And, therefore, I don't find that case
16 persuasive.

17 In Border Crossing, the other case, jurisdiction was
18 never challenged. So that case tells me nothing. Nobody ever
19 raised it. I don't know if somebody was asleep at the switch
20 that day, or they just didn't bother.

21 And then the third case is this Protect Our
22 Communities v. Chu, and all that judge did was to say, "I like
23 the Sierra Club case better than anybody else, better than any
24 of the others."

25 So we think that we clearly have the better of the

1 cases. But you know what? I don't think we need to go there.
2 And the reason I don't think we need to go there is because
3 they are all district court cases, and you can do what you want
4 as another district court judge. You are not bound by any of
5 them.

6 However, what we might want to do is focus on Supreme
7 Court and Ninth Circuit cases, and that's going to help us if
8 we just take these six cases and put them aside. We're bound
9 by Franklin v. Massachusetts. It says the President is not an
10 agency. We're bound by Jensen that says that the President can
11 delegate the agencies without any further review. And when he
12 does, that's still presidential action. We're bound by ground
13 zero that makes it abundantly clear the President is not
14 subject to NEPA.

15 THE COURT: So, Counsel, if the undersecretary in
16 this case had determined that the permit would not be in the
17 national interest, the President couldn't overrule that?

18 MR. STEENLAND: The President could certainly
19 overrule that. Absolutely. Because the President never gave
20 up any of his authority. What the President said was, "You
21 make a decision quickly." And as Judge Leon said, "The
22 President continues to exercise his power by acquiescence."

23 And so I would think that it would be a terrible
24 misunderstanding, particularly in this context, where this
25 project was so visible and where the goal was to green-light it

1 as quickly as possible, to presume that somehow if the
2 undersecretary got up on the wrong side of the bed and said,
3 "I'm going to kill this rascal," that that would be the last
4 word. I do not think so, Your Honor. I do not think there's
5 anything like that.

6 But let me add one last thought here because I know
7 I'm taking a lot of your time, and I thank you for it. Let's
8 just say that for whatever reason you like those other
9 decisions and you think that somehow this is agency action.
10 There's another part of the APA that still did not give you the
11 key to the courthouse, and that's discretion. Because what the
12 secretary was charged with and delegated with was a national
13 interest to determination.

14 And as the ROD says, same page -- page 4 is a big
15 deal -- "No statute establishes criteria for this
16 determination. The President or his delegate may take into
17 account factors he or she deems germane to the national
18 interest."

19 So let's talk about the national interest. We look
20 at the ROD. What do they say? "We want to be nice to Canada.
21 We want a reliable supply of crude oil from a neighbor who is
22 friendly. This is good for the economy. Let's talk about a
23 number of other things."

24 The national interest is a very elusive concept,
25 particularly in foreign policy. And with all due respect, when

1 we get into that bailiwick, we are walking right into the
2 admonition of *Waterman Steamship* in the Supreme Court. This is
3 not the Court's job.

4 Do we argue to you that because this pipeline is
5 going to give us a more reliable supply of crude from Canada
6 than what we might get from Venezuela or the Middle East that
7 this is more in the national interest? Should we argue to you,
8 as was concluded by the previous administration, that this
9 permit should not issue because it would compromise the
10 President's ability to negotiate overseas on climate change?

11 Is it the role of this Court to weigh those? Is it
12 the role of this court to say one administration was right and
13 another was wrong? How do you decide that? What are your
14 criteria? I don't think there are any. And that's why under
15 the APA things that are committed to agency discretion are not
16 reviewable.

17 So even if everything that Mr. Hajek and I said was
18 unpersuasive and this is agency action, Your Honor, with all
19 due respect, you have no handle by which to adjudicate whether
20 it's right or wrong.

21 Now, Your Honor, plaintiffs are going to say, "Oh,
22 yes, you do. There's NEPA." But NEPA doesn't govern the
23 underlying action. NEPA is simply a cover if you're already in
24 agency action. What we're talking about here is what is the
25 national interest when it comes to these kinds of projects.

1 And that I submit is something for the President to decide.

2 I'd like to reserve just a few minutes.

3 THE COURT: Thank you, Mr. Steenland. We're going to
4 take a ten-minute break.

5 (Proceedings were in recess from 2:44 p.m. until 2:56 p.m.)

6 (Open court.)

7 THE COURT: Please be seated.

8 Now the argument from Indigenous Environmental
9 Network, Mr. Volker.

10 And just for scheduling purposes, I assume we'll wrap
11 up the responses around 4:00, and brief rebuttal, and then
12 we'll have time to complete the preliminary pretrial
13 conference.

14 Go ahead, Mr. Volker.

15 MR. STEPHAN VOLKER: Thank you very much, Your Honor.
16 It's an honor and a privilege to appear before you today. This
17 is my first appearance in this courtroom.

18 Before launching into our overarching response to the
19 motions to dismiss, I just wanted to correct a few errors that
20 have been suggested and comments by counsel.

21 This Court's review pursuant to the Administrative
22 Procedure Act is governed by the definition set forth in that
23 statute. That statute defines "agency action" in Section 5 USC
24 551 (13). That subsection defines "agency action" to include
25 orders and licenses. The term "license" in turn is defined in

1 5 USC 551(8). That subsection defines license to mean an
2 agency permit, approval, or other form of permit. So there's
3 no question about that the permit issued in this case falls
4 squarely within the definition of "agency action" in the APA.

5 Secondly, it was suggested that federal courts lack
6 authority to enforce the procedural laws of this land on the
7 grounds that many of those laws do not constrain the
8 substantive discretion of agencies to decide whether to approve
9 or not approve a project.

10 This approach conflates to very different means of
11 regulation: substantive discretion, which is regulated
12 occasionally, and procedural discretion, which is regulated
13 frequently. An example is proposed by NEPA.

14 NEPA constrains the procedural discretion of agencies
15 by requiring that they look before they leap. It lacks
16 substantive control over the agency's decision. It does not
17 tell an agency it cannot leap. It just says, "Before you make
18 the decision whether to leap, that decision must be fully
19 informed by following the procedures prescribed by NEPA in its
20 regulations." That's a very important concept that I will
21 return to throughout my discussion today.

22 A further comment, Your Honor, as the Court is
23 undoubtedly very well aware, we are here before the Court on
24 two motions to dismiss. Motions to dismiss arise under Federal
25 Rules of Civil Procedure Section 12(b). Under *Lujan v.*

1 National Wildlife Federation, a Section 12(b) motion is rarely
2 granted. The following rules apply in reviewing such a motion:

3 First, the defendants' arguments are deemed to accept
4 the truth of plaintiffs' allegations. The Ninth Circuit case
5 on that point is *Leite v. Crane*, 749 F.3d at 1121.

6 Similarly, the Court must draw all reasonable
7 inferences in plaintiff's favor, *Wolfe v. Strankman* 392 F.3d at
8 369, Ninth Circuit, 2005.

9 All obligations of material fact are construed in the
10 light most favorable to the plaintiffs, *Knievel v. ESPN*, 393
11 F.3d at 1072. That's a Ninth Circuit decision in 2005.

12 Accordingly, motions to dismiss for failure to state
13 a claim under Rule 12(b) are viewed with disfavor and rarely
14 granted. *Gillgan v. Jamco*, 108 F.3d at 249.

15 Accordingly, the rule that this Court would follow
16 today in reviewing the pending motions to dismiss is that
17 granting a motion to dismiss is appropriate only when it is
18 clear that no relief could be granted under any set of facts
19 that could be proved consistent with the allegations. That's
20 *Canyon County v. Syngenta*, 519 F.3d at 975, Ninth Circuit,
21 2008.

22 Turning to the merits, Your Honor, there are four
23 principles that guide the Court's review:

24 Number 1, it is undisputed that the APA waives
25 sovereign immunity.

1 Two, it is clear from the pleadings that plaintiffs
2 challenge final agency action that is cognizable under the APA,
3 and I'll return to that point.

4 Three, the State Department's approval is certainly
5 not unreviewable. The reason is its approval here qualifies as
6 final agency action, as I will explain, and it is directly
7 constrained by procedures required by NEPA, the Endangered
8 Species Act, and the APA.

9 Finally, Number 4, plaintiffs' injuries are
10 redressable by ordering that the Department of State comply
11 with the required procedures.

12 THE COURT: Mr. Volker, how do you respond to the
13 argument by counsel that the permit has already been issued? I
14 can't undo that is their claim.

15 MR. STEPHAN VOLKER: Well, that's the nature of any
16 final agency action. The Court has jurisdiction once the final
17 agency action has been taken. It has in this case. As of
18 March 23 of this year, the Department of State took final
19 agency action. It actually issued three approvals. It issued
20 a record of decision and a notice of public interest
21 determination. It approved a supplemental EIS. And, most
22 importantly, it issued a presidential permit. Those are all
23 final agency actions.

24 And, particularly, when they're in combination, all
25 trigger this Court's jurisdiction under the APA, which as I've

1 indicated waives sovereign immunity under *Parola v. Weinberger*,
2 848 F.2d at 958 Ninth Circuit, 1988; and 5 USC 702, which
3 expressly waives sovereign immunity enabling federal courts to
4 exercise jurisdiction to review final agency action.

5 I'd like now to review what constitutes final agency
6 action. First, under the law, the term "final" refers to the
7 consummation of an agency's decision-making from which legal
8 consequences will flow. The citation for that is, of course,
9 *Bennett v. Spear*, 520 US at 177 to 178, 1997.

10 That definition of a final agency action is satisfied
11 here in several respects. First, the record of decision and
12 the national interest determination consummated the Department
13 of State's review of TransCanada's permit application.

14 THE COURT: Mr. Volker, is your argument that I can
15 review the record of decision and the national interest
16 determination, or just the record of decision?

17 MR. STEPHAN VOLKER: Your Honor, our position is that
18 they were issued together, and they should be read together,
19 and that together they constitute a final agency action. And
20 that the Court's review in this case is limited as requested by
21 the pleadings to a determination whether or not the procedures
22 required by law were, in fact, implemented.

23 THE COURT: So, in other words, you are not asking me
24 to decide whether this permit was issued in national interest.
25 You are asking me to decide whether the record of decision, and

1 which was part of that final process, incorporated all of the
2 necessary NEPA and ESA requirements?

3 MR. STEPHAN VOLKER: That's exactly right, Your
4 Honor.

5 Now, as we've seen, issuance of those approvals did
6 have immediate legal consequences. They enabled TransCanada to
7 begin project construction once other related approvals were
8 obtained.

9 And it's also true that the case law on the Ninth
10 Circuit could be clearer with respect to whether or not
11 issuance of an EIS is itself, in addition, final agency action.
12 In the Rattlesnake Coalition v. EPA case, 509 F.3d at 1104, the
13 Court stated that issuance of an EA and FONSI constitutes a
14 final agency action, regardless of whether the agency has
15 decided to fund the project.

16 And that could be construed to suggest that issuance
17 of an EIS, likewise, would constitute final agency action, and
18 we have a number of district court rulings that so hold.
19 However, we're not basing our position at all on the suggestion
20 that an EIS is a final agency action. Rather, in this case,
21 because the final agency action, issuance of a presidential
22 permit, and approval of the ROD were issued hand-in-hand with
23 an EIS, that together that constellation of approvals
24 constitute final agency action.

25 THE COURT: Mr. Volker, how do you respond to

1 counsel's argument that the State Department, the agency, that
2 they would have had no role in this process but for the fact
3 the proposed pipeline crosses the international border, and
4 that the President typically addresses issues related to
5 foreign relations, including these border-crossing type
6 permits?

7 MR. STEPHAN VOLKER: I'm pleased to address that.
8 It's a multiprong response, and I was going to get into how
9 that specific dynamic unfolds in this case, if I might.

10 Your Honor, in this case, we have to go back to the
11 starting point, which is Executive Order 13337. That's the
12 font, according to the federal defendants and TransCanada, of
13 the President's authority to take action in this case.

14 If one examines that executive order, which is the
15 successor to Executive Order 11423, issued by President
16 Johnson, one finds that it could not be clearer that neither
17 President Johnson nor President Bush intended that approvals
18 pursuant to the executive order be free from compliance with
19 other applicable laws adopted by Congress.

20 To the contrary, it could not be clearer that those
21 Presidents, as a matter of respect for Congress, a parallel
22 branch of government, in recognition of the need for comity
23 with a parallel branch of government, expressly provided -- and
24 this appears in several areas, but primarily in Section 5 of
25 Executive Order 13337 -- that nothing in that executive order

1 could immunize decisions thereunder from compliance with all
2 applicable laws, including, of course, those whose breach gave
3 rise to the lawsuits before the Court today.

4 THE COURT: What's the purpose of 13337?

5 MR. STEPHAN VOLKER: It was intended to streamline
6 the approval of transboundary pipeline decisions, and that's --

7 THE COURT: Did that "streamline" mean taking
8 shortcuts when it comes to NEPA obligations or ESA obligations?

9 MR. STEPHAN VOLKER: Not at all.

10 THE COURT: Why?

11 MR. STEPHAN VOLKER: No, it actually -- it purported
12 to streamline. But, as the Court perhaps is suggesting, it
13 didn't do much in that order. Why? Because its plain language
14 to the contrary could not be clearer that compliance with all
15 applicable laws --

16 THE COURT: Please go back to my question. What
17 purpose do they serve? If all you're telling me is it's
18 intended to streamline but it remains subject to all applicable
19 laws, where is the time saving?

20 MR. STEPHAN VOLKER: Well --

21 THE COURT: Is this grandstanding or is this time
22 saving?

23 MR. STEPHAN VOLKER: The federal government regulates
24 oil pipelines when they cross international boundaries, and
25 Executive Order 13337 and its predecessor, 11423, were intended

1 to provide a permit process allowing the federal government
2 through the Secretary of State and the Department of State to
3 regulate those transboundary decisions, much as other executive
4 orders operate in related fields.

5 For example, in the Chu case, as the Court may have
6 seen, that was an executive order directing the Department of
7 Energy to issue presidential permits in that case where there
8 was the transboundary transmission, either importing or
9 exporting of electricity.

10 In this case we have oil pipelines. The purpose of
11 the executive order is to make clear that the federal
12 government plays a role, because there are national interests
13 at play in a transboundary matter, and at the same time to
14 recognize, as I will explain, that there was absolutely no
15 intention to immunize or insulate such decisions from
16 compliance with all applicable laws and regulations, nor was
17 there any suggestion that issuance of such a permit would
18 confer privileges on any person to sidestep compliance with
19 other applicable laws.

20 If I might -- have I answered the Court's question?

21 THE COURT: Well, I'm still not clear what the
22 streamlining is under your view. Mr. Steenland described the
23 preparation of EIS and the other environment reviews as an act
24 of grace that they didn't even have to do. And so he argues
25 that when, for example, the January 24th memo talks about the

1 maximum extent required by law, that's just window dressing.

2 MR. STEPHAN VOLKER: Yes. Actually, that requirement
3 is an expressed condition of issuance of a transboundary
4 presidential permit under Executive Order 13337, as is made
5 clear in Section 5, which I'll get to in a minute.

6 But suffice it to say is that adoption of this
7 executive order was intended to create a permit process,
8 perhaps streamlining that review, in the Department of State to
9 enable federal agencies to, pursuant to direction from the
10 Department of State, begin a coordinated review of such
11 proposals.

12 Defendants advance three arguments in their effort to
13 transmute agency action into presidential action. The first
14 argument they make is that Executive Order 13337 reflects a
15 pure expression of executive branch authority unconstrained by
16 any countervailing restrictions by coequal branches of our
17 government.

18 And this misapprehension of the nature of 13337 also
19 surfaces in a number of the district court rulings in this
20 realm; and that, apparently, is because counsel in those cases,
21 or the reviewing courts, did not carefully review the terms of
22 13337. That executive order is not an expression or a grant of
23 pure presidential power. It is, to the contrary, an expression
24 of executive authority constrained by congressional power.

25 In the first section of Executive Order 13337, it

1 states, quote, "By the authority vested in me as President by
2 the Constitution and the laws of the United States, including
3 Section 301 of Title 3, United States Code."

4 So that summarizes where this executive order is
5 coming from. It's not a hybrid, perhaps, but it is an
6 expression of executive authority that acknowledges the
7 necessary coextensive review by Congress under its authority
8 under the commerce clause to regulate international commerce,
9 for example.

10 Rather than assert that it displaces all
11 congressional direction to the contrary, Executive Order 13337
12 does just the opposite. In Section 5, it states, quote,
13 "Nothing contained in this order shall be construed to affect
14 the authority of any department or agency of the United States
15 Government, to supersede or replace the requirements
16 established under any other provision of law, or to relieve a
17 person from any requirement to obtain authorization from any
18 other department or agency of the United States Government in
19 compliance with applicable laws and regulations subject to the
20 jurisdiction of that department or agency."

21 Now, presumably, the President, President Bush in
22 this case, meant what he stated and stated what he meant. The
23 language cannot be clearer under reasonable rules of regulatory
24 or statutory construction. When a pronouncement states that it
25 is not intended to supersede other laws, that's how it should

1 be interpreted. When it states that it is not intended to
2 relieve persons from requirements from compliance with
3 applicable laws and regulations, that's how it should be
4 interpreted.

5 THE COURT: But, Mr. Volker, this Executive
6 Order 13337, this isn't directed at the Department of
7 Agriculture or the Department of Interior. This is directed at
8 the Secretary of State. Correct?

9 MR. STEPHAN VOLKER: Yes.

10 THE COURT: And it deals with the subject matter of
11 foreign policy, which arguably has been reserved to the
12 President to decide what's best.

13 So counsel's argument, "Well, this is 'superf-' -- I
14 can't say the word -- "These sections are superfluous. They
15 are acts of grace. They are throwing us a bone here to say,
16 'Well, to whatever extent you might be bound as the President
17 by the statutes passed by Congress, we're not changing anything
18 like that, but speed these permits up.'"

19 MR. STEPHAN VOLKER: Well, that really does take us
20 into a different realm of unbridled presidential power then.

21 THE COURT: Well, but isn't an unbridled presidential
22 power cabined by the fact that we're dealing with an area of
23 foreign policy here?

24 MR. STEPHAN VOLKER: And cabined, yes, Your Honor,
25 and cabined as well, by recognition that Congress regulates in

1 that realm as well.

2 And I can imagine that in fashioning this language
3 President Bush was well aware of the need to show respect for
4 Congress, to not create uncertainty by suggesting that other
5 laws and regulations that might pertain to the subject matter,
6 international pipelines, to not suggest that those laws could
7 be ignored. That would wreak havoc with our form of government
8 where Congress enacts laws, not the President; agencies adopt
9 regulations, not Congress.

10 This carefully threads its way through both realms by
11 confirming that Congress has its role, and the executive branch
12 has its role, and together both branches must work together to
13 assure that all of them exercise the jurisdiction afforded them
14 under applicable law.

15 In this case, all that the plaintiffs have done is
16 ask the agency to comply with NEPA and the Endangered Species
17 Act pursuant to the authority granted this Court to enforce
18 those procedural laws in the Administrative Procedure Act. Had
19 Presidents Bush and Johnson intended to displace and preempt
20 all applicable laws of Congress -- such as NEPA, ESA, and the
21 APA -- perhaps they could have attempted to do so. Doing so
22 would probably create a constitutional crisis in that Congress
23 does regulate in this realm as well, but they didn't. That's
24 the key point.

25 That is not the question before this Court because

1 plainly and clearly, expressly, that is not what these
2 Presidents did. Instead, they did just the opposite. They
3 expressly waived any possible intention to, quote, "supersede
4 or replace the requirements established under any provision of
5 law," close quote.

6 And they expressly disclaimed any intent to, quote,
7 "relieve any person from any requirement to obtain
8 authorizations otherwise required in compliance with applicable
9 laws and regulations."

10 So there you have it, Your Honor. An executive order
11 must be read consistent with its plain language. The plain
12 language here could not be clearer. It calls for enforcement
13 of other requirements established by other provisions of law.
14 Here, we have NEPA, we have the Endangered Species Act, and we
15 have the APA.

16 THE COURT: Mr. Volker, that brings me back to my
17 earlier question. What does Executive Order 13337 accomplish?

18 MR. STEPHAN VOLKER: It provides a permit function
19 allowing the Department of State to regulate transboundary
20 pipelines.

21 THE COURT: Is the President empowered to impose this
22 permit function on the State Department?

23 MR. STEPHAN VOLKER: It is not an unlimited power.
24 It is a power that, as it has been expressed here, recognizes
25 the coequal authority of the Congress to adopt laws in this

1 realm, as it has done. So that, fortunately, we do have a
2 clear expression of the extent of those Presidents' intent in
3 adopting Executive Order 13337.

4 Had this executive order not included Section 5, then
5 I could understand why some of the arguments presented today by
6 the government and TransCanada might hold some force. But the
7 fact is the Presidents were wise enough to make sure that they
8 did not create a schism between the specter of unbridled
9 presidential power, on the one hand, that would allow
10 transboundary permits to issue willy-nilly without regard to
11 compliance with other federal statutes and agency regulations,
12 and the system that we do have in place that does enable the
13 Department of Interior and the EPA and other federal agencies
14 to engage in a careful NEPA process.

15 Bear in mind, Your Honor, this is the case where the
16 EIS was given a failing grade by the Environment Protection
17 Agency. That is the check-and-balance process working. And to
18 allow the President to toss that into the gutter and simply
19 allow approval of a project whose impacts are very substantial,
20 without careful review of those impacts, would be travesty.

21 That's why it falls to this Court to read this
22 language carefully and to give force to the clear, stated
23 intent of those Presidents.

24 THE COURT: Mr. Volker, how do you analyze the term
25 "committed to agency discretion by law" and you believe that

1 this decision, whether to grant the permit, was committed to
2 the discretion of the State Department?

3 MR. STEPHAN VOLKER: It was not committed to the
4 discretion of the State Department without restriction. It
5 was, as expressed in Executive Order 13337, a measured
6 enablement of a federal permit process through the Department
7 of State, which at the same time would have to proceed in
8 coordination with other federal agencies and through the other
9 permit processes required by law.

10 And, in fact, we have seen that that is the process
11 followed for five years. We had 3 million comments on the
12 final EIS, one and a half million comments on the draft EIS.
13 This shows an actively engaged dialogue between the public of
14 this country and the federal government. Exactly what NEPA
15 contemplated. Exactly what Presidents Johnson and Bush
16 contemplated, that there wouldn't be a scenario where you could
17 toss the public and other resource agencies under the bus just
18 to allow a project to proceed.

19 So this does reflect both the expression of the
20 President's constitutional authority to take measures in the
21 realm of foreign affairs, while at the same time it recognizes
22 that Congress has a parallel authority to adopt statutes that
23 regulate in that realm as well.

24 The requirements of law, in summary, Your Honor, that
25 Executive Order 13337 expressly preserved include NEPA, the

1 Endangered Species Act, and the APA, and the regulations
2 implementing them, including the Department of State's own NEPA
3 regulations at 22 CFR 161.7.

4 This completes the analysis, Your Honor, when a
5 federal agency charged with implementing a statute or
6 implementing an executive order adopts regulations to that end,
7 those regulations are given great weight under *Udall v.*
8 *Tallman*, an early '60s Supreme Court ruling and its progeny.

9 Why is that important here? Because, here, the
10 Department of State did, in fact, do what it was supposed to
11 do. It adopted NEPA regulations that expressly acknowledged
12 that the Department of State must comply with NEPA when it
13 issues pipeline permits.

14 The references in 22 CFR 161.7(c), it includes among
15 the, quote, "Actions normally requiring environmental
16 assessments," close quote, which assessments are conducted to,
17 quote, "provide the basis of the determination whether an
18 environmental impact statement is required."

19 The issuance of a pipeline permit, it states that as
20 an example of actions normally requiring environmental
21 assessments, quote, "Issuance of permits for construction of
22 international bridges and pipeline" -- there's no "S." I think
23 it's a typo, but "pipeline." And then it says, paren, (see
24 Executive Order 11423), close paren.

25 Well, Executive Order 11423 is the predecessor to

1 Executive Order 13337. It was the executive order fashioned by
2 President Johnson to create a streamlined central permit
3 process for the Department of State for transboundary pipelines.

4 So it seems pretty evident that where the President
5 directs that the Department of State issue permits and, in
6 doing so, through Executive Order 13337, it makes clear that
7 there was no intention to displace the applicability of other
8 federal laws; that when the Department of State charged with
9 implementing that direction adopts a regulation that expressly
10 references the need for environmental assessments under NEPA
11 for the pipelines that would be permitted under Executive
12 Order 11423, that you really have no remaining question. The
13 agency charged with administering this executive order concedes
14 in its own duly-adopted regulation that NEPA applies.

15 THE COURT: Mr. Volker, before you sit down, would
16 you address counsel's argument regarding redressability, as
17 well as standing by EIN to bring a citizen suit claim for the
18 Endangered Species Act.

19 MR. STEPHAN VOLKER: Yes, Your Honor.

20 First, as backdrop, on a 12(b) motion to dismiss, the
21 allegations of material fact are deemed admitted. Under Lujan
22 v. National Wildlife Federation, on a 12(b) motion, the Court
23 presumes, quote, "That general allegations embrace those
24 specific facts that are necessary to support the claim," close
25 quote. That's at 497 US, at page 889.

1 In this case we have general allegations, admittedly,
2 intended to comply with the Federal Rule of Civil Procedure
3 8(a), which are deemed to embrace under the Supreme Court's
4 articulation of the governing law, deemed to, quote, "embrace
5 those specific facts that are necessary to support the claim,"
6 close quote.

7 How does this relate to redressability? We have
8 violations of two procedural statutes. The complaint alleges
9 the concrete interest of the plaintiffs, Indigenous
10 Environmental Network and North Coast River Alliance. It
11 explains that the government's failure to comply with
12 procedures mandated by NEPA and the ESA caused harm to the
13 environmental interests of plaintiffs because there was less
14 disclosure and analysis of the environmental impacts of this
15 project than required by law, thus, leading to a less
16 well-informed decision.

17 The case law as to that procedural error is pretty
18 clear that the plaintiff need not show that compliance with ESA
19 or NEPA would necessarily protect his concrete interest. The
20 plaintiff need only show that compliance, quote, "could protect
21 his concrete interest." That's in *NRDC v. Jewell*, 749 F.3d at
22 783. Also *Defenders of Wildlife v. US EPA*, 420 F.3d at 957.

23 So, here, we have concrete injuries. We have
24 allegations that they are fairly traceable to the incomplete
25 environmental reviews conducted by the federal government in

1 violation of NEPA and the Endangered Species Act. And,
2 finally, we come to the third prong of the standing
3 requirement, redressability.

4 These are procedural statutes. Under the case law,
5 the redressability component is relaxed. Why? Because it's
6 virtually impossible for a plaintiff to demonstrate that a
7 better-informed decision would lead to a different decision.
8 That harkens back to when we were saying that there is
9 discretion as to procedure and there's discretion as to
10 substance.

11 Here, NEPA is not a substantive statute. It doesn't
12 compel any particular result, but it does compel agencies to
13 carefully review their environmental impacts of projects to
14 ascertain whether there are alternatives that would reduce
15 those impacts or avoid them. And compliance with that
16 procedure is required. It's not discretionary.

17 So, here, we do have a redressability because what
18 plaintiffs request is that the Court order compliance with the
19 environmental reviews mandated by those statutes. And under
20 the case law, it is sufficient if plaintiffs might protect
21 their concrete interests as a result of a more complete
22 environmental review by the federal government.

23 Your Honor, unless the Court has questions, I will
24 sit down.

25 THE COURT: No. Thank you, Mr. Volker.

1 Who is going to be arguing for Northern Plains?

2 Mr. Hayes?

3 MR. HAYES: Yes.

4 THE COURT: Northern Plains.

5 MR. HAYES: Good afternoon, Your Honor.

6 THE COURT: Good afternoon.

7 MR. HAYES: If it pleases the Court, I would like to
8 address some of the presidential-action issues related to
9 the --

10 THE COURT: Before you do that, I'd like you to
11 explain why you think Judge Leon got it wrong in the NRDC case.

12 MR. HAYES: Your Honor, Judge Leon erred, I believe,
13 because he failed to -- this relates to a lot of what
14 defendants and intervenors have argued here today and in their
15 briefs. They characterize this as a challenge to the State
16 Department's determination of what's in the national interest,
17 which is not something that we're challenging here.

18 Now, the Court -- I think it's important to separate
19 the two processes out that the State Department was required to
20 follow in this case before issuing the presidential permit.
21 There's the Executive Order 13337, which lays out the process
22 for issuing a permit. There's an interagency review process,
23 and then the State Department decides whether or not the
24 pipeline is in the national interest.

25 There's a separate process that's mandated by

1 Congress under the National Environmental Policy Act, as well
2 as the Endangered Species Act. And I should say, if it's okay
3 with the Court, I would like to allow -- can I save a few
4 minutes of my time for my colleague, Jared Margolis, to address
5 the Endangered Species Act?

6 THE COURT: All right. A few minutes.

7 MR. HAYES: Thank you.

8 The NEPA process is separate from the national
9 interest determination, and I think that's important because --

10 THE COURT: Well, what's the final agency action?

11 MR. HAYES: Well, the final agency action here were
12 threefold. But, as Mr. Volker said, it was all part of the
13 approval of the pipeline here. Before they issue the permit,
14 they have to issue a final ROD that marks the culmination of
15 the NEPA review and memorializes the final environmental impact
16 statement, and they also have to make a national interest
17 determination. And once those two things happen --

18 THE COURT: Typically, a federal agency in this case
19 issues a ROD, and that's the end of it.

20 MR. HAYES: Exactly.

21 THE COURT: Then we have the second step, though,
22 involving this national interest determination. How do I
23 reconcile those seemingly contradictions?

24 MR. HAYES: Well, again, I do not think they're -- I
25 think that the -- what the defendants are arguing in this case

1 is all framed around plaintiffs trying to challenge the
2 presidential decision as to whether or not this is in the
3 national interest, which is not the case here.

4 Now, Congress has mandated that agencies follow the
5 National Environmental Policy Act for all major federal
6 actions, which the State Department did here. It went through.
7 It decided it was the lead agency. It prepared several rounds
8 of environmental impact statements. And then it ultimately
9 issued a ROD that ended the process and allowed the project to
10 go forward. That's a separate legal obligation than what's set
11 forth in the executive order.

12 The record of decision, under the regulations -- it's
13 40 CFR 1505.2. It requires the agency to discuss which
14 alternatives it considered, which alternative it chose, and so
15 forth. And that's what plaintiffs are trying to challenge
16 here. So this whole argument that we are in here trying to
17 second-guess the State Department's national interest
18 determination is just not true.

19 So in this case there was a final agency action.
20 Well, there were several of them, but the State --

21 THE COURT: How can that be? How can you have
22 several final agency actions? Doesn't "final" mean something,
23 that it is the last one?

24 MR. HAYES: Well, the issuance of the permit was the
25 last one, yes, Your Honor. And under the Administrative

1 Procedure Act, this Court can review the issuance of the permit
2 based on whether or not it complies with NEPA.

3 So in this case you had the final environmental
4 impact statement and the issuance of a ROD that finished the
5 NEPA process, and these are all final -- these are both final
6 steps that the agency issued that allows this Court to review
7 those under the Administrative Procedure Act, not the national
8 interest determination.

9 THE COURT: All right. So go back to Judge Leon, and
10 tell me where he went astray.

11 MR. HAYES: Well, I think that's where I believe he
12 went astray because that decision doesn't consider the fact
13 that the -- it looks at whether or not the decision is
14 committed to agency discretion by law, and it looks at the
15 national interest determination. But in this case --

16 THE COURT: In this case is this matter, the permit,
17 committed to the State Department's discretion by law?

18 MR. HAYES: Not under NEPA, no. The State Department
19 is required to -- it does not have discretion whether or not it
20 complies with NEPA and the regulations. And courts routinely
21 apply a body of case law under NEPA, the regulations, and the
22 statute to agency decisions just like this.

23 The fact that the underlying permit may be
24 discretionary as to what the State Department decides, what
25 policy considerations it decides are in the national interest

1 or are not, is not part of that same analysis that we're asking
2 the Court to apply here.

3 And that's true for all NEPA cases. NEPA is
4 procedural, and it requires agencies to go through certain
5 steps to make sure it has all of the information before it.

6 THE COURT: Let me make sure I understand your view.
7 So the undersecretary here determines that it would be in the
8 national interest, makes a determination that the issuance of a
9 permit would be in the national interest, and issues the
10 permit. Okay. That's the last step.

11 Before you get to that step, though, the
12 undersecretary evaluated the potential environmental impacts,
13 as well as the potential effects on endangered species, and
14 issued -- who issued the record of decision? The
15 undersecretary?

16 MR. HAYES: The undersecretary did, yes, Your Honor.

17 THE COURT: All right. Was that a precursor to the
18 issuance of the permit, or was that --

19 MR. HAYES: It was a -- I believe they were signed by
20 Undersecretary Shannon on the same day, as part of the same
21 overall decision. But, as I said, the permit -- in order to
22 issue the permit, the State Department has to comply with NEPA,
23 Endangered Species Act, and it also has to make its national
24 interest determination.

25 So the question to whether it's committed to agency

1 discretion by law allows the Court to, you know, apply the NEPA
2 and other procedural factors that the agency has to follow in
3 making that decision.

4 Now, the final agency -- the Supreme Court has
5 articulated the test for final agency action reviewable under
6 the Administrative Procedure Act. And in this case, again, it
7 was all the State Department. They received the application.
8 They compiled the EIS. They allowed public comment, and they
9 issued a final EIS record of decision. The President had no
10 part in any of those steps.

11 THE COURT: Well, how do you respond to counsel that
12 the President simply delegated his authority there and that
13 delegation of authority doesn't open up an otherwise
14 unreviewable action to judicial review?

15 MR. HAYES: Again, we're not trying to second-guess
16 the State Department's determination as to what's in the
17 national interest.

18 The one case -- what I think you're referring to is
19 defendants' argument that when the President delegates
20 authority to the State Department and the State Department
21 acts, then that's the same as if the President were acting
22 himself.

23 THE COURT: Right.

24 MR. HAYES: And I think that's a key part of this
25 case, and the one case that the defendants rely on for that is

1 the Jensen case. So I would like to -- I think that's
2 important, and I'd like to discuss that for a moment.

3 THE COURT: All right.

4 MR. HAYES: The Jensen case is -- first of all, it's
5 from 1975. It predates the Supreme Court decisions in Franklin
6 v. Massachusetts, Dalton v. Specter, and Bennett v. Spear,
7 which all articulated the -- it culminated in the Bennett v.
8 Spear tasked for what is reviewable final agency action. And,
9 as I said, it marked the -- this decision marked the
10 culmination of the agency's decision-making process, and it
11 granted legal rights to TransCanada. It allowed the pipeline
12 to be built.

13 So those two tests are clearly met here. But in the
14 source of the underlying authority for the agency to be acting
15 in the first place is nowhere to be found in that test.

16 But, second, Jensen also was based on -- there's one
17 paragraph of analysis in that decision, and it says that
18 because matters of foreign affairs are committed to
19 presidential discretion, then that means, when the State
20 Department is acting in that realm, when an agency is acting in
21 that realm of foreign affairs, then they are automatically
22 committed to agency discretion by law.

23 And, Your Honor, we know from several cases that have
24 been cited by the Ninth Circuit since then that that test just
25 no longer applies.

1 The first is the No Gwen Alliance of Lane County v.
2 Aldridge. That's the Ninth Circuit from 1988. It said, you
3 know -- in that case the Air Force was installing a series of
4 communication towers that would be used for the armed forces in
5 terms of -- in times of a nuclear attack. So it was clearly a
6 matter of presidential authority as commander in chief. The
7 Air Force was not acting pursuant to any statute. And the
8 Ninth Circuit looked at this and said that's no national
9 defense exception to NEPA, and it evaluated that agency's
10 NEPA -- the Navy's NEPA compliance.

11 The same is true for the Ground Zero Center for
12 Nonviolent Action v. Department of Navy, another Ninth Circuit
13 case from 2004. In that case President Clinton ordered the
14 deployment of a missile -- tried a missile facility upgrade in
15 Washington, and the Court looked at whether the President had
16 ordered that deployment and found that it had. But they said
17 that doesn't end the inquiry because the Navy still had
18 discretion in determining how to carry out that decision, look
19 at alternatives, the mitigation measures, and so forth. And it
20 applied NEPA to the agency's -- excuse me -- to the Navy's
21 decision to comply with the commander in chief's order.

22 Now, there was no statute there. It was purely an
23 order from the commander in chief to upgrade this facility, and
24 the Ninth Circuit still applied NEPA to that case.

25 And the same is true for the ASSE International v.

1 Kerry, Your Honor. As you mentioned earlier, that was another
2 case where the Ninth Circuit said that a weak connection to
3 foreign policy is not enough to commit an agency act -- an
4 action to agency discretion.

5 In that case it was a -- it involved the State
6 Department's implementation of a visa program, an exchange
7 visitor program. The Court said, you know, "We can look -- we
8 can apply the State Department's compliance with its own
9 regulation." And that's what we're asking the Court to do here
10 is apply the NEPA regulations and apply the State Department's
11 own regulations to their compliance with NEPA.

12 THE COURT: What about -- we have a District of
13 Minnesota case, White Earth Nation; and a District of South
14 Dakota case, the Sisseton-Wahpeton Oyate Tribe case. How do
15 you distinguish those? What's wrong with those?

16 MR. HAYES: Well, a couple ways, Your Honor. The
17 same is true with those cases as it was with the NRDC v. State
18 Department, Judge Leon's decision, in that they looked only at
19 whether or not the national interest determination is
20 judicable. That's not what we're asking the Court to apply
21 here.

22 Those cases also relied on this provision of
23 Executive Order 13337 that reserved the final discretionary
24 decision in some cases to the President. And as you've heard
25 today with the presidential memorandum from January of this

1 year, the President actually waived that mechanism. So there's
2 no remaining process with Keystone XL by which this decision
3 would make it to the President.

4 THE COURT: How do you respond to counsel's argument?
5 I posed the question: What if the President didn't like the
6 undersecretary's decision? He said the President has the
7 authority to reverse it.

8 MR. HAYES: Well, the executive order delegating that
9 authority to the State Department is still in place. It has
10 been since 2004. And it's possible that the State
11 Department -- or excuse me -- the President could revoke that
12 or amend that delegation of authority and decide to make the
13 decision himself, but those aren't the facts that are before
14 this Court.

15 We have an agency that made the complete decision.
16 It went through -- it purported to comply with NEPA. It
17 decided it was the lead agency, and it made its final decision.
18 So, you know, this isn't a situation where the President had
19 any part of that decision.

20 Now, I'd like to just turn to the 7- -- the APA's
21 exception under 701(a)(2), that talks about whether or not an
22 agency action is committed to discretion by law, which we've
23 talked about. The Webster v. Doe Supreme Court case, Your
24 Honor, we discussed -- which also comes after the -- well after
25 the Jensen case, discussed what it means to be committed to

1 agency discretion by law. It recognized the narrowness of the
2 exception, and it said it requires a careful examination of the
3 purpose and structure of the statute. So in that case it would
4 have involved the CIA firing an employee because he was
5 allegedly a national security threat, and he was trying to
6 challenge that decision in the APA.

7 The Supreme Court looked at that, the structure of
8 the statute, the National Security Act in that case, and said,
9 you know, "This isn't -- the judgment as to who and what pose a
10 national security threat and who should be fired or not by the
11 CIA is a sensitive matter that you can't really have courts
12 coming in and second-guessing the CIA director's decision on
13 such. They are often close calls, and it's just not something
14 that's fit for judicial review."

15 Whereas, here, NEPA is precisely the opposite of
16 that. The purpose and structure of NEPA is to require agencies
17 to have all of the information before it before they make their
18 decision, to involve the public at every step of the way. The
19 Supreme Court has discussed the purpose and structure of NEPA
20 at length in *Robertson v. Methow*, and it guarantees that the
21 information will be made available to the public at every step
22 of the way. So it's clear that Congress did intend for NEPA
23 and the APA to apply to all agency decisions like we have here.

24 And I just want to also touch on the President's
25 actual delegations in this case because I think that's

1 important. I know it's been raised by other attorneys here
2 today, but the government's position is that the delegation of
3 foreign affairs to the State Department under Executive
4 Order 13337 exempts the agency from all environmental reviews,
5 and they only complied with NEPA on this pipeline and others
6 out of the goodness of their heart, or I think as a matter of
7 grace is what TransCanada described it as.

8 But the agency -- even the delegations themselves
9 acknowledge that the agency, that the State Department, that
10 Executive Order 13337 only applied to the State Department.
11 And Section 5 states, "Nothing contained in this order shall be
12 construed to affect the authority of any department or agency
13 of the United States Government or to supersede or replace the
14 requirements established under any other provision of law."

15 So the only situation that this executive order is
16 discussing is the State Department's evaluation of permits.
17 And even there, in 2004, the President is delegating that
18 authority but recognizing that the agency still has to comply
19 with other broadly applicable laws that apply to agency action.

20 And then fast-forward to January of this year when
21 the President issued a presidential memorandum. It didn't --
22 again, it did not come in -- the President did not come in and
23 say, "This is a matter of foreign affairs, and you can go
24 forward without complying with any other laws."

25 In fact, it say said contrary. It recognized that

1 Executive Order 13337 was still in place. It required the
2 decision within 60 days but then acknowledged that NEPA still
3 applies, as you've pointed out earlier. It acknowledged that
4 to the maximum extent permitted by law, I think it said, that
5 the agency should use the previously issued -- it directed the
6 agency to use to the maximum extent permitted by law the
7 previously issued environmental impact statement.

8 So here we have a delegation of authority that even
9 the President on multiple occasions -- in 2004 and, again, here
10 in 2017 -- is acknowledging that the agency is still bound by
11 other laws that Congress has passed.

12 THE COURT: Well, what's the purpose, then, of these
13 executive orders?

14 MR. HAYES: The purpose of -- if you look at -- are
15 you asking what's the difference between the 1968 and 2004?

16 THE COURT: No, I'm sorry. What's the purpose of
17 13337 and the 2017 memorandum from President Trump, if all they
18 do is say, "Comply with the law and review these permits for
19 me"?

20 MR. HAYES: Well, that is the only basis for the
21 State Department -- I mean, Executive Order 13337 sets forth
22 the process by which an agency is supposed to evaluate these
23 permits. It has an interagency consultation process, and it
24 sets forth the process that the State Department should go
25 through and delegates that authority to issue the permits in

1 the first place.

2 And then the decision from -- excuse me -- the
3 presidential memorandum from this year recognizes -- leaves
4 that executive order in place but just amends it by requiring a
5 decision within 60 days, acknowledging that NEPA and the
6 Endangered Species Act still do apply to the agency here, and
7 then removing that one provision that allows -- that would
8 allow the decision to be kicked up to the President in the
9 event of a disagreement between the agencies.

10 So the purpose is -- but nothing in there, again,
11 exempts the -- is even intended to exempt the State Department
12 from complying with these other laws.

13 Let me just see if...

14 Well, Your Honor, unless Your Honor has any other
15 questions, I would turn it over to --

16 THE COURT: I don't think so. Thank you, Mr. Hayes.

17 And then we have Mr. --

18 MR. MARGOLIS: Margolis, Your Honor.

19 THE COURT: Go ahead, Mr. Margolis.

20 MR. MARGOLIS: Good afternoon, Your Honor. Not much
21 has been said today about the Endangered Species Act claims,
22 but what little has been said requires at least a concise
23 response, and I'll try to be as quick as possible.

24 THE COURT: Okay.

25 MR. MARGOLIS: The defendants have argued that this

1 Court should rely on the reasoning in Franklin regarding the
2 APA and apply that same reasoning to the Endangered Species Act
3 context. However, Franklin was reviewing the sovereign ruling
4 and waiver in the APA, and the sovereign ruling and waiver
5 under the Endangered Species Act is quite different. And so
6 this Court has to take into consideration the statutory scheme
7 of the Endangered Species Act to consider whether this is an
8 agency action under that act and falls within that sovereign
9 immunity waiver.

10 Under the Endangered Species Act, agency actions
11 include the granting of permits. And by its terms, ESA
12 Section 7 applies to any action authorized or carried out by an
13 agency. And, here, while the President may be authorizing
14 these permits, it's certainly clear that the State Department
15 here is the one carrying out the issuance of those permits.

16 THE COURT: You would agree, then, that if the
17 President was the one issuing the permit, you wouldn't have any
18 claim under the citizens' supervision of the ESA?

19 MR. MARGOLIS: That's possible, but that's not the
20 facts before us.

21 THE COURT: That wasn't my question. I just asked if
22 that were the case.

23 MR. MARGOLIS: If the President was directly
24 authorizing the permit, then that would change the landscape
25 drastically, but that's never been contemplated. The Executive

1 Order 13337 specifically delegates the decision-making
2 authority to the agency and, as has been pointed out, retains
3 the need to comply with other laws. And I won't repeat that
4 whole argument.

5 THE COURT: Well, let me just -- we're getting a
6 little far afield, but counsel argued, "Look, the federal
7 government typically doesn't regulate oil pipelines." Whether
8 that was something that Senator Johnson or Speaker Rayburn at
9 the time got exemptions for their constituents, but that's the
10 landscape he claims. And unless you've got this cross-border
11 situation that potentially implicates foreign policy, how do
12 you get a hook here to even review these actions?

13 MR. MARGOLIS: Under the Endangered Species Act, the
14 test for whether the agency has to comply with Section 7 is
15 whether that agency has discretion and control to benefit
16 listed species. So, here, it's not about who had the
17 authority. It's about whether the agency retained that
18 discretion and control.

19 The Ninth Circuit in Karuk Tribe specifically said
20 that the relevant consideration is only if the agency can
21 influence third parties to protect listed species.

22 So, here, that's clear. The memorandum that
23 President Trump issued directed the State Department to make
24 final determinations as to conditions on the permit. The
25 permit itself contained conditions regarding protections for

1 the environment and protections for endangered species.

2 So that's the relevant consideration here. It's
3 whether that agency retained that discretion and control to do
4 something to benefit listed species. That's been the test in
5 the Ninth Circuit, and here it's clear that that test has been
6 met.

7 The other issue that was brought up is the Salmon
8 Spawning case. I want to touch on that briefly because Salmon
9 Spawning, I believe, has been misconstrued by the defendants,
10 and I believe it actually goes our way. The Court there
11 allowed Section 7 claims to move forward against the State
12 Department when it was implementing presidential authority. In
13 that case it was a treaty.

14 So even where the Department of State was acting
15 under delegated presidential authority, the Court there, the
16 Ninth Circuit, found that the agency action triggering ESA
17 Section 7 consultation process was the State Department's
18 decision to enter into the treaty on behalf of the United
19 States.

20 Now, certain claims were dismissed in that case, but
21 those claims were brought years later. And the issue there was
22 that the Court could not second-guess the decision to enter
23 into the treaty because that would take both Canada and the US
24 to alter the decision to enter into the treaty.

25 But here we don't have that situation. What we have

1 here is a permit for a project that has not been built yet, and
2 there's been some discussion about whether our claims are
3 forward-looking. In *Center for Biological Diversity v. Mattis*,
4 it made clear what the Court considered to be forward-looking.
5 The Court in that case said that the details of the
6 construction and operation are susceptible to potential
7 alteration and modification.

8 And that's exactly what we have going on here. This
9 has not been built yet. In fact, the borderlines that are
10 going to be in Nebraska haven't even been settled yet. And so
11 all our claims are forward-looking, just as they were in *Salmon*
12 *Spawning* where there's now the opportunity through the formal
13 consultation process to apply potentially better conservation
14 measures for the protection of listed species or to determine
15 that the project would jeopardize these listed species, and
16 that something needs to be done to prevent that.

17 So this is consistent with *Salmon Spawning* and
18 consistent with the regulatory test that has been accepted in
19 the Ninth Circuit regarding discretion and control for agency
20 actions. And, again, the sovereign immunity waiver there has
21 to be looked at within that context.

22 THE COURT: What about the standing question raised
23 by counsel that Northern Plains alleged -- you might have
24 intended particular species, but it's pretty vague. How
25 concrete does the alleged injury have to be to qualify for

1 standing?

2 MR. MARGOLIS: As counsel for IEN pointed out, at
3 this stage general allegations are acceptable for a motion to
4 dismiss. I think that our third amended complaint does provide
5 very specific allegations of injury and causation.

6 The issue that's been brought up mostly by defendants
7 is this issue of whether we are in the vicinity, if we have
8 interest in the vicinity of the project, I believe. Is that
9 what you are asking about?

10 THE COURT: Yes.

11 MR. MARGOLIS: Okay. Well, first of all, the
12 DC Circuit has found that allegations that an organization's
13 members use resources in the vicinity has been determined to be
14 sufficient for a motion to dismiss. That's National Wildlife
15 Federation v. Burford, DC Circuit, 1987.

16 But, here, proximity has to be considered in the
17 context of the claim. This is not a claim about, like,
18 aesthetics where you have to see the area in order to be
19 affected by the project. This is about specific populations of
20 migratory species, and birds move around.

21 The procedures that the defendants were supposed to
22 follow, formal consultation, is intended to prevent harm to
23 those populations. Here, the whooping crane is a great
24 example. We have a very specific flock. It's called the
25 Aransas/Buffalo flock. If that flock is harmed as it moves

1 through the migratory corridor, that affects the ability of our
2 members to see and study that species anywhere through that
3 migratory corridor.

4 So this is very different from the ecosystem nexus
5 theory where any area within that ecosystem that's affected
6 gives you standing. That's not what we're arguing. What we're
7 arguing is that there's impacts to a specific population of
8 birds that can be affected here that will affect our interest
9 in seeing and studying those species in the future.

10 THE COURT: All right. Anything else, Mr. Margolis?

11 MR. MARGOLIS: We have gone through a lot today, and
12 I think at this point, due to the time, I'll have a seat.

13 THE COURT: Thank you.

14 We'll have rebuttal. Mr. Hajek, first. No more than
15 ten minutes, please.

16 MR. HAJEK: Good afternoon, Your Honor. Again, I
17 don't plan to take ten minutes. I think the first thing I'd
18 like to address is counsel's reinterpretation of the executive
19 order and their focus on Section 5, which I don't think got
20 much attention during the briefing.

21 First, it is important to realize that the authority
22 for the presidential permit comes from the President's
23 constitutional authority. It comes from nowhere else. I mean,
24 sometimes I hear the arguments being made that the executive
25 order itself is the source of the authority, but it's the other

1 way around. It comes from the President's constitutional
2 authority. And the only statute that's referenced is this
3 3 USC 301, which just says that the President may delegate his
4 functions to an agency official, and those actions remain the
5 responsibility of the President.

6 Now, plaintiffs have pointed to Section 5, and they
7 say that this evinces an intent on behalf of the Presidents,
8 President Johnson and President Bush, to apply different
9 statutes, like, NEPA, the ESA, and other environmental
10 statutes. But those statutes were not mentioned anywhere in
11 this executive order.

12 Early on, the executive order mentions approval while
13 maintaining safety, public health, environmental protections.
14 But it doesn't say to follow the procedures of NEPA, the ESA,
15 or anything else. NEPA does not apply to the President. And,
16 as we know, there will be other approvals that will be
17 necessary for this pipeline, including the approval of a
18 right-of-way by the BLM.

19 What Section 5 is saying is that nothing in this
20 executive order supersedes other requirements of law or the
21 requirements that other agencies might have for the approval of
22 such a project.

23 THE COURT: Well, how do you respond to cocounsel's
24 argument that, to the extent the memorandum or the executive
25 order even mention requirements to comply with statutes, those

1 are just acts of grace, that they didn't have to do that, that
2 the State Department did that as a matter of goodwill and was
3 seeking input from the public?

4 MR. HAJEK: TransCanada's counsel?

5 THE COURT: Yes.

6 MR. HAJEK: I don't know that I'd put it in exactly
7 the same way, but we agree. They were not required to follow
8 those particular procedures. NEPA doesn't apply to the --

9 THE COURT: Then why did the State Department prepare
10 an EIS and obtain a biological opinion in this case?

11 MR. HAJEK: I think the easiest answer to that, Your
12 Honor, is that when the State Department is faced with doing
13 some kind of analysis to look at environmental impacts that
14 might affect the undersecretary's weighing of the factors that
15 he considers in the national interest, the easiest thing for
16 the agency to do is follow a NEPA process.

17 In fact, if they had to do some other environmental
18 process, they would have to start from square one. So they
19 turned to a process that they were familiar with. But at the
20 end of the day --

21 THE COURT: And why, then, would the memorandum
22 direct them to get comments from other agencies and review from
23 that?

24 MR. HAJEK: Are you talking about the executive order
25 or the --

1 THE COURT: Well, let's talk about the executive
2 order first. All right. So the executive order directs the
3 Secretary of State to defer the application, get the views of
4 all these other departments and agencies.

5 MR. HAJEK: Yes, it does that. That's one thing
6 that's specifically required by the executive order for the
7 Secretary of State to follow.

8 THE COURT: But the law doesn't require that?

9 MR. HAJEK: I'm sorry?

10 THE COURT: The law wouldn't require it?

11 MR. HAJEK: No. These were procedures that were
12 totally created by President Bush in this executive order.
13 Without that, there would be no specific requirement to get the
14 input of these agency heads.

15 So, in any case, Section 5 notes the fact that other
16 statutes, other substantive statutes, may require other
17 agencies to act and for an applicant to get approval from those
18 agencies. But it's reading too much into this to say that this
19 is a requirement that NEPA applies.

20 THE COURT: The executive order further directs the
21 secretary to notify the President, forwarding disputes raised
22 by other agencies to the secretary's decision to the President.

23 MR. HAJEK: Yes. And that specific procedure was the
24 one that was waived in the President's January 2017,
25 memorandum.

1 THE COURT: All right. Anything else?

2 MR. HAJEK: I'd just like to mention the State
3 Department's NEPA regulations. This is not an indication that
4 NEPA applies to the presidential permit at issue here. The
5 regulations state only that NEPA would apply normally to
6 issuance of permits under Executive Order 11423 or the
7 International Bridge Act. Neither of those are at issue here.

8 And the State Department's NEPA regulations were
9 issued in 1980, 24 years before President Bush issued Executive
10 Order 13337 directing the secretary to expedite the reviews of
11 these kinds of applications. There's no mention of NEPA in
12 Executive Order 13337 and no indication that he intended for
13 the State Department to follow its NEPA regulations, which
14 don't specifically mention that executive order.

15 But I would say even if the Court were to say that --
16 even if the Court were to believe that these regulations apply,
17 the Court must first address the APA jurisdictional question.
18 The plaintiffs have struggled to identify the final agency
19 action that's subject to review, whether it be the EIS, the
20 national interest determination, or the permit. But it's none
21 of those things. None of those things can be reviewed in a
22 vacuum without the waiver of sovereign immunity in the APA.
23 The first threshold question is the sovereign immunity, which
24 the Court must address.

25 And I think there's just one other point that I would

1 like to address. The plaintiffs have referenced the
2 No Gwen case and the Ground Zero case.

3 THE COURT: Which one? What was the first one?

4 MR. HAJEK: The No Gwen case, involving the radio
5 tower for transmissions about potential nuclear warfare, and
6 the Ground Zero case involving the construction of a Navy base.
7 Neither of those cases involved the question of APA review and
8 sovereign immunity.

9 In the No Gwen case, it was -- the issue that was
10 raised was the political question doctrine, which is not
11 something that we're raising here. And the actual action was
12 the construction of a tower, the type of thing that's done
13 pursuant to statutory authority and for which NEPA is done. So
14 the APA jurisdictional question was not at issue there.

15 And the same thing is true with the Ground Zero case.
16 It was not an issue of APA jurisdiction. Rather, it was an
17 issue of NEPA, and the Court clearly said that the President's
18 decision to site the base was the presidential action and was
19 not subject to NEPA. But the Navy acting pursuant to statutory
20 authorities that were within its discretion, those would be
21 subject to NEPA. So the actions carried out pursuant to
22 statutory authority did require NEPA, but the President's
23 siting decision did not.

24 Unless the Court has other questions --

25 THE COURT: No. Thank you, Mr. Hajek.

1 MR. HAJEK: Okay. Thank you very much, Your Honor.

2 MR. STEENLAND: May I have two minutes, Your Honor?

3 THE COURT: I was going to -- yes, certainly.

4 MR. STEENLAND: Just two, I promise.

5 THE COURT: All right.

6 MR. STEENLAND: Thank you.

7 THE COURT: Madam Clerk, start the clock. We'll give
8 him ten seconds to get to the podium.

9 MR. STEENLAND: Thank you.

10 Two quick points:

11 First, with regard to Section 5 of this executive
12 order, let's go back to basics again. What is an executive
13 order? It is a technique for the President to manage the
14 executive branch. It's housekeeping. It's a directive to tell
15 all the people who supposedly work for him what he or she wants
16 them to do.

17 And in this case what Section 5 does is simply to
18 say, "As I am telling you what else to do when you process
19 these permits, I am not messing with any of your other
20 authority."

21 Bear in mind that early on in this order the
22 Secretary of State is supposed to coordinate with some nine or
23 ten other federal agencies. Send it out. Get their views.
24 Bring them back. Circulate comments. Do all of those kinds of
25 things. All that is, is to say, "This is a self-contained

1 directive, and what I'm doing here does not affect any of your
2 other tasks."

3 THE COURT: So Section 5 would be surplusage.

4 MR. STEENLAND: No, it's not surplusage. It's a
5 cautionary word to agencies saying, "What I'm asking you to do
6 here does not affect any of your other duties."

7 Now, if those other duties involve other statutes, of
8 course, but it doesn't create new duties.

9 THE COURT: Right. So it boils down to whether, in
10 the absence of the executive order, Congress impose any
11 statutory duties on this agency.

12 MR. STEENLAND: Yes. And that's right where I want
13 to close. Because if we want to help these folks out, let's
14 pass a law. Let's pass a law that simply says the Department
15 of State shall require every pipeline owner who proposes to
16 construct and operate a border-crossing pipeline to apply for a
17 permit and to demonstrate that such pipeline is in the national
18 interest.

19 Now, if Congress did that, those NEPA regs that
20 counsel talked about would make a lot of sense because that
21 would be agency action. The State Department would have a
22 statutory mission. It would have its own organic authority.
23 It would have a law, and that law would empower it to do what
24 the President has delegated and asked it to do.

25 At that point, we don't have motions to dismiss,

1 Judge Morris. We're on our way to summary judgment because at
2 this point -- at that point the State Department is an agency.
3 And if it issues a permit, the permit is agency action.

4 But we're going back to right where we started.
5 Let's talk about whether we've got a key to unlock this
6 courthouse door, and what I just read you would do that. But
7 until then, what we're talking about is presidential action
8 delegated to the State Department that has no statutory
9 component; and, therefore, it is not judicially reviewable in
10 this Court.

11 Thank you very much.

12 THE COURT: Thank you, Mr. Steenland.

13 I will take these motions under advisement. We're
14 going to take another ten-minute break and come back, and I'll
15 hold the preliminary pretrial conference.

16 If any members of the public are still awake in the
17 back, you are free to leave at this point. We've got some
18 scheduling matters to attend to for the rest of the hearing.

19 We'll be back here in ten minutes.

20 (Proceedings were in recess from 4:17 p.m. until 4:29 p.m.)

21 (Transcript of Preliminary Pretrial Conference filed
22 separately.)
23
24
25

1 REPORTER'S CERTIFICATE

2 I, Yvette Heinze, a Registered Professional
3 Reporter and Certified Shorthand Reporter, certify that the
4 foregoing transcript is a true and correct record of the
5 proceedings given at the time and place hereinbefore mentioned;
6 that the proceedings were reported by me in machine shorthand
7 and thereafter reduced to typewriting using computer-assisted
8 transcription; that after being reduced to typewriting, a
9 certified copy of this transcript will be filed electronically
10 with the Court.

11 I further certify that I am not attorney for, nor employed
12 by, nor related to any of the parties or attorneys to this
13 action, nor financially interested in this action.

14 IN WITNESS WHEREOF, I have set my hand at Great Falls,
15 Montana this 14th day of November, 2017.

16
17 */s/ Yvette Heinze*

18 _____
19 Yvette Heinze
20 United States Court Reporter
21
22
23
24
25

APPENDIX

2

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

INDIGENOUS ENVIRONMENTAL
NETWORK and NORTH COAST
RIVERS ALLIANCE,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF
STATE,
et al.,

Federal Defendants,

) CV 17-29-GF-BMM
)
) **IEN AND NCRA PLAINTIFFS'**
) **MEMORANDUM IN OPPOSITION**
) **TO TRANSCANADA'S MOTION**
) **FOR STAY PENDING APPEAL**

)
) Hearing: January 14, 2019

) Time: 1:30 p.m.

)
) Judge: Hon. Brian M. Morris
)
)

and)
)
TRANSCANADA KEYSTONE)
PIPELINE and TRANSCANADA)
CORPORATION,)
)
Defendant-Intervenors.)
_____)

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**MEMORANDUM IN OPPOSITION TO
TRANSCANADA’S MOTION FOR STAY PENDING APPEAL**

Plaintiffs Indigenous Environmental Network (“IEN”) and North Coast Rivers Alliance (“NCRA” and, collectively with IEN, “Plaintiffs”) respectfully submit this memorandum in opposition to the Motion filed by TransCanada Corporation and TransCanada Keystone Pipeline LP (collectively, “TransCanada”) under Rule 62(c) to stay this Court’s November 8, 2018 Order (ECF 218) and November 15, 2018 Order (ECF 219) granting summary judgment to Plaintiffs and enjoining any activity in furtherance of construction or operation of the Keystone XL Pipeline project (“Keystone XL”), as modified by this Court’s December 7, 2018 Supplemental Order Regarding Permanent Injunction (ECF 231) clarifying the scope of the allowable preconstruction activities, while TransCanada pursues an appeal.

This Court correctly balanced the equities when it decided to issue its carefully-crafted injunction barring those construction and preconstruction activities that would cause irreparable harm to environmental and cultural resources. TransCanada’s alleged harm, by contrast, is limited to speculative and temporary monetary loss which, by definition, cannot be “irreparable.” None of the grounds advanced by TransCanada’s motion presents any valid basis for reversal of this Court’s thoughtfully formulated and legally unassailable injunction, which is absolutely necessary to protect the public interest in compliance with this nation’s paramount environmental laws pending the Federal

Defendants' correction of the unlawful conduct that prompted Court's entry of summary judgment and a permanent injunction in Plaintiffs' favor.

This Court properly found that issuance of a Presidential Permit is subject to review under the Administrative Procedure Act (APA), 5 U.S.C. § 702 and that the U.S. Department of State (State) failed to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq. and the Endangered Species Act (ESA), 16 U.S.C. § 1531 et seq. November 8, 2018 Order (ECF 218) and December 7, 2018 Order (ECF 231). Accordingly, this Court should deny TransCanada's Motion.

FACTUAL AND PROCEDURAL BACKGROUND

This Court's November 22, 2017 Order denying the Federal Defendants' and TransCanada's motions to dismiss for lack of jurisdiction (ECF 99), August 15, 2018 Partial Order on Summary Judgment Regarding NEPA Compliance (ECF 210), and November 8, 2018 Order on Summary Judgment (ECF 218) set forth the pertinent facts and procedural background. Plaintiffs summarize the salient facts and history below.

On March 23, 2017, State issued, on behalf of the President, a Record of Decision/National Interest Determination ("ROD/NID") and a Presidential Permit that purportedly authorized TransCanada to construct, connect, operate, and maintain a cross-border oil pipeline known as Keystone XL between Morgan, Montana, and Steele City, Nebraska. (ECF 99:2-6.) IEN and NCRA filed suit challenging those approvals on March 27, 2017. (ECF 1.) Northern Plains

Resource Council, et al. filed suit on March 30, 2017. On October 4, this Court ordered the actions consolidated for briefing and hearing. (ECF 82.)

On June 9 and 16, 2017, State and TransCanada, respectively, filed motions to dismiss the complaints on the grounds they challenged Presidential action not subject to review under the APA or NEPA. (ECF 44-1, 49.) This Court denied the motions on November 22, 2017 (ECF 99), and thereafter State and TransCanada filed answers (ECF 107 (State) and 108 (TransCanada).) Following State's lodging of its Administrative Record on December 8, 2017 (ECF 111), Plaintiffs filed their summary judgment motion on February 9, 2018 (ECF 145-154). State and TransCanada filed their cross-motions on March 30, 2018. (ECF 176, 178.) On August 15, 2018 the Court granted partial summary judgment to Plaintiffs, and ordered State to supplement its NEPA review with an analysis of Keystone XL's revised "Main Line Alternative" route through Nebraska (ECF 210). That review is ongoing. On November 8, 2018, the Court decided the remaining claims, ruling for Plaintiffs on some (ECF 218) and vacating State's ROD/NID and permanently enjoining Federal Defendants and TransCanada "from engaging in any activity in furtherance of the construction or operation of Keystone and associated facilities" until specified supplemental reviews are completed and State renders a new ROD/NID. (ECF 218:54.)

TransCanada then moved the Court to clarify or modify the injunction to allow TransCanada to conduct certain "preconstruction activities." (ECF 221.) The Court allowed some of the "preconstruction" activities, but not those

involving direct irreparable harm to cultural and environmental resources and the public interest. (ECF 232.) On December 21, 2018, TransCanada filed a notice of appeal.

LEGAL STANDARD

This Court applies a four-factor test in deciding motions for stay pending appeal: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies.” (*Nken v. Holder*, 556 U.S. 418, 434 (2009).) TransCanada must show that all four factors favor the stay. (*Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012).) Because TransCanada has not done so, its motion must be denied.

ARGUMENT

I. TRANSCANADA IS NOT LIKELY TO SUCCEED ON THE MERITS OF ITS APPEAL.

A. THIS COURT CORRECTLY RULED THAT STATE’S DECISION TO ISSUE THE PRESIDENTIAL PERMIT IS SUBJECT TO REVIEW UNDER THE APA AND THE ESA.

TransCanada is not likely to succeed in its appeal of this Court’s decision that issuance of the Presidential Permit constitutes agency action subject to review under the NEPA and the ESA. (ECF 99:12-14, 27-40; ECF 218:52.) This Court’s Orders finding jurisdiction under NEPA and the ESA are correct.

TransCanada repeats the arguments from its motion to dismiss which this

Court already rejected. (ECF 99:7-15.) State’s approval of its Presidential Permit was “‘a major Federal action that may have a significant impact upon the environment within the meaning of NEPA’” and “[t]he APA waives the government’s sovereign immunity and provides a private right of action.” (ECF 99:7, citing 5 U.S.C. §§ 701-706.) Based on State’s own Notice to Prepare an EIS in the Federal Register, “[t]he logical conclusion to be drawn is that the State Department intended for the publication of the ROD/NID and the issuance of the accompanying Presidential Permit to be reviewable as final agency action.” (ECF 99:8.)

This Court properly applied the two-factor test for determining whether Keystone’s approval constitutes presidential action: (1) whether the President carries out the final action himself, and (2) whether Congress has curtailed his authority to direct the “agency.” (ECF 99:10, citing *Natural Resources Defense Council v. U.S. Department of State*, 658 F.Supp.2d 105, 111 (D.D.C. 2009). The Court correctly concluded that “[t]he President waived any right . . . to review State’s decision under Executive Order 13337” and “[t]he State Department’s obligation to study the environmental impacts of its decision fundamentally does not stem from the foreign relations power assigned to the President.” (*Id.*) Rather, “State[’s] own NEPA regulations recognize that . . . a Presidential Permit represents a ‘major Departmental action’ subject to . . . NEPA.” (*Id.* at 10, citing 22 C.F.R. §§ 161.7, 161.7(c)(1).”) Accordingly, State prepared an FSEIS and published a subsequent ROD/NID based on the premise that this was final agency

action subject to NEPA. (*Id.*)

TransCanada cites the same district court rulings from its previous motion to dismiss: *Natural Resources Defense Council v. U.S. Department of State*, 648 F.Supp.2d 105 (D.D.C. 2009); *Sisseton-Wahpeton Oyate v. U.S. Department of State*, 659 F.Supp.2d 1071 (D.S.D. 2009); *White Earth Nation v. Kerry*, No. 14-4726, 2015 WL 8483278 (D. Minn. Dec. 9, 2015). (Motion:6). This Court already distinguished these cases, pointing out that *NRDC* and *Sisseton-Wahpeton* relied on the President’s retention of his “ultimate authority to settle any interagency dispute” – which he expressly *waived* here – and *White* relied on those two inapposite cases. (ECF 99:12.) Here, “[t]he President remains the final actor in determining the issuance of the Presidential Permit . . . [since he] specifically waived, in his Memorandum, authority that he retained to make the final decision regarding . . . the Presidential Permit.” (ECF 99:12.) “This distinction proves persuasive.” (*Id.*)

And, *Sierra Club v. Clinton*, 689 F.Supp.2d 1147 (D. Minn. 2010), “declined to follow *NRDC* and *Sisseton-Wahpeton*.” (*Id.*) *Sierra Club* “expressed particular skepticism at the notion of shielding from judicial review under the EPA ‘the preparation of an EIS for a major federal action.’” (*Id.*) *Protect Our Communities Foundation v. Chu*, 214 WL 1289444 at *6 (S.D. Cal. 2014), agreed with *Sierra Club*. (ECF 99:13.) This Court concluded that “[t]he reasoning of *Sierra Club* and *Chu* applies here. The State Department took final agency action when it published the ROD/NID for the Keystone XL Pipeline and issued the

accompanying Presidential Permit.” (ECF 99:14.) Moreover, “[t]he Ninth Circuit has determined that ‘once an EIS’s analysis has been solidified in a ROD, the agency has taken final agency action, reviewable under [APA section] 706(2)(A).’” (ECF 99:14-15, quoting *Oregon Natural Desert Ass’n v. Bureau of Land Management*, 625 F.3d 1092, 1118-19 (9th Cir. 2010).)

And, finally, “[a] strong presumption exists that Congress intends judicial review of administrative action,” and neither NEPA nor the ESA bars review. (ECF 99:15.)

B. THIS COURT CORRECTLY RULED THAT STATE’S DECISION TO ISSUE A PRESIDENTIAL PERMIT WAS NOT COMMITTED TO THE AGENCY’S DISCRETION, AND THEREFORE IS SUBJECT TO JUDICIAL REVIEW.

TransCanada also repeats its previous failed argument that “[t]he APA also does not apply because a national interest determination is committed to agency discretion and thus exempt from review.” (Motion:11, citing *Detroit International Bridge Co. v. Government of Canada*, 189 F.Supp.3d 85, 101 (D.D.C. 2016).)

But as this Court already ruled, “Congress commits agency action to agency discretion in those rare instances where Congress draws statutes in such broad terms that no law exists to apply in a given case.” (ECF 99:15, citing 5 U.S.C. § 701(a)(2).) Here, by contrast, “Congress has provided a meaningful standard in the form of NEPA against which to judge the State Department’s conduct.” (*Id.* at 16.) “Congress enacted NEPA to ‘protect the environment by requiring that federal agencies carefully weigh environmental considerations and consider

potential alternatives to the proposed action before the government launches any major federal action.” (ECF 99:16, quoting *Barnes v. U.S. Department of Transportation*, 655 F.3d 1124, 1131 (9th Cir. 2011). And, “[t]he Ninth Circuit has made clear that the State Department cannot avoid judicial review simply by invoking its consideration of ‘foreign policy’ or ‘security’ factors.” (*Id.*, citing *Kerry*, 803 F.3d at 1069.)

TransCanada once again relies on *Jensen v. National Marine Fisheries Service*, 512 F.2d 1189 (9th Cir. 1975) to argue that “[s]ince presidential action in the field of foreign affairs is committed to presidential discretion by law . . . it follows that the APA does not apply to’ [an] agency’s approval, pursuant to delegation of presidential authority.” (Motion:12). Not so. “Plaintiffs in *Jensen* challenged . . . a specific halibut fishing regulation adopted by the International Pacific Halibut Commission” pursuant to a Treaty between the United States and Canada which granted the Commission authority to enact fishing regulations with the approval of the President and the Governor General of Canada. (ECF 99:20.) As the *Chu* Court explained, *Jensen* is distinguishable because the Treaty specifically delegated to the Commission authority to enact fishing regulations *subject to the approval of the President and the Governor General of Canada*. (ECF 99:21, citing *Chu*, 214 WL 1289444 at 8.) Here, by contrast, “Plaintiffs do not challenge the Secretary of State’s approval of a regulation enacted by an international Commission.” (*Id.*) “Plaintiffs seek, by contrast, to *enforce* the State Department’s *compliance with its own regulations*.” (*Id.*, emphasis added.) And,

“[n]o statute prohibits review here,” “State . . . acknowledged the need for NEPA review throughout TransCanada’s previous applications,” and NEPA provides detailed standards to guide judicial review. (ECF 99:22.)

C. THIS COURT CORRECTLY RULED THAT NEPA SUPPLEMENTATION IS WARRANTED.

TransCanada next argues “[t]he Court erred in holding that ‘new information’ related to Keystone XL requires State to supplement its NEPA analysis. (Motion:13, citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373-74 (1989), *Northern Idaho Community Action Network v. U.S. Department of Transportation*, 545 F.3d 1147, 1155 (9th Cir. 2008) and *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004). But this Court has already rejected TransCanada’s arguments. They have not improved with age, nor through repetition. As this Court previously ruled, the “Federal Defendants did not properly analyze Keystone’s environmental impacts” on Nebraska since they “did not know Keystone’s final route through Nebraska” when they purported to “consider” them. (ECF 210:4-12.)

TransCanada again claims that the new route through Nebraska did not present “new information provid[ing] a *seriously* different picture of the environmental landscape.” (Motion:13, quoting *Friends of Capital Crescent Trail v. Federal Transit Administration*, 877 F.3d 1051, 1060 (D.C. Cir. 2017) (emphasis added). But this Court already ruled that the new “Mainline Alternative” route *does* pose substantially different impacts:

“The Mainline Alternative route differs from the route analyzed in the EIS. [It] crosses five different counties. [It] crosses different water bodies. [It] would be longer. [It] would require an additional pump station and accompanying power line infrastructure.”

(ECF 210:10.) It ill behooves TransCanada to proclaim – *sans* any record support – that this changed route’s impacts are not “serious” when State has never even evaluated them under NEPA.

Settled law requires State to evaluate the impacts of this fundamentally changed route since it is a “connected action” even more than logging roads were connected to timber sales in *Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985), and State retains ample authority to make appropriate adjustments to its approval decision since Keystone’s construction has not yet started. (ECF 210:9-11, citing *Marsh*, 490 U.S. at 367-372 and distinguishing *Cold Mountain v. Garber*, 375 F.3d 884, 891-894 (9th Cir. 2004). “The Mainline Alternative route represents an interdependent part of the larger action of Keystone,” and “[t]he entire pipeline . . . requires one EIS to understand the functioning of the entire unit.” (ECF 210:11.)

TransCanada next attacks this Court’s ruling that ongoing changes in oil markets necessitated a revised NEPA analysis. (Motion:15-16.) TransCanada claims this Court “failed to identify how low oil prices correlated to significantly different environmental impacts.” (Motion:15.) But TransCanada ignores the fact “that the Environmental Protection Agency [had] called upon [State] to revisit the EIS’s conclusions after the 2015 oil prices drop.” (ECF 218:17, citing DOS973-

74.) And, TransCanada also overlooks this Court’s observation that “[s]uch an analysis proves material . . . to [State’s] consideration of Keystone’s impact on tar sands production.” (ECF 218: 18.) Higher oil prices could mean greater tar sands production (and its associated impacts), whereas lower oil prices might reduce production and the related economic benefits that State forecast. Both factors are pertinent to State’s National Interest Determination and compliance with NEPA.

TransCanada next challenges this Court’s ruling that post-FSEIS pipeline spills “qualify as significant,” and that State “would have evaluated the spills in the 2014 SEIS had the information been available.” (ECF 218:30.) TransCanada argues that “[w]hether an agency would have evaluated information had it been available is not the proper legal standard for evaluating new information under NEPA.” (Motion:16.) But TransCanada ignores this Court’s explanation that “the risk of spills likely would affect Keystone’s potential impact on other areas of the ROD’s analysis, including risks to water and wildlife.” (ECF 218:30.) This Court’s reasoning is spot-on. Clearly, this new information regarding the frequency and severity of pipeline spills is highly relevant to State’s assessment of the oil spill risks that Keystone XL would pose “to water and wildlife.” (ECF 218:30.)

TransCanada also challenges this Court’s finding that State “acted upon incomplete information by failing to consider the National Academy of Sciences (NAS) study on dilbit.” (Motion:16, citing ECF 218:29-31.) TransCanada claims this Court’s conclusion “is not supported by the record,” citing the fact that the

FSEIS did disclose that “dilbit reacts differently from other crude oils when released into water” and that “the ROD/NID addressed the NAS study.”

(Motion:16.) But TransCanada ignores the fact that the FSEIS did not address the detailed and authoritative findings set forth in the NAS study on dilbit, and thereby failed to provide both decisionmakers and the public with this critical information in the manner that NEPA mandates. As this Court explained, the NAS study “found that diluted bitumen presents more challenges for cleanup response than other types of oil moved by pipeline,” and that “responders need more training and better communication to address these spills adequately.” (ECF 218:30, citing the NAS study at 1391.) Moreover, TransCanada overlooks this Court’s discussion regarding how the ROD’s analysis was likewise deficient, holding that (1) it “fails to show how the 2014 SEIS adequately addressed the NAS study,” (2) it “merely asserts that Keystone has agreed to consult with local emergency responders and update its mitigation response plans as new information becomes available” – a “conclusory statement [that] fails to meet NEPA’s ‘hard look’ requirement” – and (3) the “absence of this information from the 2014 SEIS’s mitigation measures demonstrates that the agency acted upon incomplete information in setting forth its mitigation measures.” (ECF 218:30-31, citing *Marsh*, 490 U.S. at 371. Because this Court adequately explained the detailed basis for its ruling, TransCanada’s attack fails, and its motion must be denied.

TransCanada next challenges this Court’s conclusion that “State must supplement its NEPA analysis with a revised calculation of potential GHG

emissions using the GREET model” on the grounds “the Court offered no analysis suggesting the potential impacts of Keystone XL would be significantly different if State used the GREET model.” (Motion:17-18, referring to ECF 218:19-23.) Again, TransCanada ignores what this Court did, and why. For example, this Court explained that although State “analyzed the cumulative emissions of Keystone and the Alberta Clipper [pipeline expansion from 450,000 bpd to 880,000 bpd] in the Alberta Clipper EIS” – and importantly, the latter “EIS also used the updated Greenhouse Gas, Regulated Emissions, and Energy Use in Transportation (“GREET”) model to analyze greenhouse gas emissions” – the 2014 SEIS failed to address *either* the Alberta Clipper expansion *or* the new GREET model.” (ECF 218:20.) The GREET model constitutes “new and relevant information that warrants supplement[ation]” because it “results in estimates of greenhouse gas emissions that are up to 20% higher than the model used in the 2014 SEIS.” (*Id.*)

And, this Court explained that “NEPA requires that an EIS consider the cumulative impacts of the proposed action,” citing 40 C.F.R. § 1508.7 and *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 971 (9th Cir. 2006). (*Id.*) Since this Court fully explained the factual and legal basis for its correct ruling, TransCanada’s attack is without merit, and its motion must be denied.

D. THIS COURT CORRECTLY RULED THAT STATE’S CUMULATIVE IMPACTS ANALYSIS VIOLATED NEPA.

Relatedly, TransCanada next argues that this “Court erred in holding that

State should have considered the cumulative impacts from the Alberta Clipper pipeline expansion project in the Keystone XL NEPA analysis,” claiming that this “Court reasoned that State was unaware of the cumulative impacts of both projects notwithstanding the fact that it disclosed in the 2017 EIS for the Alberta Clipper the potential cumulative GHG emissions of both pipelines.” (Motion:19.) But that was never the basis for this Court’s reasoning. To the contrary, as this Court carefully detailed, the 2014 SEIS was itself deficient because it failed to address the cumulative impacts from the Alberta Clipper. (ECF 218:22.) As the Order explains, the SEIS’s omission “left out significant information from the climate analysis in the Department’s possession:”

“The Keystone SEIS indicated that greenhouse gas emissions associated with the pipeline would range generally from 1.3 to 27.4 MMTCO_{2e}. The Alberta Clipper EIS determined that combined greenhouse gas emissions associated with both pipelines would range generally from 2.1 to 49.9 MMTCO_{2e}. A difference of this magnitude cannot be dismissed simply as harmless error.”

(ECF 218:22.)

The Court further explained that it was aware that State had decided to issue the permit for the Alberta Clipper expansion in 2017 notwithstanding its apparent knowledge that the combined greenhouse gas emissions from both projects would be nearly double those from the Keystone project alone. (*Id.*) Indeed, as the Court pointed out, State admits “that the 2014 SEIS failed to analyze greenhouse gas emissions associated with the Alberta Clipper,” and “therefore, ignored its duty to take a ‘hard look’” at the “whole picture of emissions for these connected actions.”

(ECF 218:21, citing *Churchill County v. Norton*, 276 F.3d 1060, 1072 (9th Cir. 2001).) As the Court explained, it “cannot assume without reasoned analysis [in the Keystone XL SEIS], however, that the Department [of State] would reach the same conclusion for the Keystone permit.” (*Id.*)

Accordingly, this Court properly ruled that State “must supplement this analysis to include the same information,” and, as discussed above, must also “include the same updated GREET model analysis used in the Alberta Clipper EIS.” (ECF 218:22-23.) Because the Court fully explained its correct conclusion – a conclusion that TransCanada misstates – TransCanada’s motion is without merit and must be denied.

E. THIS COURT CORRECTLY RULED THAT STATE FAILED TO ANALYZE IMPACTS TO CULTURAL RESOURCES.

TransCanada next attacks this Court’s ruling “that State’s failure to conduct cultural resources surveys on 1,000 acres of land violates NEPA,” on the grounds that “the Court completely overlooked the Programmatic Agreement covering the project and TransCanada’s obligation to complete cultural surveys prior to any construction activity.” (Motion:20.) TransCanada argues that “State was able to complete a review of potential impacts to cultural resources” without actually knowing what those resources might be, and where they might be located, “because the Programmatic Agreement imposed a variety of mitigation measures that would prevent adverse impacts to cultural resources.” (Motion:21.) TransCanada then argues that “[n]umerous federal agencies follow the same

procedure,” citing *HonoluluTraffic.com v. Federal Transit Administration*, 742 F.3d 1222, 1234 (9th Cir. 2014), *City of Alexandria v. Slater*, 198 F.3d 862, 873 (D.C. Cir. 1999), and *Colorado River Indian Tribes v. Department of Interior*, No. ED CV14-02504 JAK, 2015 WL 12661945, at *19 (C.D. Cal.).

TransCanada is mistaken both factually and legally. Contrary to its argument, this Court was fully aware, as its Order states, “that [State] entered into [the Programmatic] [A]greement with other federal agencies and state historic preservation officers.” (ECF 218:26, citing DOS6553-54.)” (ECF 218:26.) And, this Court recognized that “[t]his agreement governs identification of historic properties and consultation regarding potential adverse impacts.” (*Id.*) However, this Court also noted, as Plaintiffs had pointed out that “[t]he 2014 SEIS states . . . that ‘[a]s of December 2013, approximately 1,038 acres remained unsurveyed and are the subject of ongoing field studies.’” (ECF 218:26, citing DOS6522.) Importantly, “[t]he Department [of State] offered no supplemental information on the unsurveyed acres before it issued the 2017 permit,” but rather simply “describe[d] the surveys as ‘ongoing.’” (*Id.*, quoting from State’s summary judgment memorandum at 68.) As this Court correctly concluded, “[t]his explanation proves outdated.” (ECF 218:26.)

Further, none of the cases TransCanada cites is germane. In *HonoluluTraffic.com*, the defendants could not conduct the required surveys because the “exact route” of the project was unknown. (742 F.3d at 1234.) In *Slater*, the required cultural surveys could not occur “until the design stage” of the

project. (198 F.3d at 873.) In *Colorado River*, the FEIS concluded that ground-disturbing searches would harm the very resources sought to be protected. (2015 WL 12661945 at *19.) No such factors restrict State’s ability to complete required cultural resource surveys here. And, none of these cases excuses State from providing a “full and fair discussion of the potential effects of the project to cultural resources” as NEPA requires. (ECF 218:27, quoting *Native Ecosystem Council v. U.S. Forest Service*, 418 F.3d 953, 965 (9th Cir. 2005).) Contrary to NEPA, State “jumped the gun when it issued the ROD in 2017 and acted on incomplete information regarding potential cultural resources along 1,038 acres of unsurveyed route.” (ECF 28:27.)

Accordingly, this Court correctly concluded that State “must supplement the information on the unsurveyed acres . . . in order to comply with its obligations under NEPA.” (*Id.*, citing 40 C.F.R. §§ 1502.16(g), 1508.8.) TransCanada’s challenge is without merit, and its motion must be denied.

F. THIS COURT CORRECTLY RULED THAT STATE FAILED TO ADEQUATELY EXPLAIN ITS POLICY CHANGE ON GHG IMPACTS.

TransCanada next claims this Court “erred in two respects” in holding that “State was required to justify its policy change regarding GHG impacts and . . . that State disregarded prior factual findings.” (Motion:21.) TransCanada argues that “[the] APA does not authorize review of a NID because it is a purely discretionary decision.” (Motion:22, citing *Sierra Club v. U.S. Department of Energy*, 867 F.3d 189, 196 (D.C. Cir. 2017).) Not so. An agency never has

“discretion” to ignore its prior factual findings. As this Court ruled, “[a]n agency must provide a detailed justification for reversing course and adopting a policy that ‘rests upon factual findings that contradict those which underlay its prior policy.’” (ECF 218:31, quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), and citing *Organized Village of Kake v. U.S. Department of Agriculture*, 795 F.3d 956, 966 (9th Cir. 2015).)

This Court detailed why State’s 2017 ROD failed to provide an adequate explanation for its abrupt reversal despite factual findings by Secretary of State Kerry that this project would *not* serve the public interest:

“Section 6.3 of the 2015 ROD determined that the United States’s climate change leadership provided a significant basis for denying the permit. The Department acknowledged science supporting a need to keep global temperature below two degrees Celsius above pre-industrial levels. [DOSKXLDMT0001182-83.] The Department further recognized the scientific evidence that human activity represents a dominant cause of climate change

The 2017 ROD initially tracked the 2015 ROD nearly word-for-word. The 2017 ROD, without explanation or acknowledgment, omitted entirely a parallel section discussing ‘Climate Change-Related Foreign Policy Considerations.’ The 2017 ROD ignores the 2015 ROD’s conclusion that 2015 represented a critical time for action on climate change. The 2017 ROD avoids this conclusion with a single paragraph [. . . and] simply states that since 2015, there have been ‘numerous developments related to global action to address climate change, including announcements by many countries of their plans to do so.’ *Id.* at 2518. Once again, this conclusory statement falls short of a factually-based determination, let alone a reasoned explanation, for the course reversal.”

(ECF 218:35.) Quoting *Fox*, 556 U.S. at 573, this Court concluded that “[a]n agency cannot simply disregard contrary or inconvenient factual determinations

that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.” (*Id.*)

Because State failed to provide the required “reasoned explanation” and “instead simply discarded prior factual findings related to climate change to support its course reversal,” TransCanada’s challenge is without merit and its motion must be denied. (*Id.*, citing *Kake*, 795 F.3d at 968.)

**G. THIS COURT CORRECTLY RULED THAT THE
U.S. FISH AND WILDLIFE SERVICE SHOULD UPDATE
ITS PREVIOUS REVIEW UNDER THE ESA.**

Finally, TransCanada argues that this Court “also erred in setting aside State’s 2012 Biological Assessment (BA) and the U.S. Fish and Wildlife Service’s (FWS) 2013 Biological Opinion (BiOp) and concurrence.” (Motion:22-23.) TransCanada advances two reasons for its challenge: that “neither the APA nor the ESA provides a right of review for Plaintiffs’ claim that State violated Section 7 of the ESA,” and “the Court pointed to no FWS statements identifying oil spills as a potential source of adverse effects to the listed species nor does the order contain any support for such a finding.” (Motion:23.)

TransCanada is wrong on both counts. First, both the APA and the ESA provide a right of review for Plaintiffs’ claim that State violated Section 7 of the ESA. As this Court explained, “[s]ection 7(a)(2) [of the ESA] requires agencies, in consultation with the expert wildlife agency (here, . . . FWS . . .), to insure “that any action authorized, funded, or carried out by [an] agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened

species or result in the destruction or adverse modification of habitat[.]” (ECF 218:35-36, quoting 16 U.S.C. § 1536(a)(2), (4).) And, to satisfy this duty State “must initiate formal consultation” with FWS if its proposed “actions may adversely affect listed species.” (*Id.* at 36, citing 50 C.F.R. § 402.14.) State must use “the best scientific and commercial data available” and may not “disregard[] available scientific evidence that is in some way better than the evidence [it] relies on.” (*Id.*, quoting *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1080 (9th Cir. 2006). As discussed above, this Court has jurisdiction under the APA to enforce these ESA provisions.

Second, this Court fully explained why State had failed to use “the best scientific and commercial data available” in approving the ROD/NID, because its consultation with FWS in 2012 did not reflect significant subsequent changes and improvements in that data, including its “list[ing] as threatened the northern long-eared bat and the rufa red knot,” its identification of “the American burying beetle as the only listed species likely to be adversely affected by Keystone after it was proposed again in 2017,” and Nebraska’s approval of the new Mainline Alternative route. (ECF 218:37.) This Court properly concluded that State and FWS “failed to consider properly the potential impacts of pipeline oil spills on listed species,” other than the American burying beetle, and therefore State “must supplement new and relevant information regarding the risk of spills” and, together with FWS, “must use the ‘best scientific and commercial data available’ in all respects, including the effects of potential oil spills on endangered species.”

(ECF 218:43-44, citing 16 U.S.C. § 1536(a)(2)).

Since State and FWS must accordingly reexamine the potential adverse impacts of oil spills on listed species, TransCanada’s contrary argument is without merit and its Motion must be denied.

II. TRANSCANADA IS NOT ENTITLED TO A STAY

A. THIS COURT HAS AUTHORITY TO ENJOIN ANY ACTIVITIES RELATED TO PIPELINE CONSTRUCTION.

TransCanada contends that this Court’s “authority to enjoin actions by TransCanada ‘extends only so far as the [presidential] permitting authority,’” and that the Court therefore lacks authority to enjoin “preconstruction” activities. (Motion:24 (quoting *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1123 (9th Cir. 2005)).) Wrong. This Court has authority to enjoin any activities related to pipeline construction.

TransCanada attempts to draw a nonexistent distinction between the various activities that constitute the Project. It erroneously argues that State’s Presidential permitting authority over the “construction” of pipelines that cross United States borders does not extend to “transport[ing] or refurbish[ing] pipe, mow[ing] grass, fabricat[ing] materials, or construct[ing] a labor camp or storage yard.” (Motion:24.) To the contrary, those activities are part and parcel of pipeline construction, and thus subject to State’s permitting authority.

Dr. Ramsay, the TransCanada executive “responsible for the Project’s engineering, procurement, construction, testing, commissioning and start-up,”

admits that those “preparatory activities . . . are necessary” for “constructing a project the magnitude of Keystone XL.” (ECF 222-1 ¶16.) State likewise makes clear that “[c]onstruction of the proposed Project would include the pipeline itself plus various aboveground ancillary facilities (e.g., access roads, pump stations, and construction camps) and connected actions.” (DOS5652 (quote), 2497, 5968-86 (SEIS description of ancillary facilities).) As this Court has already held, “TransCanada’s proposed preconstruction activities” are so intertwined with pipeline construction that allowing them to continue “could skew the Department’s future analysis and decision-making regarding the project.” (ECF 232:10.)

TransCanada’s so-called “preconstruction” activities are “so interrelated and functionally interdependent” with project construction “as to bring the entire project within” State’s – and thus this Court’s – “jurisdiction.” (*Stewart v. Potts*, 996 F.Supp.668, 683 (S.D. Tex. 1998) (quoted with approval in *Save Our Sonoran*, 408 F.3d at 1124).)

**B. TRANSCANADA WILL NOT BE IRREPARABLY INJURED
ABSENT A STAY.**

TransCanada erroneously argues that the stay on “preconstruction” activities is causing it irreparable harm, including threatening its workforce investment and ability to begin construction in 2019. (Motion:25-26.) TransCanada’s argument fails as discussed below.

First, TransCanada’s claimed harms are speculative. TransCanada fails to

demonstrate that it would be able to start construction in 2019 even if it were allowed to continue “preconstruction” activities. This Court vacated State’s NID/ROD and enjoined Project construction pending compliance with NEPA and the APA. (ECF 218:54.) Until State complies with NEPA, the ESA and the APA, and re-issues a Presidential permit, TransCanada may not proceed with construction. TransCanada has not shown that State is likely to complete those actions in 2019, if at all. State did not issue a notice of intent to prepare a supplemental EIS until December 2, 2018. (83 Fed. Reg. 62398.) And even Dr. Ramsay acknowledges that supplemental environmental review “is likely to take at least well into the first quarter of 2019 . . . , if not longer.” (ECF 222-1:8, ¶20.) In addition, “TransCanada is continuing discussions with both the Bureau of Land Management regarding its right-of-way application and with the U.S. Army Corps of Engineers with respect to federal permits required by the Clean Water Act.” (Id. at 4.)

Second, regardless of the cause of TransCanada’s claimed harms, they would only be *temporary*, not *irreparable*. (*Cf. League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014) (“plaintiffs’ irreparable environmental injuries outweigh the temporary delay intervenors face in receiving a part of the economic benefits of the project”).) TransCanada attempts to paint a delay in preconstruction activity as a permanent loss of jobs, but that is simply incorrect. (Motion:25.) If the Project is approved after adequate environmental review, TransCanada could

begin construction one year later. Similarly, TransCanada's claim that its "skilled workers are likely to find other employment" during a delay fails to address TransCanada's ability to hire skilled workers if and when preconstruction activities commence. (Motion:25.)

Third, TransCanada's claimed potential harms are self-inflicted. TransCanada knows its project approvals have been ruled invalid, and is well aware of the uncertainties associated with future pipeline permitting. (ECF 222-1 ¶¶7-16.) Yet it voluntarily chose an aggressive timeline for project construction and made related investments. TransCanada cannot rely on the harm resulting from *its own* voluntary commitment of resources to claim irreparable injury from this Court's injunction. (*Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 997 (8th Cir. 2011); *Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002).)

Finally, all of the cases that TransCanada cites to support its position are inapposite. In *Alaska Survival v. Surface Transportation Board*, 704 F.3d 615 (9th Cir. 2012), the Court recognized defendant's economic harms only in deciding whether to dissolve a stay after determining that the Surface Transportation Board had complied with NEPA, and "allow[ing] the project to move forward." (*Id.* at 616; Motion:26.) Here, by contrast, Project construction is *barred* until State complies with NEPA and the ESA. The temporary economic impacts that enjoining preconstruction activities might cause are not a foreordained conclusion.

TransCanada's reliance on *James River Flood Control Association v. Watt*,

680 F.2d 543, 544 (8th Cir. 1982), likewise fails. (Motion:26.) There the court found no “factual basis for the conclusion that the [plaintiff] or the public will suffer irreparable harm if construction proceeds.” (*Id.*) That contrasts sharply with the facts here, where the record shows that preconstruction activities will substantially and irreparably harm the environment. (DOS5969, 5983, 6781, 6800, 6801.)

C. ISSUANCE OF A STAY WILL SUBSTANTIALLY INJURE PLAINTIFFS.

TransCanada erroneously asserts that a stay will not harm Plaintiffs because Plaintiffs will only suffer “injuries from the building [and operation] of the actual pipeline.” (Motion:26.) But TransCanada ignores the substantial injuries Plaintiffs will suffer from preconstruction activity as well.

TransCanada plans to mow 11,666 acres of the right-of-way, causing “[p]ermanent loss of wetlands,” “permanent modification of surface and subsurface flow patterns,” “permanent modification of wetland vegetation,” and “[l]oss or alternation of wetland soil integrity,” among other harms. (ECF 221-1 ¶ 18; DOS5952, 6782-6784, 6809-6811; FWS2062.) Preconstruction activities will also require clearing of 1,916 to 2,316 acres, including 1,037.6 acres for pipe storage yards, 479 acres for contractor yards, and between 400 and 800 acres for construction camps. (DOS5979-5980.) Despite this uncontroverted evidence, TransCanada claims that preconstruction would impact a much smaller area. (ECF 230 at 2-3.) But neither the record nor TransCanada provide any evidence

supporting this assertion.

TransCanada also claims that any injury “caused by ‘bureaucratic momentum’ is legally erroneous and devoid of factual support.” (Motion:26-28.)

To the contrary, this Court correctly ruled that the preconstruction activities “go beyond ‘design, planning, and permit application[.]’” (ECF231:9 (citing *National Audubon Society v. Department of Navy*, 422 F.3d 174, 206 (4th Cir. 2005)).)

TransCanada ascribes the Court’s conclusion to a single line from the Court’s five-page analysis of *National Audubon*. (ECF 231 at 6-11.) But this Court reviewed *National Audubon* in detail, and based its conclusion that preconstruction activities “go beyond simply ‘integrating the NEPA process with other planning’” on a thorough analysis of that case. (*Id.*)

As this Court previously held, the proposed preconstruction activities are “more analogous to those enjoined in *Colorado Wild*.” (ECF 231:10; *Colorado Wild Inc. v. U.S. Forest Service*, 523 F.Supp.2d 1213, 1221 (D.Colo. 2007).)

Indeed, allowing preconstruction activities *would* “‘skew the analysis and decision-making’ toward approving a pipeline route” because all of those activities will have occurred along one particular route. (Motion:28 (citing *Colorado Wild*, 523 F.Supp.2d at 1221).) As in *Colorado Wild*, the preconstruction activities here are all “in furtherance of the decision that is being challenged.” *Colorado Wild*, 523 F.Supp.2d at 1221.) “Each step taken . . . in reliance on this decision ‘represents a link in the chain of bureaucratic commitment that will become progressively harder to undo the longer it

continues.’” (*Id.* (citing *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989)).)

Furthermore, if this Court grants a stay pending appeal, it is possible that TransCanada will complete much more than preconstruction activity during the pendency of this appeal. The appeals process can take years, and TransCanada must not be allowed to irreparably destroy environmental resources while the court of appeal adjudicates TransCanada’s appeal.

D. THE PUBLIC INTEREST FAVORS DENIAL OF A STAY.

TransCanada relies upon State’s NID findings regarding the *completed* Keystone XL Pipeline to argue that the injunction is against the public interest. (Motion:28-29.) Yet TransCanada has not asked this Court to permit construction and operation of the Keystone XL Pipeline pending State’s compliance with NEPA. Thus, even if State’s national interest findings were lawful, they would be irrelevant to the preconstruction activities contemplated here.

Moreover, this Court *set aside* State’s NID findings, ruling that State failed to analyze the cumulative climate impacts of the Pipeline, and acted arbitrarily when it ignored the 2015 ROD’s NID finding that the project was *not* in the national interest. (ECF 218:21-23, 34-35.)

As shown, TransCanada’s preconstruction activities will scrape away 1,916 to 2,316 acres of vegetation for pipe storage yards, construction yards and worker camps, and clear 11,666 acres of right-of-way that would otherwise provide wildlife habitat. If the project is not reapproved, the harm stemming from these preconstruction activities will continue as the stripped lands will take decades (if

ever) to recover. Therefore, the public interest favors denial of TransCanada's Motion.

CONCLUSION

For these reasons, TransCanada's Motion is without merit and must be denied.

Dated: January 4, 2019

Respectfully submitted,

PATTEN, PETERMAN, BEKKEDAHN &
GREEN, PLLC

s/ James A. Patten

JAMES A. PATTEN

Dated: January 4, 2019

LAW OFFICES OF STEPHAN C. VOLKER

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INDIGENOUS ENVIRONMENTAL NETWORK
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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2) of the District of Montana Local Rules, and the Court's March 3, 2018 Order Regarding Combined Briefs and Word Limits (ECF 166), I certify that this Brief contains 6,456 words, excluding caption, certificates of service and compliance, table of contents and authorities, and exhibit index, as counted by WordPerfect X7, the word processing software used to prepare this brief.

Dated: January 4, 2019

s/ Stephan C. Volker
STEPHAN C. VOLKER

CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2019, a copy of the foregoing
**IEN AND NCRA PLAINTIFFS' REPLY MEMORANDUM IN
OPPOSITION TO TRANSCANADA'S MOTION FOR STAY PENDING
APPEAL** was electronically served on all counsel of record via the Court's
CM/ECF system.

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APPENDIX

3

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

INDIGENOUS ENVIRONMENTAL
NETWORK and NORTH COAST RIVER
ALLIANCE,

and

NORTHERN PLAINS RESOURCE
COUNCIL, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
STATE, et al.,

Defendants,

} CV 17-29-GF-BMM
} CV 17-31-GF-BMM

} **OBJECTION OF IEN**
} **PLAINTIFFS TO**
} **TRANSCANADA’S UNTIMELY**
} **“STATUS UPDATE” AND**
} **DECLARATION**

} Hearing: January 14, 2018

} Time: 1:30 p.m.

} Judge: Honorable Brian Morris

TRANSCANADA KEYSTONE PIPELINE }
and TRANSCANADA CORPORATION, }
 }
Defendant-Intervenors. }
_____ }

Plaintiffs Indigenous Environmental Network and North Coast Rivers Alliance (collectively, “IEN Plaintiffs”) respectfully object to Defendant-Intervenors TransCanada Keystone Pipeline, LP, et al’s (collectively, “TransCanada’s”) Status Update and its accompanying Declaration of Norrie Ramsay filed January 7, 2019.

The basis for the objection is simple. Mr. Ramsay’s Declaration is expressly intended to “supplement[] [his] declaration of November 15, 2018, in which [he] identified various harms that will flow from [this Court’s] injunction” and *thereby bolster TransCanada’s motion to stay this Court’s injunction* (“Stay Motion”). Ramsay Dec. ¶ 3. As such, it is untimely.

Local Civil Rule 7.1(d)(1)(A) directs that “[a] motion, if opposed, must be accompanied by a brief in support *filed at the same time as the motion* Failure to timely file a brief will result in *denial of the motion*” (*Id.*, emphasis added.) TransCanada failed to file and serve Mr. Ramsay’s Declaration on December 21, 2018 when it filed its Stay Motion.

In the meantime, in reliance on the TransCanada's presumed compliance with the requirements of Rule 7.1(d)(1)(A), and as required by Rule 7.1(d)(1)(B)(ii), the IEN Plaintiffs already filed their response to TransCanada's Stay Motion last Friday, January 4, 2019, "14 days after the motion was filed."

Consequently, TransCanada's untimely filing of Mr. Ramsay's Declaration has the effect of foreclosing the IEN Plaintiffs from responding to his Declaration, let alone affording the IEN Plaintiffs the 14 days for response to which they are entitled under Rule 7.1(d)(1)(B)(ii).

Accordingly, the IEN Plaintiffs object to TransCanada's untimely submission of its "Status Update" and its supporting Declaration of Norrie Ramsay. This Court should disregard those two documents in ruling on TransCanada's Stay Motion because their untimely submission is highly prejudicial to the IEN Plaintiffs.

Dated: January 8, 2019

Respectfully submitted,

LAW OFFICES OF STEPHAN C. VOLKER

s/ Stephan C. Volker

STEPHAN C. VOLKER

Of Counsel for IEN Plaintiffs

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///

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PATTEN, PETERMAN, BEKKEDAHL, &
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s/ James A. Patten

JAMES A. PATTEN

Attorneys for Plaintiffs
INDIGENOUS ENVIRONMENTAL NETWORK
and NORTH COAST RIVERS ALLIANCE

CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2019, a copy of the foregoing
OBJECTION OF IEN PLAINTIFFS TO TRANSCANADA’S UNTIMELY
“STATUS UPDATE” AND DECLARATION was electronically served on all
counsel of record via the Court’s CM/ECF system.

s/ Stephan C. Volker
Attorneys for Plaintiffs
INDIGENOUS ENVIRONMENTAL NETWORK
and NORTH COAST RIVERS ALLIANCE

APPENDIX

4



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 22 2013

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
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Washington, DC 20520

Dear Mr. Fernandez and Dr. Jones:

In accordance with our authorities under the National Environmental Policy Act (NEPA) and Section 309 of the Clean Air Act, EPA has reviewed the Department of State's draft Supplemental Environmental Impact Statement (DSEIS) for a Presidential Permit application by TransCanada Keystone Pipeline, LP (TransCanada) to construct and operate the Keystone XL Project (Project). This DSEIS builds on the Department of State's August 2011 Final EIS, and includes information regarding a new proposed route in Nebraska.

NEPA serves an important role in the decision making process for federal actions that may have environmental effects. Through the NEPA process, federal agencies disclose and analyze the potential impacts of a proposed action and reasonable alternatives, as well as measures that could mitigate any potential harmful effects. NEPA brings transparency to the federal decision making process, requiring that other federal, state, tribal and local agencies, as well as citizens, are given a meaningful opportunity to provide comments, helping to ensure federal decisions are better informed.

EPA believes this DSEIS strengthens the analysis presented to date in the NEPA process. While we appreciate this effort, we also have several recommendations for improving the analysis and considering additional mitigation as you move forward to complete the NEPA process.

Greenhouse Gas Emissions

We commend the Department of State's efforts to estimate the lifecycle greenhouse gas (GHG) emissions associated with oil sands development and the proposed Project, to analyze the effect of the Project on Canadian oil sands production and to consider measures to reduce GHG emissions. As recognized by the DSEIS, oil sands crude is significantly more GHG intensive than other crudes, and therefore has potentially large climate impacts. The DSEIS reports that lifecycle GHG emissions from oil sands crude could be 81% greater than emissions from the average crude refined in the U.S. in 2005 on a well-to-tank basis, and 17% greater on a well-to-wheels basis.¹ This difference may be even greater depending on the assumptions made.² The incremental emissions from oil sands crude transported by the Project would therefore be 18.7 million metric tons CO₂-e (carbon dioxide equivalent) per year when compared to an equal amount of U.S. average crudes, based on the Project's full capacity of 830,000 barrels of oil sands crude per day.³ To place this difference in context, we recommend using monetized estimates of the social cost of the GHG emissions from a barrel of oil sands crude compared to average U.S. crude. If GHG intensity of oil sands crude is not reduced, over a 50 year period the additional CO₂-e from oil sands crude transported by the pipeline could be as much as 935 million metric tons. It is this difference in GHG intensity - between oil sands and other crudes - that is a major focus of the public debate about the climate impacts of oil sands crude.

Although the DSEIS describes the GHG intensity of oil sands crude, the DSEIS nevertheless concludes that regardless of whether the Project permit is approved, projected oil sands production will remain substantially unchanged. This conclusion is based on an analysis of crude oil markets and projections of oil sands crude development, including the potential for other means of transport to bring oil sands crude to market. One of the alternative transport possibilities discussed in the DSEIS is the potential construction of other pipelines. As part of this discussion, the DSEIS appropriately recognizes that there is uncertainty about when, if ever, additional pipelines will be built. In light of these uncertainties, the DSEIS examines options for transporting oil sands crude by rail, and concludes that scaling up transport by rail is logistically and economically feasible, and that market forces will result in additional rail transport of oil sands crude if the Project is not built. It is this finding that supports the DSEIS' overall conclusion that approval of the permit will not by itself substantially affect GHG emissions or contribute to climate change.

¹ DSEIS, Table 4.15-22 "GHG Emissions for Producing Gasoline from Different Crude Sources from NETL 2009 and Estimates of the Impact of Key Assumptions on the Oil Sands - U.S. Average Differential." In addition to lifecycle emissions estimates from the Department of Energy's National Energy Technology Laboratory (NETL) study, the DSEIS also provides estimates from other analyses. See discussion in DSEIS section 4.15.

² DSEIS, p. 4.15-106, "Adjusting the NETL results to include other product emissions could increase the differential in incremental emissions from WCSB oil sands compared to the 2005 U.S. average crude oils by roughly 30 percent."

³ DSEIS p. 4.15-105

The market analysis and the conclusion that oil sands crude will find a way to market with or without the Project is the central finding that supports the DSEIS's conclusions regarding the Project's potential GHG emissions impacts. Because the market analysis is so central to this key conclusion, we think it is important that it be as complete and accurate as possible. We note that the discussion in the DSEIS regarding energy markets, while informative, is not based on an updated energy-economic modeling effort. The DSEIS includes a discussion of rail logistics and the potential growth of rail as a transport option, however we recommend that the Final EIS provide a more careful review of the market analysis and rail transport options. This analysis should include further investigation of rail capacity and costs, recognizing the potential for much higher per barrel rail shipment costs than presented in the DSEIS. This analysis should consider how the level and pace of oil sands crude production might be affected by higher transportation costs and the potential for congestion impacts to slow rail transport of crude.

In its discussion of practicable options for mitigating GHG emissions, the DSEIS outlines ongoing efforts by the government of Alberta to reduce the GHG emissions associated with development of oil sands crude in Alberta. EPA recommends that the Final EIS complement this discussion with an exploration of specific ways that the U.S. might work with Canada to promote further efforts to reduce GHG emissions associated with the production of oil sands crude, including a joint focus on carbon capture and storage projects and research, as well as ways to improve energy efficiency associated with extraction technologies. With regard to the estimated GHG emissions from construction and operation of the proposed Project - primarily emissions associated with electrical generation for the pumping stations - we recommend that the Department of State explore specific commitments that TransCanada might make to implement the mitigation measures recommended in the DSEIS. This would complement the significant efforts already made to reduce the risk of spills and ensure community safety. Specifically, we recommend a focus on pumping station energy efficiency and use of renewable energy, as well as investment in other carbon mitigation options.

Pipeline Safety

We have learned from the 2010 Enbridge spill of oil sands crude in Michigan that spills of diluted bitumen (dilbit)⁴ may require different response actions or equipment from response actions for conventional oil spills. These spills can also have different impacts than spills of conventional oil. We recommend that these differences be more fully addressed in the Final EIS, especially as they relate to the fate and transport of the oil and the remediation that will be required. The Enbridge spill involved a 30-inch diameter pipeline, smaller than the 36-inch diameter pipeline for proposed Project, and 20,000 barrels of oil sands crude were released. In that spill, oil sands crude sank to the bottom of the Kalamazoo River, mixing with the river bottom's sediment and organic matter, making the oil difficult to find and recover. After almost three years of recovery

⁴ As noted in the DSEIS, transporting oil sands crude via pipeline requires that it be mixed with a petroleum-based product (called a diluent), such as benzene, naphtha or natural gas condensate, to make a less viscous liquid called dilbit (diluted bitumen).

efforts, EPA recently determined that dredging of bottom sediments will be required to protect public health and welfare and the environment. This determination was based in large part on demonstrations that the oil sands crude associated with the Enbridge spill will not appreciably biodegrade.⁵ We recommend that the Final EIS more clearly acknowledge that in the event of a spill to water, it is possible that large portions of dilbit will sink and that submerged oil significantly changes spill response and impacts. We also recommend that the Final EIS include means to address the additional risks of releases that may be greater for spills of dilbit than other crudes. For example, in the Enbridge spill, the local health department issued voluntary evacuation notices based on the level of benzene measured in the air. Given these concerns, it is important to ensure that the future response and remediation plans will protect communities from impacts due to spills.

The DSEIS also outlines specific measures that the Department of State would require TransCanada to undertake to prevent and detect oil discharges. The measures include commissioning an independent engineering analysis to review TransCanada's risk assessment of the potential impacts from oil discharges to surface and groundwater resources, as well as TransCanada's current proposals for placing mainline valves along the pipeline route and installing leak detection equipment. The DSEIS also notes that the Department of State will obtain concurrence from both EPA and PHMSA on both the scope of the engineering analysis and decisions regarding the need for any additional mitigation measures. We recommend that the Department of State provide an opportunity for public review and comment on the scope of the analysis, and an opportunity for public comment on a draft of the analysis when it is completed. We also recommend that the Final EIS consider requiring TransCanada to establish a network of sentinel or monitoring wells along the length of the pipeline, especially in sensitive or ecologically important areas, as well as where water supply wells are located and at stream crossings to provide a practical means for early detection of leaks that are below the proposed detection limit (1.5 – 2%) of the pipeline flow rate.

In addition to prevention measures, we agree with the DSEIS's suggestion that additional mitigation measures regarding preparedness to reduce the impacts of a spill may be appropriate (DSEIS, p. 4.13-79). For example, we recommend including the following measures as permit conditions:

- Requiring that the emergency response plan, as well as contingency plans address submerged oil, as well as floating oil, including in a cold weather response;
- Requiring pre-positioned response assets, including equipment that can address submerged oil;
- Requiring spill drills and exercises that include strategies and equipment deployment to address floating and submerged oil; and

⁵ Order for Removal under Section 311(c) of the Clean Water Act, March 14, 2013 (<http://www.epa.gov/enbridgespill/ar/enbridge-AR-1720.pdf>)

- Requiring that emergency response and oil spill response plans be reviewed by EPA.

The DSEIS also recognizes that dissolved components of the dilbit that may be transported through the pipeline, such as benzene, polycyclic aromatic hydrocarbons (PAHs), and heavy metals, could be slowly released back to the water column for many years after a release and could cause long-term chronic toxicological impacts to organisms in both the benthic and pelagic portions of the aquatic environment. We recommend that the Final EIS more clearly recognize that this characteristic of dilbit is different from the fate and transport of oil contaminants associated with conventional crude oil and refined product spills from pipelines. For that reason we recommend that as a permit condition TransCanada be required to develop a plan for long term sampling/monitoring in the event of an oil discharge to assess and monitor these impacts as part of the spill response plan. In addition, we recommend that the permit require TransCanada to provide detailed Material Safety Data Sheets and information about the diluent and the source crude oil to support response preparations and address safety concerns in advance of any spills.

Alternative Pipeline Routes

CEQ regulations implementing NEPA require the consideration of project alternatives in an EIS, and characterize the alternatives analysis as the “heart” of an EIS.⁶ The DSEIS has been significantly improved by considering more alternative routes, including an alternative that would avoid crossing the Sand Hills Region in Nebraska, reducing impacts to this fragile ecosystem. Another significant issue in the consideration of alternative routes for this Project has been the potential for impacts to the Ogallala Aquifer in the event of a spill. The alternative route in Nebraska has avoided most of the impacts to the Sand Hills Region, but still crosses the Ogallala Aquifer. The alternative laid out in the DSEIS that would avoid the Ogallala Aquifer is the I-90 Corridor Alternative, which largely follows the path of existing pipelines. The I-90 Corridor Alternative would significantly reduce the length of pipeline crossing the Northern High Plains Aquifer system, which includes the Ogallala formation, and would further reduce the potential for adverse impacts to critical groundwater resources.

We are concerned, however, that the DSEIS does not provide a detailed analysis of the Keystone Corridor Alternative routes, which would parallel the existing Keystone Pipeline and likely further reduce potential environmental impacts to groundwater resources. By determining that these routes are not reasonable, the DSEIS does not provide an analysis of their potential impacts sufficient to enable a meaningful comparison to the proposed route and other alternatives. The Keystone Corridor Alternatives were determined not to be reasonable alternatives primarily on the basis that these routes are longer than the proposed Project’s route, and that additional pipeline miles would be needed to connect to Bakken MarketLink project, which would allow the proposed Project to also transport crude from North Dakota and Montana. As we have indicated in the past, we believe these alternative routes could further reduce risks to

⁶ 40 C.F.R. 1502.14

groundwater resources. We recommend that the Final EIS either provide more detailed information as to why these alternatives were not considered reasonable or analyze these alternatives in more detail.

Community and Environmental Justice Impacts

The DSEIS provides a comprehensive analysis of community demographics, including minority, low-income, and tribal populations, along TransCanada's proposed pipeline route. We are especially appreciative of the effort to identify and contact each of the Local Emergency Planning Committees regarding the status of their emergency response plans, and to provide that information in the DSEIS. We also commend your recognition that environmental justice communities may be more vulnerable to health impacts from a spill, and appreciate your efforts to consider communities' access to health care, including consideration of "Health Professional Shortage Areas and Medically Underserved Areas" located along the proposed pipeline route.

EPA appreciates TransCanada's commitment to conduct cleanup and restoration and to provide alternative water supplies to affected communities in the event of an oil discharge affecting not only surface waters, but also groundwater. We recommend that these commitments be clearly documented as proposed permit conditions. We believe this would give important assurances to potentially affected communities of TransCanada's responsibilities in the event of an oil discharge that affects either surface or groundwater resources.

Conclusion

Based on our review, we have rated the DSEIS as EO-2 ("Environmental Objections – Insufficient Information") (see enclosed "Summary of Rating Definitions and Follow-up Actions").

We look forward to continuing to work with you and to provide assistance as you prepare the Final EIS. We also look forward to working with you as you determine whether approving the proposed project serves the national interest under Executive Order 13337 "Issuance of Permits With Respect to Certain Energy-Related Facilities and Land Transportation Crossings on the International Boundaries of the United States".

Please feel free to contact me or have your staff contact Susan Bromm, Director, Office of Federal Activities, at (202) 564-5400 if you have any questions or would like to discuss our comments.

Sincerely,


Cynthia Giles

Enclosure

Summary of Rating Definitions and Follow-up Action

Environmental Impact of the Action

LO--Lack of Objections

The EPA review has not identified any potential environmental impacts requiring substantive changes to the proposal. The review may have disclosed opportunities for application of mitigation measures that could be accomplished with no more than minor changes to the proposal.

EC--Environmental Concerns

The EPA review has identified environmental impacts that should be avoided in order to fully protect the environment. Corrective measures may require changes to the preferred alternative or application of mitigation measures that can reduce the environmental impact. EPA would like to work with the lead agency to reduce these impacts.

EO--Environmental Objections

The EPA review has identified significant environmental impacts that must be avoided in order to provide adequate protection for the environment. Corrective measures may require substantial changes to the preferred alternative or consideration of some other project alternative (including the no action alternative or a new alternative). EPA intends to work with the lead agency to reduce these impacts.

EU--Environmentally Unsatisfactory

The EPA review has identified adverse environmental impacts that are of sufficient magnitude that they are unsatisfactory from the standpoint of public health or welfare or environmental quality. EPA intends to work with the lead agency to reduce these impacts. If the potentially unsatisfactory impacts are not corrected at the final EIS stage, this proposal will be recommended for referral to the CEQ.

Adequacy of the Impact Statement

Category 1--Adequate

EPA believes the draft EIS adequately sets forth the environmental impact(s) of the preferred alternative and those of the alternatives reasonably available to the project or action. No further analysis or data collection is necessary, but the reviewer may suggest the addition of clarifying language or information.

Category 2--Insufficient Information

The draft EIS does not contain sufficient information for EPA to fully assess environmental impacts that should be avoided in order to fully protect the environment, or the EPA reviewer has identified new reasonably available alternatives that are within the spectrum of alternatives analyzed in the draft EIS, which could reduce the environmental impacts of the action. The identified additional information, data, analyses, or discussion should be included in the final EIS.

Category 3--Inadequate

EPA does not believe that the draft EIS adequately assesses potentially significant environmental impacts of the action, or the EPA reviewer has identified new, reasonably available alternatives that are outside of the spectrum of alternatives analyzed in the draft EIS, which should be analyzed in order to reduce the potentially significant environmental impacts. EPA believes that the identified additional information, data, analyses, or discussions are of such a magnitude that they should have full public review at a draft stage. EPA does not believe that the draft EIS is adequate for the purposes of the NEPA and/or Section 309 review, and thus should be formally revised and made available for public comment in a supplemental or revised draft EIS. On the basis of the potential significant impacts involved, this proposal could be a candidate for referral to the CEQ.

APPENDIX

5

**UNITED STATES OF AMERICA
DEPARTMENT OF STATE**

TRANSCANADA KEYSTONE PIPELINE, L.P.) No. _____

**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**

Pursuant to Executive Order 11423, 33 Fed. Reg. 11714 (Aug. 16, 1968), as amended, and Executive Order 13337, 69 Fed. Reg. 25229 (Apr. 30, 2004), TransCanada Keystone Pipeline, L.P. (“Keystone”) hereby submits its application to the United States Department of State (“Department”) 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 international border between the United States and Canada, at Phillips County, Montana (the “border crossing facilities”), as more fully described herein. Authorization to construct, connect, operate, and maintain the border crossing facilities is being requested in connection with Keystone’s proposed international pipeline project – the Keystone XL Project (“Project”). If this application is approved, the Project will allow transportation of crude oil production from the Western Canadian Sedimentary Basin (“WCSB”) and the Bakken supply basin in Montana and North Dakota, to a point located on the existing Keystone Pipeline system at Steele City, Nebraska, which will allow for the delivery of that production to existing refinery markets in the Texas Gulf Coast area.

The Project will serve the national interest of the United States by providing a secure and reliable source of Canadian crude oil to meet the demand from refineries and

markets in the United States, by facilitating the delivery of domestic supplies, and by reducing U.S. reliance on comparable foreign heavy crude oils,¹ particularly declining supplies from Mexico and Venezuela.² The project also will provide significant economic and employment benefits to the United States, with minimal impacts on the environment.

I. BACKGROUND

Keystone submitted an application for a Presidential Permit for the Keystone XL Pipeline Project on September 19, 2008. The Department reviewed that application for over three years and issued Draft and Supplemental Draft Environmental Impact Statements in April 2010 and 2011, respectively, and a Final Environmental Impact Statement (FEIS) on August 26, 2011, finding that the potential impacts associated with construction and normal operation of the project suggest there would be no significant impacts to most resources along the project corridor. The FEIS was developed with the participation of numerous cooperating and assisting federal, state, and local agencies and was prepared consistent with the National Environmental Policy Act (“NEPA”) 42 U.S.C. §§ 4321, et seq.

On November 10, 2011, the Department announced that it was delaying its decision on the Presidential Permit application in order to allow additional time to gather information regarding potential alternative routing in Nebraska. In late December 2011, Congress included a provision in the Payroll Tax Cut Extension Act requiring the President to make a decision on the Presidential Permit within 60 days. On January 18,

¹ State Department Record of Decision/National Interest Determination, November 2015, at pp.7-8 (Keystone XL ROD/NID).

² Final Supplemental Environmental Impact Statement, January 2014, at Sections 1.4.2.6 and 1.4.2.7.

2012, the Department announced its determination that the project – as presented and analyzed at that time – did not serve the national interest. The determination was based solely on the rationale that the time provided for a decision was not adequate to complete the national interest review of the project, including specifically the assessment of potential alternative pipeline routes that avoid the Sandhills region in Nebraska. The President’s acceptance of the Department’s recommendation to deny the Permit rested on the same reasoning. In announcing the denial of Keystone’s application, the Department expressly stated that the denial did not preclude any subsequent permit application or applications for similar projects.

By letter dated February 27, 2012, Keystone advised the Department that it intended to file a Presidential Permit application in the near future. Keystone further advised the Department that Keystone had concluded the portion of the previously proposed Keystone XL Project that would directly serve the Gulf Coast had its own independent utility as the stand-alone Gulf Coast Project.³ Keystone acquired the remaining permits and constructed the Gulf Coast Project in 2012 and 2013. Commercial operation of the Gulf Coast pipeline commenced in January 2014. The Gulf Coast pipeline will provide capacity to deliver up to 830,000 bpd of crude oil from Cushing, Oklahoma to the Gulf Coast refinery market.

On May 4, 2012, Keystone submitted a new application for a Presidential Permit for a more limited Keystone XL Project, which included the former “Steele City Segment” of the original project. In its application, Keystone incorporated by reference the FEIS prepared by the Department for the originally proposed Keystone XL Project.

³ Keystone’s February 27, 2012 letter included a detailed appendix setting forth the basis for the independent utility of the Gulf Coast Project.

The Department reviewed Keystone's 2012 application for an additional three and a half years. It was the subject of a Draft Supplemental EIS (March 2013) and a Final Supplemental EIS (FSEIS, January 2014), both of which again concluded the Project would not have significant adverse impacts to the environment. The Department's review of Keystone's 2008 and 2012 applications involved the opportunity for, and consideration of, millions of public comments.

Almost seven years after Keystone's initial application, and notwithstanding its issuance of no less than five favorable Environmental Impact Statements, the Department issued a negative Record of Decision and National Interest Determination on November 3, 2015. The Department found that issuance of a Presidential Permit would not serve the national interest primarily on the basis that such action would undermine U.S. climate leadership in the perception of other nations. While this conclusion was inconsistent with the Department's own factual findings, nonetheless, the President and the Secretary announced the denial of Keystone's application on November 6, 2015.

II. IDENTIFYING INFORMATION

Communications and correspondence with respect to this application should be directed to the following persons:

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The identity of the applicant is TransCanada Keystone Pipeline, L.P., a limited partnership, organized under the laws of the State of Delaware and owned by affiliates of TransCanada Corporation (TransCanada), a Canadian public company organized under the laws of Canada. Keystone's primary business address is 700 Louisiana Street, Houston, Texas, 77002. Keystone's affiliate, TC Oil Pipeline Operations Inc. will be the operator of the Project. TC Oil Pipeline Operations Inc. is also owned by affiliates of TransCanada.

TransCanada has more than 65 years experience in the responsible development and reliable and safe operation of North American energy infrastructure including crude oil and natural gas pipelines, power generation, gas storage facilities, and projects related to liquefied natural gas facilities. TransCanada currently operates the 2,639-mile Keystone Pipeline system, which currently has the capacity to deliver up to 591,000 bpd of Canadian crude oil into U.S. refining and terminalling markets. The U.S. mainline segment of the Keystone Pipeline system extends from the North Dakota-Canada border to Wood River and Patoka, Illinois. The Keystone Cushing Extension extends from Steele City, Nebraska, to Cushing, Oklahoma. TransCanada also operates the Gulf Coast Pipeline, which connects with the Keystone Pipeline system at Cushing and delivers crude oil to U.S. Gulf Coast refineries. TransCanada also constructed the Houston Lateral Pipeline from Liberty County, Texas to refineries near Houston, which commenced commercial service in July 2016. Since 2010, the Keystone Pipeline System has safely delivered over 1.4 billion barrels of Canadian and U.S. domestic crude oil to markets in the U.S.

In addition to its crude oil pipeline operations and projects, TransCanada operates a network of natural gas pipelines that extends more than 56,100 miles, tapping into virtually all major gas supply basins in North America. TransCanada is the continent's leading provider of gas storage and related services with 664 billion cubic feet of storage capacity. A large independent power producer, TransCanada currently owns or has interests in over 10,700 megawatts of power generation in Canada and the United States.

As of September 30, 2016, TransCanada had total assets of approximately U.S. \$66.8 billion. For the year ended December 31, 2015, TransCanada had a net loss attributable to common shares of approximately U.S. \$0.90 billion and funds generated from operations of approximately U.S. \$3.26 billion. Attached as Exhibit A is a summary document demonstrating TransCanada's fitness to develop, construct, connect, operate, and maintain the Project as a major cross-border pipeline system.

III. DESCRIPTION OF FACILITY

Keystone requests a Presidential Permit authorizing it to construct, connect, operate, and maintain the specific border crossing facilities associated with the proposed Keystone XL Project, as shown on Exhibit B hereto. Consistent with Department policy, the border crossing facilities are defined as a 1.2 mile segment of 36-inch diameter pipeline extending downstream from the United States border, in Phillips County, Montana up to and including the first pipeline isolation valve, located at Milepost 1.2, where the first pump station in the United States is proposed to be located. Exhibit B shows: (i) a pipeline route map reflecting the location of the border crossing facilities; (ii) an engineering drawing depicting the border crossing; and, (iii) photos of the proposed construction site.

The portion of the border crossing facilities from Milepost 0.0 to Milepost 0.93 will be located on lands administered by the U.S. Bureau of Land Management (BLM). After the denial of its Presidential Permit application in November 2015, Keystone voluntarily withdrew, without prejudice, its application for authorization from BLM under the Mineral Leasing Act of 1920, as amended (30 USC 181 et seq.) and the Federal Land Policy and Management Act, as amended (43 USC 1701), to permit construction and operation of the proposed facilities at those locations, as well as across 46 additional miles of federal lands in Montana. Keystone will resubmit its application to BLM in short order. The portion of the border crossing facilities from Milepost 0.93 to Milepost 1.2 will be located on land owned by the State of Montana. Keystone is in the process of acquiring a lease for that land from the State.

The technical specifications of the line pipe to be utilized for the border crossing facilities, and the Project as a whole, are set forth in Exhibit C hereto. The pipeline will be constructed and operated in compliance with the regulations of the United States Department of Transportation, Pipeline and Hazardous Materials Safety Administration (PHMSA) as set forth at 49 CFR Parts 194 and 195. In addition, Keystone has agreed to adopt and comply with 59 Special Conditions developed by PHMSA and included at Appendix Z to the Department's January 2014 FSEIS prepared for the Keystone XL Project.

The border crossing facilities are intended to transport crude oil as an integral part of the proposed Project -- an international project designed to transport Canadian crude oil from the WCSB, and, subject to commercial demand, domestic U.S. crude oil production from the Bakken supply basin in Montana and North Dakota, to refinery

markets in the U.S. Gulf Coast region. Specifically, Keystone proposes to construct and operate a crude oil pipeline and related facilities from an oil supply hub near Hardisty, Alberta, Canada to the northernmost point of the existing Keystone Pipeline Cushing Extension at Steele City, Nebraska, which will provide access to existing refinery markets in the Texas Gulf Coast area. Subject to commercial demand, the related Bakken Market Link Project would include the construction of “on-ramp” facilities in Fallon County, Montana to allow Bakken crude oil to access the pipeline system for delivery to Steele City and then to the Gulf Coast. Maps depicting the previously approved Keystone XL Pipeline route in Montana and South Dakota are provided in the FEIS (Figures 2.1-1 and 2.1-2).⁴ The Bakken Marketlink Project is described as a connected action to the Keystone XL Project at Section 2.5.3 and Figure 2.5.3-1 of the 2011 FEIS.

In 2012, Keystone identified alternative routing in Nebraska that avoided the “Sandhills” region and submitted that proposed alternative route to the Nebraska Department of Environmental Quality (NDEQ) for evaluation under Nebraska law. The NDEQ completed its evaluation and sent it to then-Governor Heineman in December 2012. In January 2013, the Governor advised the Secretary of State that he approved of the revised route in the State. Subsequently, the Nebraska statute was the subject of litigation in Nebraska courts. To avoid uncertainty, Keystone intends to submit an

⁴ The portion of the proposed route through Montana was approved by the Montana Department of Environmental Quality (MDEQ) in the Certificate of Compliance issued to Keystone on March 30, 2012 under the Montana Major Facilities Siting Act. The MDEQ was a cooperating agency in the DOS NEPA review of the original Keystone XL application. The MDEQ approved route is included as part of the preferred route selected in the FEIS. See FEIS at p. 4-75. The portion of the proposed route through South Dakota was approved by the South Dakota Public Utilities Commission in a Final Decision and Order issued in March 2010 (and an amended Final Decision and Order in June 2010), approving construction of the Project in the state. The SDPUC accepted Keystone’s four-year Certification in January 2016.

application for route approval to the Nebraska Public Service Commission under Nebraska's Major Oil Pipeline Siting Act⁵ shortly.

There will be 18 pump stations along the pipeline route in the U.S. The project will also include additional pumping capacity at existing pump stations, as well as, two (2) new pump stations along the Keystone Cushing Extension in Kansas. Along the Gulf Coast Pipeline, there will be one new pump station in Oklahoma and three new pump stations in Texas.

The Project will have an initial nominal capacity of 830,000 bpd. Construction of the proposed Project is expected to commence after issuance of the remaining outstanding permits, including the Presidential Permit requested herein, and the Project is planned to be placed into service within two years of commencement of construction.

In Canada, approximately 329 miles of new 36-inch pipeline will be constructed from Hardisty, Alberta to Monchy, Saskatchewan where it will cross into Phillips County, Montana. Review, approval, and construction of the proposed Canadian facilities are discussed below at Section X.

IV. NATIONAL INTEREST

Approval of Keystone's application for a Presidential Permit would clearly be in the national interest of the United States for a number of reasons:

- The proposed Project would enhance the United States' energy security by providing additional critically important infrastructure for the delivery of a dependable supply of crude oil from Canada, as well as facilitating the delivery

⁵ Nebraska Revised Statute Section 57-1401 et seq.

of domestic supplies. Due to its unique physical and political characteristics, Canada is the most secure, stable, and reliable source of imported crude oil that is required by U.S. refinery markets to provide the products needed to sustain the American economy and standard of living. Its producing areas are physically close to the U.S. refinery markets. They have low production decline rates compared to conventional oil fields, which provides greater geologic certainty of future supply levels. As a neighboring country, there are limited chokepoints to disrupt trade between Canada and the United States. Canada is not a member of the Organization of Petroleum Exporting Countries, which acts to restrict oil production and influence market conditions. It also has a low likelihood of political unrest, resource nationalism, or conflict – factors that sometimes disrupt oil production in other regions (See Keystone XL ROD/NID, at p. 24).

- The proposed Project increases the diversity of supplies among the worldwide crude oil sources at a time of considerable tension in other major oil producing countries and regions. Increased output from WCSB can be utilized by a growing number of refineries in the United States that have access and means of transport for these increased supplies (See the Alberta Clipper ROD/NID September 3, 2009, at p. 25).
- Access to the WCSB shortens the transportation pathway for a sizable portion of U.S. crude oil imports. Western Canadian crude oil supplies represent the largest and closest foreign supply source to domestic refineries that do not require many days or weeks of marine transportation (See the Alberta Clipper ROD/NID September 3, 2009, at p. 25).

- Issuance of a Presidential Permit for the proposed Project would enhance the United States' relationship with Canada, its most important trade partner and key ally.
- The proposed Project would create significant employment benefits in the form of tens of thousands of well-paying jobs and associated earnings throughout the United States. This includes direct jobs, which are jobs at firms that are awarded contracts for goods and services, including construction, directly by Keystone, as well as jobs that would result from indirect and induced spending. (See Section 4.10.3 of the FSEIS).
- The proposed Project would provide substantial economic benefits to the United States. As found in the FSEIS, those benefits would include a multi-billion dollar contribution to the U.S. GDP and significant property tax revenues, as well as sales and use and other tax revenues, to counties and states along the proposed Project route. Construction of the proposed Project is expected to contribute approximately \$3.4 billion to the U.S. GDP, which includes not only earnings by workers, but all other income earned by businesses and individuals engaged in the production of goods and services demanded by the proposed Project. Property tax revenues generated from the construction camps, alone, would be approximately \$4 million. The total estimated property tax from the proposed Project in the first full year of operations would be about \$55.6 million spread across 27 counties in three states. Additionally, sales and use taxes revenue from the construction of the proposed Project would be approximately \$66 million.

These revenues could help to ease the tax burden on ordinary Americans (See Section 4.10.3 of the FSEIS).

- Importantly, issuance of a Presidential Permit for the proposed Project would send a signal to American industry that permitting decisions for critical infrastructure projects will be assessed based on their merits and based on the relevant facts; that these reviews will be conducted in a timely, fair, and predictable manner; and that projects will not be rejected based on alleged perceptions or political considerations. This would allow American businesses and others wishing to invest in infrastructure development in the U.S. to once again rationally plan and implement large investments, putting Americans to work, and benefitting the economy in general.

V. SIMILAR FACILITIES

The nearest similar crude oil pipeline facilities to the proposed border crossing facilities are those of the Express Pipeline system. Those facilities cross the border approximately 100 miles west of the proposed Project. Because of the distance, the Express facilities fall outside the coverage of the maps of the proposed Project; however, the Express facilities may be identified on any commercial crude oil map. Nearby natural gas pipeline facilities owned by Northern Border Pipeline (an affiliate of Keystone) and Foothills Pipeline are shown on Exhibit B.

VI. CONSTRUCTION PLAN

The design and procedures for construction of the Project are discussed in detail in Chapter 2 of the FEIS and Chapter 2 in the FSEIS. In addition, the project will be

constructed in conformance with a detailed Construction Mitigation and Reclamation Plan (“CMRP”) that is set forth at Appendix G (Volume 7) of the FSEIS. Further, the Project will be constructed in compliance with all conditions included in applicable permits. Permitting and approvals for the Project are discussed elsewhere in this application and in the FSEIS (Section 1.9).

VII. FINANCING AND RATES

The capital cost of the U.S. portion of the Project, from the U.S-Canada border to Steele City, Nebraska, is estimated to be U.S. \$5.3 billion. The project is anticipated to be financed through a combination of internally generated funds, bank financing, and access to capital markets.

The rates for crude oil transportation through the U.S. portion of the Project will be subject to regulation by the Federal Energy Regulatory Commission (“FERC”). Keystone anticipates there will be two categories of services offered:

- 1) Committed or term service – Keystone is proposing long-term contracts with discounted rates and a fixed/variable rate design. The rates vary with contract term, with lower rates offered for longer terms. The fixed portion of the rate is based on levelized 10 or 20-year contracts and will not change over the term of the shipper’s contract. The fixed portion of the rate is designed to recover the capital invested and is designed on a postage stamp basis. The variable portion of the rate is a flow-through of the actual operating costs, adjusted annually.

- 2) Uncommitted or spot service – Keystone will offer service to non-contract shippers on a month-to-month basis at a posted spot rate. The spot rate will be subject to indexing, as permitted by FERC.

VIII. HISTORIC PRESERVATION

In compliance with federal laws enacted to protect cultural resources from damage resulting from federally funded or permitted activities, including the National Historic Preservation Act, cultural resource investigations were conducted for each state crossed by the proposed Project. These investigations were conducted in consultation with the State Historic Preservation Officers (“SHPOs”) for each state and the Department. A discussion of the results of those surveys and the concurrence of the SHPOs is provided in Section 3.11.3 (Volume 2) of the FSEIS. Additional surveys of previously un-surveyed tracts in Montana, South Dakota, and Nebraska, as well as treatment plans and mitigation plans, have been filed with Department and respective SHPOs under the terms of the Programmatic Agreement (PA) for Department review and concurrence.

The Department conducted extensive government-to-government consultations with Native American tribes along the Project route in Montana, South Dakota, and Nebraska.⁶ Those consultations are summarized in Sections 1.6 and 3.11.4.3 of the FSEIS and the results of those consultations are incorporated into the PA.

⁶ In the course of the eight years since DOS began reviewing the proposed Project, 124 face-to-face meetings with tribal members were held, 446 phone conversations, 3,690 emails, and 1,759 letters were exchanged between DOS and the tribes.

IX. OTHER U.S. APPROVALS

Table 1.9-1 of the FSEIS provides a list of the federal and state permits, licenses, approvals, and consultation requirements applicable to the Project in the United States. Keystone has worked extensively with the BLM on a Plan of Development (POD) for construction of the Project on federally managed land. Upon denial of its 2012 Presidential Permit application, Keystone withdrew its application to BLM without prejudice. Keystone will resubmit its application shortly. Keystone will also file with the U.S. Army Corps of Engineers for authorization to utilize Nationwide Permit 12 issued under Section 404(e) of the Clean Water Act, with respect to wetland and waterbody crossings.

Keystone has completed the South Dakota Public Utilities Commission (SDPUC) process under the Energy Conversion and Transmission Facilities Act and received a Final Decision and Order from the SDPUC in March 2010 and an amended Final Decision and Order in June 2010, in Docket HP09-001, approving construction of the Project in the state. On January 21, 2016, the SDPUC issued a Final Decision and Order in Docket HP14-001, accepting Keystone's Certification that the Project continues to meet the conditions upon which the 2010 permit was issued. An appeal from that order is pending in South Dakota Circuit Court.

The Montana Department of Environmental Quality (MDEQ) was a cooperating agency in the development of the FEIS. The FEIS incorporates the MDEQ construction specifications as well as the route variations that were adopted by the MDEQ in Montana (Appendix I, Volume 6). The MDEQ issued a Certificate of Compliance under the Major Facility Siting Act (MFSA) to Keystone on March 30, 2012.

As noted, Keystone will submit an application to the Nebraska Public Service Commission in early 2017 for approval of its proposed routing in Nebraska. The proposed route will be essentially the route previously evaluated by the NDEQ in 2012 and approved by the Nebraska Governor in 2013 and included in the FSEIS review. Keystone expects the Nebraska alternative route selection process to be complete in 2017.

Keystone has filed for the majority of its required county and local permits and approvals for Montana and South Dakota. With respect to the other outstanding permits and approvals, Keystone will file these permits and approvals prior to construction.

X. CANADIAN APPROVALS

In Canada, approximately 329 miles of new 36-inch pipeline will be constructed from Hardisty, Alberta to Monchy, Saskatchewan where it will cross into Phillips County, Montana. Review and approval of the proposed Canadian facilities is subject to the jurisdiction of the Canadian National Energy Board (“NEB”) as well as various local, municipal, provincial and other federal authorities.

The Canadian portion of the Project will cross provincial and international boundaries and, accordingly, has been subject to the regulatory oversight of the NEB. The NEB issued a Certificate of Public Convenience and Necessity (“CPCN”) under section 52 of the National Energy Board Act (“NEB Act”) authorizing construction and operation of the Project on April 27, 2010. In its Reasons For Decision (OH-1-2009), the NEB determined:

- That taking into account the implementation of proposed mitigative measures and those set out in the CPCN conditions, the Project is not likely to cause significant adverse environmental effects.
- That the Project is and will be required by the present and future public convenience and necessity.

On September 2, 2010 and November 3, 2010, the NEB approved the detailed route for the Project in Canada pursuant to section 36 of the NEB Act.

In addition, on September 7, 2010, the NEB approved the relevant pre-construction conditions in Certificate OC-56 to allow construction to commence on the Hardisty B Terminal and major river crossings to be constructed by horizontal directional drill (HDD). Construction commenced on the Hardisty B Terminal on September 13, 2010. On August 30, 2011, the NEB approved the pre-construction conditions for the pump stations and earth grading work has commenced. The HDD crossings of two major water courses -- the Red Deer and South Saskatchewan Rivers -- were completed during the first quarter of 2012.

Various ancillary authorizations from local, municipal, provincial and federal authorities for activities related and incidental to the construction and operation of the project facilities is also required. Filing for these authorizations is well advanced and the majority have already been received.

XI. ENVIRONMENTAL JUSTICE

To facilitate the Department's obligations under Executive Order 12898, environmental justice considerations, including information on minority and low-income

populations likely to be affected by construction of the proposed pipeline, were addressed in the FEIS (Section 3.10.1.1), as updated in the FSEIS (Section 3.10.2.4). The Department concluded that potential impacts to minority and low-income populations during construction within counties crossed by the proposed Project corridor would be minor and would not disproportionately affect these populations when considered at the county population level. Some potential limited, short-term construction impacts were posited to minority and low-income populations at the micro, census block level, however, mitigations for these impacts were identified in the FEIS. Further, the FEIS concluded it is not likely that operation of the proposed Project would disproportionately adversely impact minority and low income populations. This extensive analysis was conducted under guidance from the Environmental Protection Agency.

XII. COMPATIBILITY WITH NEC RECOMMENDATIONS

With respect to the recommendations contained in the August 8, 1994 National Economic Council White Paper, “Staff Recommendations on the Task Force on Border Infrastructure and Facilitation for Improved U.S. Border Operations,” Keystone states as follows:

- No specific support infrastructure or access roads are necessary or required by state or regional plans with respect to the border crossing facilities.
- No Canadian development plans or priorities have been identified as specifically applicable to the border crossing facilities. Keystone XL will

comply with all permitting and other requirements applicable to the Canadian segment of the project, to the border.

- Keystone XL will inspect the border crossing facilities in accordance with U.S. Department of Transportation regulatory requirements set forth at 49 C.F.R. Parts 194 and 195, including aerial, foot and in-line mechanical inspections. The cost of these inspections will be covered by Keystone's normal operating budget. Keystone operational personnel will carry out all required inspections.

XIII. ENVIRONMENTAL REVIEW

A FEIS was released on August 26, 2011, which addressed the proposed Project as described in Keystone's 2008 application. A FSEIS was released on January 31, 2014, which addressed the proposed Project as described in Keystone's 2012 application. In the FEIS and the FSEIS, the Department evaluated the potential construction and operational impacts of the proposed Project and alternative impacts that may occur without the proposed Project on a wide range of environmental and cultural resources.

Keystone's application as submitted today follows the route from the Canadian border across Montana and South Dakota that was fully studied in the FSEIS, as well as the route approved by the Governor of Nebraska, which Keystone will submit to the Nebraska PSC. There have been no material changes to the impacts considered and described in the 2014 FSEIS.

Because so much of the environmental analysis relevant to this application was recently completed in the comprehensive review associated with the prior Keystone XL

application, there is no basis for the Department to conduct, *ab initio*, a new or supplemental NEPA process for this application. The existing environmental record can be relied upon because the currently proposed action meets all four accepted criteria for determining whether existing environmental documents adequately cover a proposed action under consideration:⁷

- The new proposed action is essentially similar to an alternative analyzed in the existing NEPA documents. It is within the same analysis area and the geographic and resource conditions are similar or identical to those analyzed in the existing NEPA documents.
- The range of alternatives analyzed in the existing NEPA documents is appropriate with respect to the proposed action, given current environmental concerns, interests, and resource values.
- The existing analyses are valid in light of any new information or circumstances. It is reasonable to conclude that new information and new circumstances would not substantially change the analysis of the proposed action.
- The direct, indirect, and cumulative effects that would result from implementation of the proposed action are the same as those assessed in the existing NEPA documents.

⁷ See, BLM National Environmental Policy Handbook, p. 23, January, 2008.

In this light, the Presidential Memorandum regarding Construction of the Keystone XL Pipeline signed and issued by the President on January 24, 2017, directs that:

To the maximum extent permitted by law, the Final Supplemental Environmental Impact Statement issued by the Department of State in January 2014 regarding the Keystone XL Pipeline (Final Supplemental EIS) and the environmental analysis, consultation, and review described in that document (including appendices) shall be considered by the Secretary of State to satisfy the following with respect to the Keystone XL Pipeline as described in TransCanada's permit application to the Department of State of May 4, 2012:

- (A) all applicable requirements of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 et seq.; and
- (B) any other provision of law that requires executive department consultation or review (including consultation required under section 7(a) of the Endangered Species Act of 1973, 16 U.S.C. 1536 (a)).

XIV. CONCLUSION

For the reasons set forth above, Keystone submits that the construction, connection, operation, and maintenance of the proposed border crossing facilities, in conjunction with the Project as described herein and in the FEIS and FSEIS, are in the national interest of the United States. Accordingly, Keystone respectfully requests that the Department promptly issue a Presidential Permit authorizing the construction, connection, operation, and maintenance of the identified border crossing facilities for the importation of crude oil, to be located at the international border between the United States and Canada, at Phillips County, Montana, as more fully described in this application.

Respectfully submitted,



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Director, U.S. Regulatory Law - Liquids
TransCanada Corporation
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Washington, DC 20005

Dated: January 26, 2017

APPENDIX

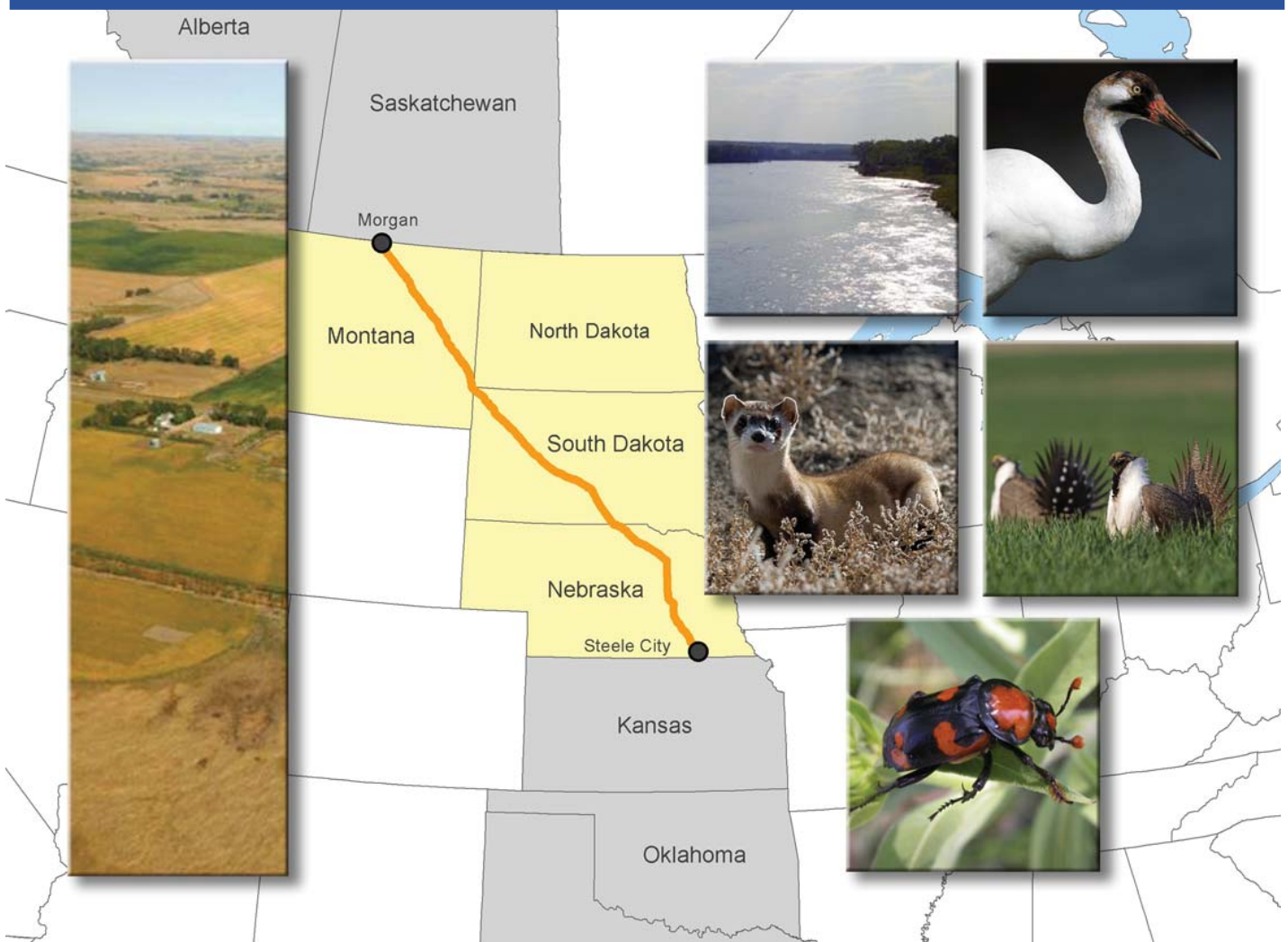
6



United States Department of State
Bureau of Oceans and International
Environmental and Scientific Affairs

Final Supplemental Environmental Impact Statement for the **Keystone XL Project** Executive Summary January 2014

Applicant for Presidential Permit: TransCanada Keystone Pipeline, LP



Front cover photo sources in order of appearance top to bottom:

Whooping crane

Hagerty, Ryan. 2012. *Endangered Whooping Crane (Grus Americana)*. Photograph. U.S. Fish and Wildlife Service. 23 February 2012. Website: <http://www.flickr.com/photos/usfwshq/6777481034/>.

Black-footed ferret

U.S. Fish & Wildlife Service. 2012. *Black-footed ferret*. Photograph. USFWS Headquarters. 3 July 2012. Website: <http://www.flickr.com/photos/usfwshq/7013874797/in/photolist-9Z7MXd-bFMWBP-bsoAvk-9DoXKC-bZh2uu/>.

Sage grouse

Rush, Kenneth. No Date. *Male Greater Sage Grouse Strutting at Hat Six Lek near Casper, Wyoming*. Photograph. Shutterstock, Image ID: 52631191. Website: <http://www.shutterstock.com/pic-52631191/stock-photo-male-greater-sage-grouse-strutting-at-hat-six-lek-near-casper-wyoming.html>.

American burying beetle

Backlund, Doug. No date. *Untitled [American Burying Beetle]*. Photograph. U.S Fish & Wildlife Service – South Dakota Field Office. Website: <http://www.fws.gov/southdakotafieldoffice/BEETLE.HTM>.

United States Department of State Final Supplemental Environmental Impact Statement

For the
KEYSTONE XL PROJECT
Applicant for Presidential Permit:
TransCanada Keystone Pipeline, LP

Executive Summary



Genevieve Walker
Project Manager
United States Department of State
Bureau of Oceans and International Environmental
and Scientific Affairs
2201 C Street NW, Room 2726
Washington, DC 20520

Cooperating Agencies

U.S. Army Corps of Engineers (USACE)
U.S. Department of Agriculture—Farm Service Agency (FSA)
U.S. Department of Agriculture—Natural Resource Conservation Service (NRCS)
U.S. Department of Agriculture—Rural Utilities Service (RUS)
U.S. Department of Energy (DOE)
U.S. Department of Interior—Bureau of Land Management (BLM)
U.S. Department of Interior—National Park Service (NPS)
U.S. Department of Interior—U.S. Fish and Wildlife Service (USFWS)
U.S. Department of Transportation—Pipeline and Hazardous Materials Safety Administration,
Office of Pipeline Safety (PHMSA)
U.S. Environmental Protection Agency (USEPA)

Assisting Agencies

U.S. Department of the Interior, Bureau of Reclamation (BOR)
Nebraska Department of Environmental Quality (NDEQ)
Various State and Local Agencies in Montana, South Dakota, Nebraska, and Kansas

January 2014

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- 1.0 Introduction
- 2.0 Description of the Proposed Project and Alternatives

Volume II

- 3.0 Affected Environment

Volume III

- 4.0 Environmental Consequences

Volume IV

- 5.0 Alternatives
- 6.0 List of Preparers
- 7.0 Distribution List—Final Supplemental EIS or Executive Summary
- 8.0 Index

Volume V

Comments and Responses (Part 1)

Volume VI

Comments and Responses (Part 2)

Volume VII

- Appendix A Governor Approval of the Keystone XL Project in Nebraska
- Appendix B Potential Releases and Pipeline Safety
- Appendix C Supplemental Information to Market Analysis
- Appendix D Waterbody Crossing Tables and Required Crossing Criteria for Reclamation Facilities
- Appendix E Amended Programmatic Agreement and Record of Consultation
- Appendix F Scoping Summary Report
- Appendix G Construction, Mitigation, and Reclamation Plan

Volume VIII

- Appendix H 2012 Biological Assessment, 2013 USFWS Biological Opinion, and Associated Documents

Volume IX

- Appendix I Spill Prevention, Control, and Countermeasure Plan; and Emergency Response Plan
- Appendix J Basin Electric Big Bend to Witten 230-kV Transmission Project Routing Report
- Appendix K Historical Pipeline Incident Analysis
- Appendix L Oil and Gas Wells within 1,320 ft of Proposed Right-of-Way
- Appendix M Soil Summary for Montana, South Dakota, and Nebraska

Volume X

- Appendix N Supplemental Information for Compliance with MEPA
- Appendix O Socioeconomics
- Appendix P Risk Assessment

Volume XI

- Appendix Q Crude Oil Material Safety Data Sheets
- Appendix R Construction/Reclamation Plans and Documentation
- Appendix S Pipeline Temperature Effects Study
- Appendix T Screening Level Oil Spill Modeling
- Appendix U Lifecycle Greenhouse Gas Emissions of Petroleum Products from WCSB Oil Sands Crudes Compared with Reference Crudes
- Appendix V Literature Review
- Appendix W Past, Present, and Reasonably Foreseeable Future Project Descriptions
- Appendix X Canadian Environmental Assessment Act and Canadian Regulatory Review of Keystone XL
- Appendix Y Estimated Criteria Pollutants, Noise, and GHG Emissions
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ES.1.0 OVERVIEW OF REVIEW PROCESS

The Keystone XL Pipeline (the proposed Project) is a proposed 875-mile pipeline project that would extend from Morgan, Montana, to Steele City, Nebraska. The pipeline would allow delivery of up to 830,000 barrels per day (bpd) of crude oil from the Western Canadian Sedimentary Basin (WCSB) in Canada and the Bakken Shale Formation in the United States to Steele City, Nebraska, for onward delivery to refineries in the Gulf Coast area (see Figure ES-1). TransCanada Keystone Pipeline, LP (Keystone) has applied for a Presidential Permit that, if granted, would authorize the proposed pipeline to cross the United States-Canadian border at Morgan, Montana.

The proposed route differs from the route analyzed in the 2011 Final Environmental Impact Statement (2011 Final EIS) in that it would avoid the environmentally sensitive Nebraska Department of Environmental Quality (NDEQ)-identified Sand Hills Region and no longer includes a southern segment from Cushing, Oklahoma, to the Gulf Coast area.

The U.S. Department of State (the Department) prepared this Final Supplemental Environmental Impact Statement (the Supplemental EIS) to assess the potential impacts associated with the proposed Project and its alternatives. The Supplemental EIS takes into consideration over 400,000 comments received during the scoping period and 1.5 million comments received on the Draft Supplemental EIS issued in March 2013. Notable changes since the Draft Supplemental EIS include:

- Expanded analysis of potential oil releases;
- Expanded climate change analysis;
- Updated oil market analysis incorporating new economic modeling; and
- Expanded analysis of rail transport as part of the No Action Alternative scenarios.

ES.1.1 Presidential Permit Process

For proposed petroleum pipelines that cross international borders of the United States, the President, through Executive Order (EO) 13337, directs the Secretary of State to decide whether a project serves the national interest before granting a Presidential Permit.

To make this decision (i.e., the National Interest Determination), the Secretary of State, through the Department, considers many factors, including energy security; environmental, cultural, and economic impacts; foreign policy; and compliance with relevant state and federal regulations. This Supplemental EIS was produced consistent with the National Environmental Policy Act (NEPA) and will help inform that determination. Before making such a decision, the Department also asks for the views of eight federal agencies identified in EO 13337: the Departments of Energy, Defense, Transportation, Homeland Security, Justice, Interior, and Commerce, as well as the U.S. Environmental Protection Agency (USEPA).

If the proposed Project is determined to serve the national interest, it will be granted a Presidential Permit that authorizes the construction, connection, operation, and maintenance of the facilities at the border between the United States and Canada. The applicant would be required to abide by certain conditions listed in this Supplemental EIS and the Presidential Permit. The Department's primary role is to make a National Interest Determination. Its jurisdiction does not include selection of specific pipeline routes within the United States.

In addition, the Department acts consistent with the National Historic Preservation Act (NHPA) and the Endangered Species Act (ESA) as part of its comprehensive NEPA consistent review.

ES.1.2 Background

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

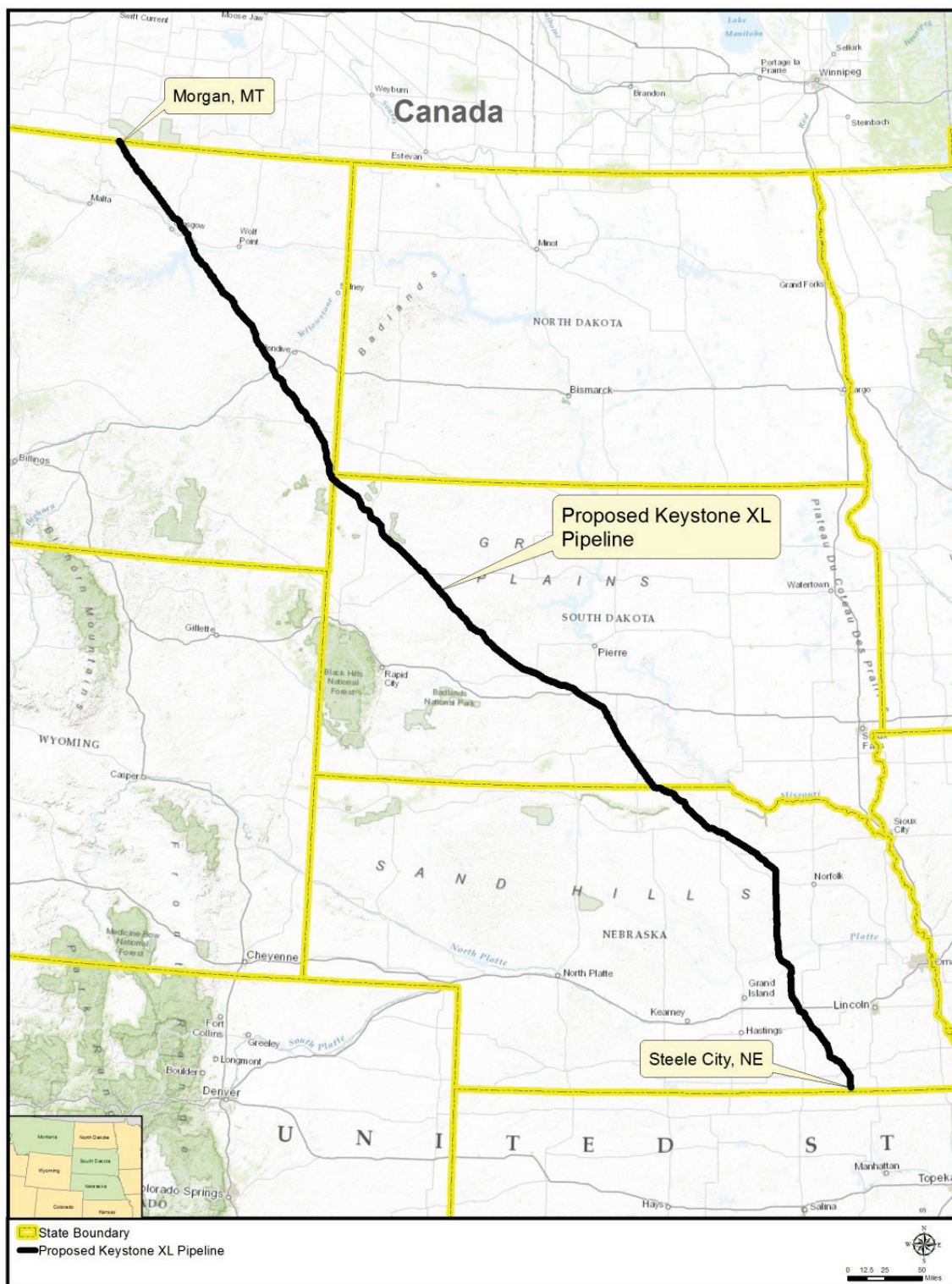


Figure ES-1 Proposed Keystone XL Project Route

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

In February 2012, Keystone informed the Department that it considered the Gulf Coast portion of the originally proposed pipeline project (from Cushing, Oklahoma, to the Gulf Coast area) to have independent economic utility, and indicated that it intended to proceed with construction of that pipeline as a separate project, the Gulf Coast Project (see Figure ES-2). The Gulf Coast Project did not require a Presidential Permit because it does not cross an international border. Construction on the Gulf Coast Project was recently completed.

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

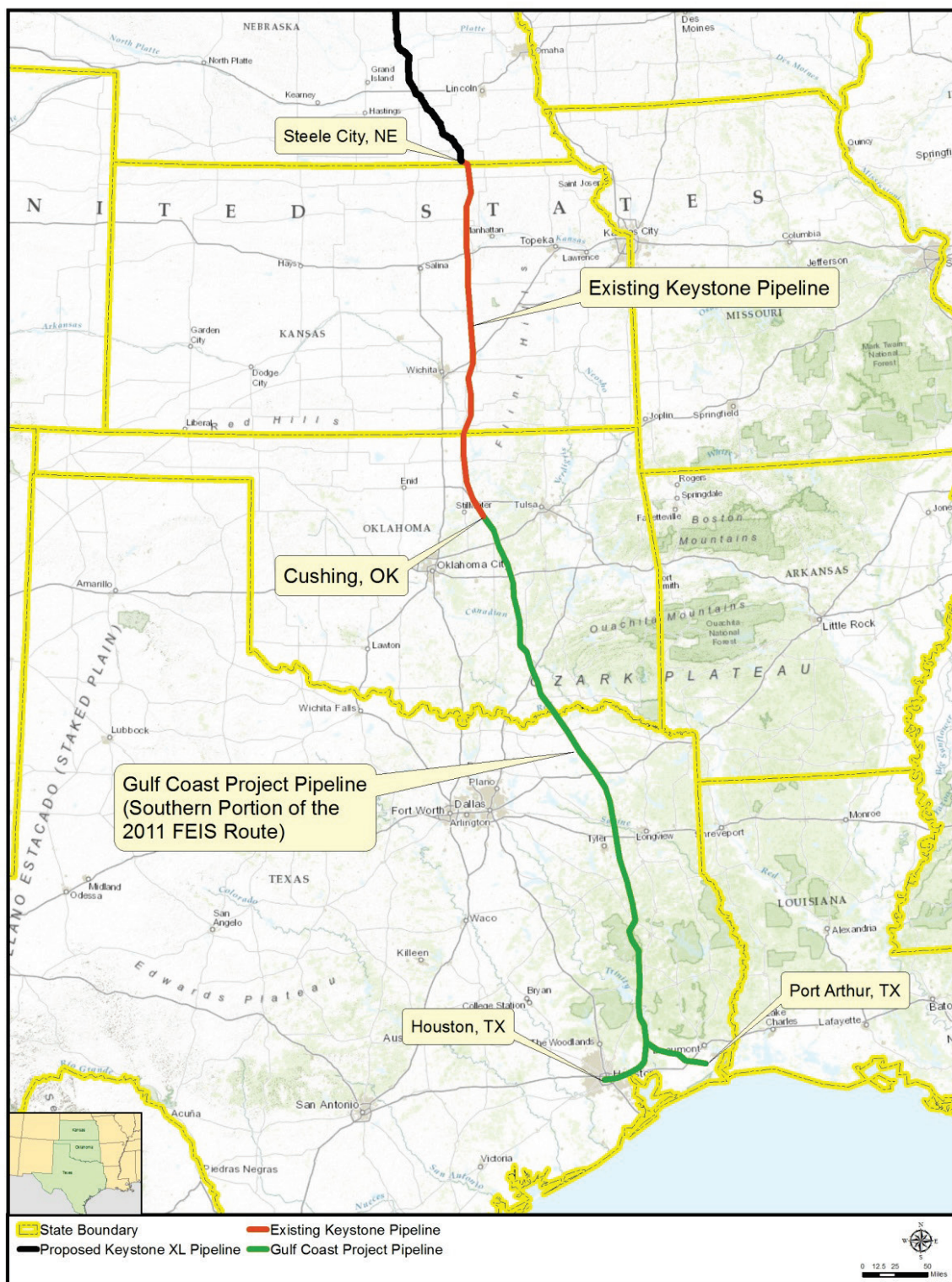
In addition to the NDEQ-identified Sand Hills Region, the proposed Project route would avoid other areas in Nebraska (including portions of Keya Paha County) that have been identified by the NDEQ as having soil and topographic characteristics similar to the Sand Hills Region. The proposed Project route would also avoid or move further away from water wellhead protection areas for the villages of Clarks and Western, Nebraska. Figure ES-3 compares the 2011 Final EIS route and the proposed Project route.

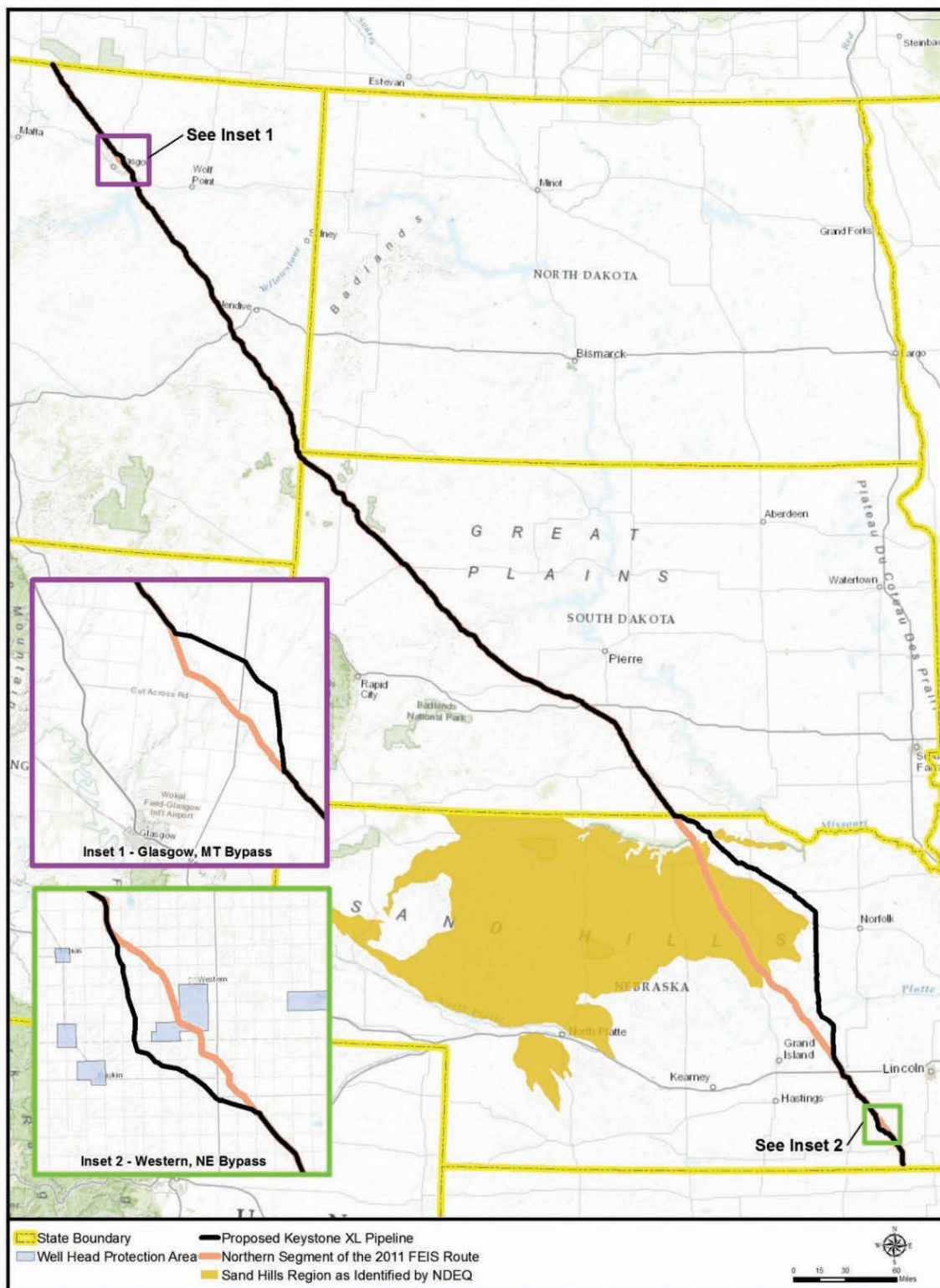
The proposed route in Montana and South Dakota is largely unchanged from the route analyzed in the 2011 Final EIS except for minor modifications that Keystone made to improve constructability and in response to landowner requests (see Figure ES-3).

The Department, after discussions with the USEPA and the Council on Environmental Quality (CEQ), determined consistent with NEPA that issuance of the new Presidential Permit would constitute a major federal action that may have significant environmental impact, and that it would prepare a supplement to the 2011 Final EIS for the new application. This Supplemental EIS provides a thorough analysis of the environmental impacts from the proposed Project; it has been revised, expanded, and updated to include a comprehensive review of the new route in Nebraska as well as any significant new circumstances or information that is now available and relevant to the overall proposed Project.

To assist in preparing this Supplemental EIS, the Department retained an environmental consulting firm, Environmental Resources Management (ERM). ERM was selected pursuant to the Department's interim guidance on the selection of independent third-party contractors. This guidance is designed to ensure that no conflicts of interest exist between the contractor and the applicant and that any perceived conflicts that would impair the public's confidence in the integrity of the work are mitigated or removed. ERM works at the sole and exclusive instruction of the Department and is not permitted to communicate with Keystone unless specifically directed to do so by Department officials.

On June 15, 2012, through a Notice of Intent, the Department solicited public comments for consideration in establishing the scope and content of this Supplemental EIS. The scoping period extended from June 15 to July 30, 2012. In total, an estimated 406,712 letters, cards, emails, e-comments, or telephone conversation records (henceforth referred to as submissions) were received from the public, agencies, and other interested groups and stakeholders during the scoping period. In March 2013, the Department issued a Draft Supplemental EIS that included new analysis and analysis built upon the work completed in the 2011 Final EIS, as well as the estimated 406,712 submissions mentioned above that were received during the 2012 scoping process.

**Figure ES-2 Gulf Coast Project Route**



Note: The 2011 Final EIS route is also referred to in this Final Supplemental EIS as the 2011 Steele City Segment Alternative.

Figure ES-3 Comparison of Proposed Project to 2011 Final EIS Route

**ES.1.3 Public Comments Received
Regarding the Draft
Supplemental EIS**

Following publication of the 2013 Draft Supplemental EIS, the Department invited the public to comment on the document. Electronic versions were made available for download, and hard copies were made available in public libraries along the proposed pipeline route. Hard and electronic copies of the Draft Supplemental EIS were sent to interested Indian tribes, agencies, elected and appointed officials, non-governmental organizations (NGOs), and other parties. The Department also solicited input at a public meeting held on April 18, 2013 in Grand Island, Nebraska. In total, the Department received an estimated 1,513,249 submissions during the public comment period for the Draft Supplemental EIS. Submissions were made by federal, state, and local representatives, members of the public, government agencies, Indian tribes, NGOs, and other interested groups and stakeholders. Submissions made by the public on the Draft Supplemental EIS were posted on www.regulations.gov.

Of this total number of submissions, an estimated 1,496,396 submissions (99 percent of the total) were form letters sponsored by NGOs. The remaining 16,853 submissions were identified as unique submissions. All submissions were evaluated and addressed, as appropriate, in this Supplemental EIS. Some of the most frequent comment topics included:

- Concerns that the 2013 Draft Supplemental EIS did not adequately address the greenhouse gas (GHG) and climate change effects of the extraction, processing, and use of the crude oil that the proposed Project would carry;
- Concerns that potential releases from the proposed Project (i.e., spills) could pollute major groundwater resources such as the Ogallala Aquifer;
- Concerns that the 2013 Draft Supplemental EIS did not adequately address the impacts of bitumen extraction in Canada;
- Concerns about the contractor and subcontractor selection process for preparing this Supplemental EIS;
- Concerns that the crude oil transportation market was not adequately analyzed;
- Suggestions that the existing Keystone Pipeline right-of-way (ROW) be considered in lieu of the currently proposed pipeline route; and

- Questions about the accuracy of job creation estimates for construction and operation of the proposed Project, as well as the types, locations, and hiring preferences of those jobs.

ES.1.4 About the Final Supplemental EIS

This Supplemental EIS for the proposed Keystone XL pipeline project builds on the analysis provided in the 2011 Final EIS and the 2013 Draft Supplemental EIS and is now available for download by the public. Moreover, this Supplemental EIS has been distributed to participating federal and state agencies, elected officials, media organizations, Indian tribes, private landowners, and other interested parties. Printed copies have also been distributed to public libraries along the proposed pipeline route.

In completing this Supplemental EIS, the Department took into consideration the over 1.5 million submissions received. In response to these comments, the Department has revised the text from the 2013 Draft Supplemental EIS for the proposed Project. This Final Supplemental EIS includes the latest available information on the proposed Project resulting from ongoing discussions with federal, state, and local agencies. It also describes updated analysis of the potential effects (including direct, indirect, and cumulative effects) of the proposed Project and alternatives on various resources. The analysis reflects inputs from other U.S. government agencies and was reviewed through an interagency process.

**ES.2.0 OVERVIEW OF PROPOSED
PROJECT****ES.2.1 Proposed Project Purpose and Need**

According to the application submitted by Keystone, the primary purpose of the proposed Project is to provide the infrastructure to transport crude oil from the border with Canada to delivery points in the United States (primarily to the Gulf Coast area) by connecting to existing pipeline facilities near Steele City, Nebraska. The proposed Project is meant to respond to the market demand of refineries for crude oil of the kind found in Western Canada (often called *heavy* crude oil). The proposed Project would also provide transportation for the kind of crude oil found within the Bakken formation of North Dakota and Montana (often called *light* crude oil).

The proposed Project would have the capacity to deliver up to 830,000 bpd, of which 730,000 bpd of capacity has been set aside for WCSB crude oil and the remaining 100,000 bpd of capacity set aside for Williston Basin (Bakken) crude oil. Keystone has

represented that it has firm commitments to transport approximately 555,000 bpd of heavy crude oil from producers in the WCSB, as well as 65,000 bpd of crude oil from the Bakken. The ultimate mixture and quantity of crude oils transported by the proposed Project over its lifetime would be determined by market demand.

There is existing demand for crude oil—particularly heavy crude oil—at refiners in the Gulf Coast area, but the ultimate disposition of crude oil that would be transported by the proposed Project, as well as any refined products produced from that crude oil, would also be determined by market demand and applicable law.

ES.2.2 Proposed Project Description

The proposed Project would consist of approximately 875 miles of new 36-inch-diameter pipeline and related facilities for transport of WCSB and Bakken crude oil, the latter from an oil terminal near Baker, Montana. Crude oil carried in the proposed Project would be delivered to existing pipeline facilities near Steele City, Nebraska, for onward delivery to refineries in the Gulf Coast area. The proposed Project would also include two pump stations (one new and one expanded) along

the existing Keystone Pipeline in Kansas (see Figure ES-5).

Construction of the proposed Project would include the pipeline itself plus various aboveground ancillary facilities (e.g., access roads, pump stations, and construction camps) and connected actions. Figure ES-4 illustrates the construction sequence that would be followed for the proposed Project.

Construction of the proposed Project would generally require a 110-foot-wide temporary ROW and is expected to last 1 to 2 years. After construction, the proposed Project would generally maintain a 50-foot-wide permanent ROW easement over the pipeline in Montana (approximately 285 miles), South Dakota (approximately 316 miles), and Nebraska (approximately 274 miles).

Keystone would have access to property within the easement, but property owners would retain the ability to farm and conduct other limited activities within the easement. The permanent aboveground ancillary facilities would include electrically operated pump stations, mainline valves, and permanent access roads.

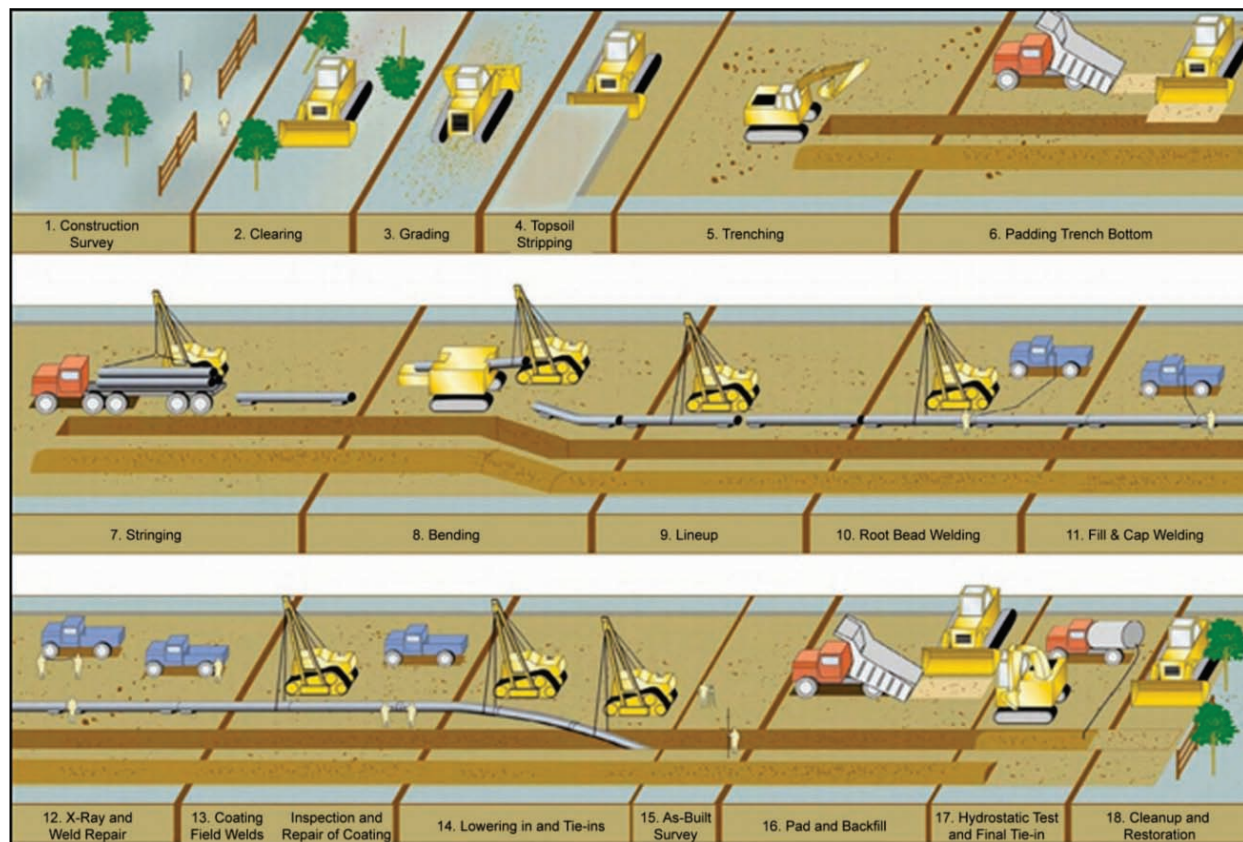


Figure ES-4 Keystone XL, Typical Pipeline Construction Sequence

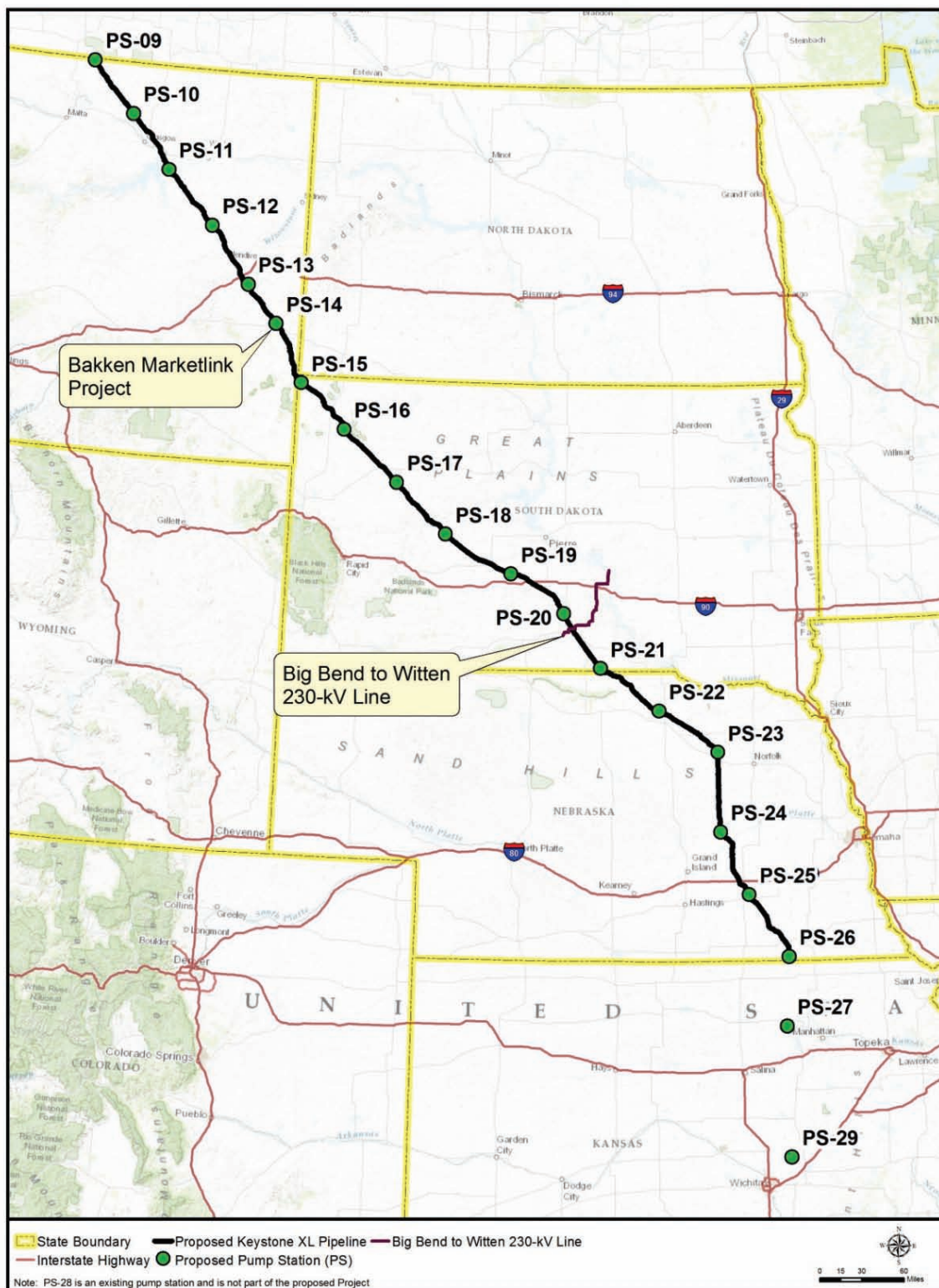


Figure ES-5 Proposed Project Overview

The U.S. portion of the proposed Project is estimated to cost approximately \$3.3 billion, and would be paid for by Keystone. If permitted, the pipeline would begin operation approximately 2 years after final approvals were received, with the actual in-service date dependent on construction as well as obtaining any additional permits, approvals, and authorizations necessary before operations can commence.

ES.2.2.1 The Bakken Marketlink Project

Keystone Marketlink, LLC, a wholly owned subsidiary of TransCanada Pipelines Limited, would construct and operate the Bakken Marketlink Project. This project would include a 5-mile pipeline, pumps, meters, and storage tanks to supply Bakken crude oil to the proposed pipeline from the Bakken Marketlink pipeline system in North Dakota and Montana. Two crude oil storage tanks would be built near Baker, Montana, as part of this project. This project would be able to deliver up to 100,000 bpd of crude oil, and has commitments for approximately 65,000 bpd.

ES.2.2.2 Big Bend to Witten 230-kV Electrical Transmission Line

The Western Area Power Administration (Western) has determined that providing reliable electricity for operation of the proposed Project requires the construction of a new 230-kilovolt (kV) transmission line originating at the Fort Thompson/Big Bend Dam area in South Dakota and extending south to the existing Witten Substation, near Pump Stations 20 and 21. To meet these demands, Western would repurpose existing transmission infrastructure and construct new infrastructure between the Big Bend Dam and a proposed Big Bend Substation. The Basin Electric Power Cooperative would construct a new 76-mile, 230-kV transmission line from the Big Bend Substation to the existing Witten Substation, and would operate both the transmission line and the Big Bend Substation.

ES.2.2.3 Electrical Distribution Lines and Substations

Electrical power for the proposed Project would be obtained from local power providers. These power providers would construct the necessary substations and transformers, and would either use existing service lines or construct new service lines to deliver electrical power to the specified point of use (e.g., pump stations and mainline valves), which would be located at intervals along the proposed Project route.

ES.3.0 OVERVIEW OF PETROLEUM MARKETS

The scope and content of the market analysis in this Supplemental EIS were informed by public and interagency comments as well as new information that was not previously available. Among the notable updates to this analysis are revised modeling to incorporate evolving market conditions, more extensive information on the logistics and economics of crude by rail, and a more detailed analysis of supply costs to inform conclusions about production implications.

The updated market analysis in this Supplemental EIS—similar to the market analysis sections in the 2011 Final EIS and 2013 Draft Supplemental EIS—concludes that the proposed Project is unlikely to significantly affect the rate of extraction in oil sands areas (based on expected oil prices, oil-sands supply costs, transport costs, and supply-demand scenarios). The Department conducted this analysis, drawing on a wide variety of data and leveraging external expertise.

ES.3.1 Summary of Market Analysis

The 2011 Final EIS was developed contemporaneously with the start of strong growth in domestic light crude oil supply from so-called *tight* oil formations, such as those formations found in North Dakota's Bakken region. Domestic production of crude oil has increased significantly, from approximately 5.5 million bpd in 2010 to 6.5 million bpd in 2012 and 7.5 million bpd by mid-2013. Rising domestic crude production is predominantly light crude, and it has replaced foreign imports of light crude oil. However, demand persists for imported heavy crude by U.S. refineries that are optimized to process that kind of oil. Meanwhile, Canadian production of bitumen from the oil sands continues to grow, the vast majority of which is currently exported to the United States to be processed by U.S. refineries that want heavy crude oil. North American production growth and logistics constraints have contributed to significant discounts on the price of landlocked crude and have led to growing volumes of crude shipped by rail in the United States and, more recently, Canada.

Both the 2011 Final EIS and the Draft Supplemental EIS published in March 2013 discussed the transportation of Canadian crude by rail as a possibility. Due to market developments since then, this Supplemental EIS notes that the transportation of Canadian crude by rail is already occurring in substantial volumes. It is estimated that approximately 180,000 bpd of Canadian crude oil is already traveling by rail (see Figure ES-6).

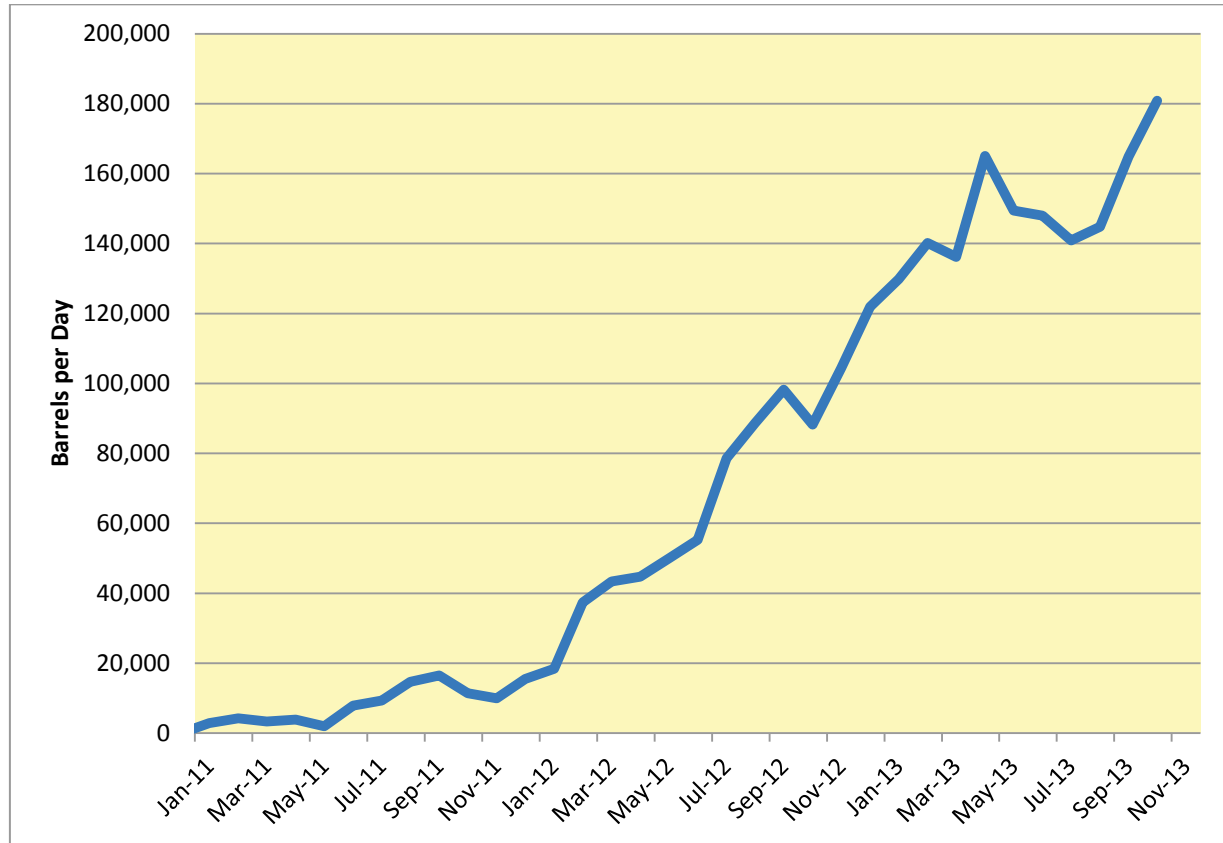
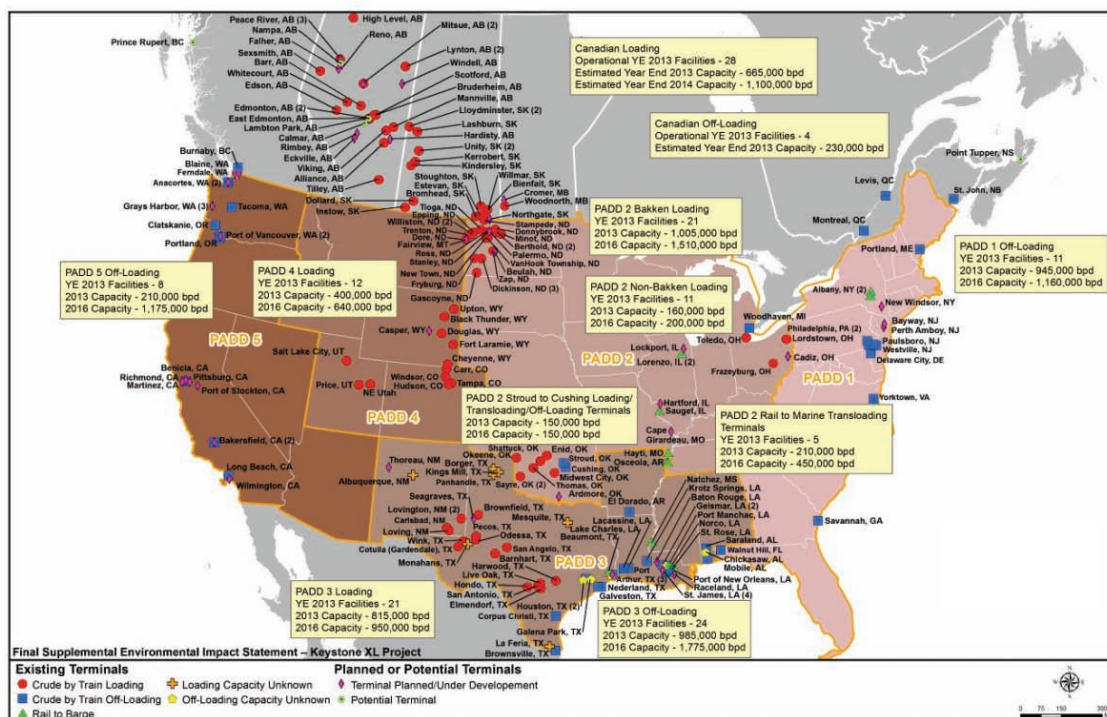
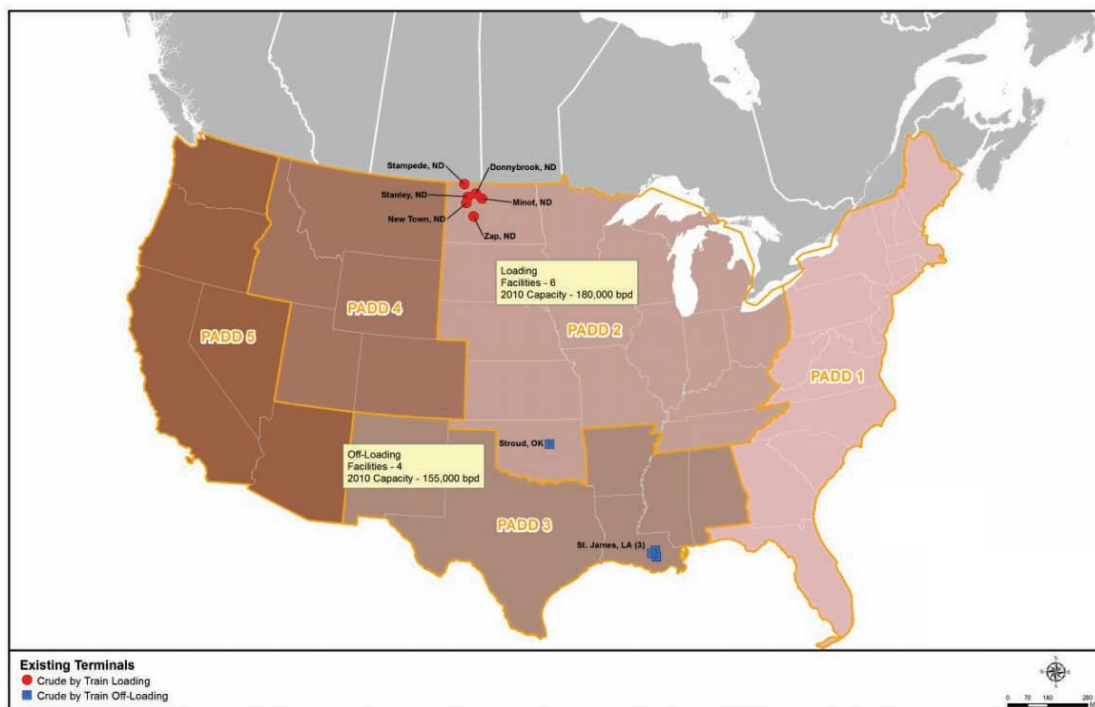


Figure ES-6 Estimated Crude Oil Transported by Rail from WCSB, bpd

The industry has been making significant investments in increasing rail transport capacity for crude oil out of the WCSB. Figure ES-7 illustrates the increase in rail loading and unloading terminals between 2010 and 2013. Rail loading facilities in the WCSB are estimated to have a capacity of approximately 700,000 bpd of crude oil, and by the end of 2014 this will likely increase to more than 1.1 million bpd. Most of this capacity (approximately 900,000 to 1 million bpd) is in areas that produce primarily heavy crude oil (both conventional and oil sands), or is being connected by pipelines to those oil production areas.

Various uncertainties underlie the projections upon which this Supplemental EIS partially relies. In recognition of the uncertainty of future market conditions, the analysis included updated modeling about the sensitivity of the market to some of these elements.

Updated information on rail transportation and oil market trends, particularly rising U.S. oil production, was incorporated in oil market modeling. This modeling was developed in response to comments received on the Draft Supplemental EIS. To help account for key uncertainties about oil production, consumption, and transportation, the modeling examined 16 different scenarios that combine various supply-demand assumptions and pipeline constraints. Modeled cases test supply and demand projections based on the official energy forecasts of independent U.S. Energy Information Administration's (EIA) 2013 Annual Energy Outlook that correspond to uncertainties raised in public comments, including potential higher-than-expected U.S. supply, lower-than-expected U.S. demand, and higher-than-expected oil production in Latin America.



Note: These estimates do not include a facility being constructed in Edmonton, Canada, with a design capacity of 250,000 bpd (100,000 bpd expected to be operational by the end of 2014) that was announced shortly before this Supplemental EIS was completed. In addition, Altex Energy has plans for a 55,000 bpd loading facility in Vermillion, Alberta.

Figure ES-7 Crude by Train Loading and Off-Loading Facilities in 2010 (top map) and 2013 (bottom map)

The supply-demand cases were paired with four pipeline configuration scenarios: an unconstrained scenario that allows pipelines to be built without restrictions; a scenario in which no new cross-border pipeline capacity to U.S. markets is permitted, but pipelines from the WSCB to Canada's east and west coasts are built; a scenario where new cross-border capacity between the United States and Canada is permitted, but Canadian authorities do not permit new east-west pipelines; and a constrained scenario that assumes no new or expanded pipelines carrying WCSB crude are built in any direction.

Updated model results indicated that cross-border pipeline constraints have a limited impact on crude flows and prices. If additional east-west pipelines were built to the Canadian coasts, such pipelines would be heavily utilized to export oil sands crude due to relatively low shipping costs to reach growing Asian markets. If new east-west and cross-border pipelines were both completely constrained, oil sands crude could reach U.S. and Canadian refineries by rail.

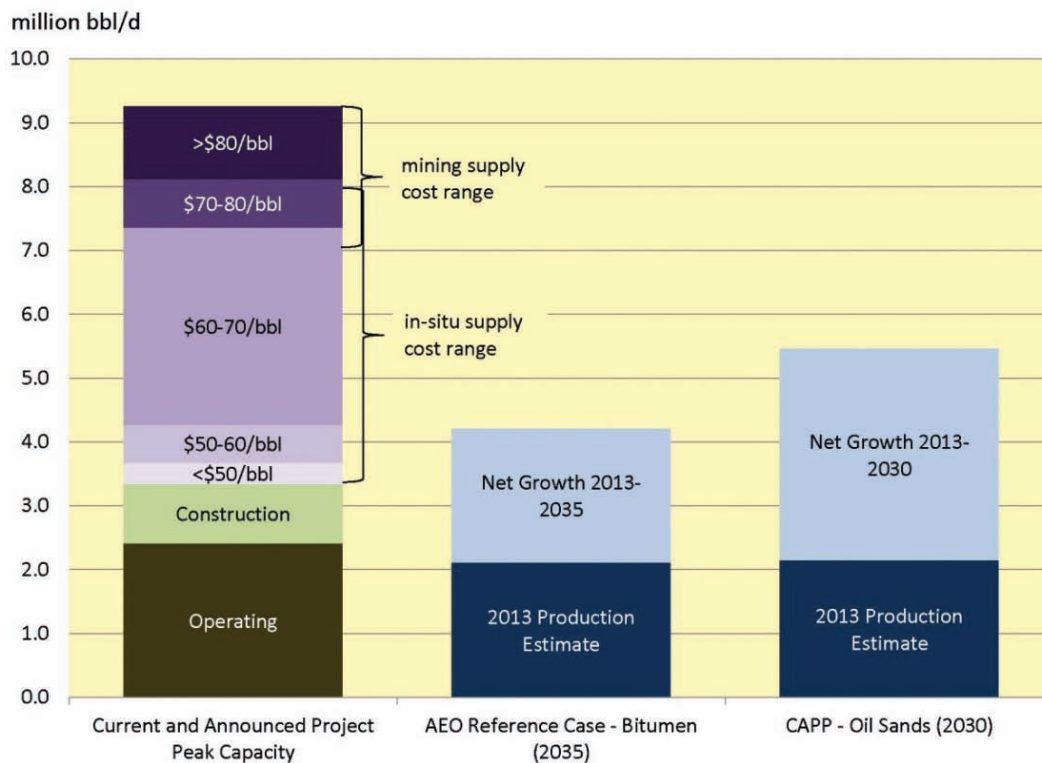
Varying pipeline availability has little impact on the prices that U.S. consumers pay for refined products such as gasoline or for heavy crude demand in the Gulf Coast. When this demand is not met by heavy Canadian supplies in the model results, it is met by heavy crude from Latin America and the Middle East.

Conclusions about the potential effects of pipeline constraints on production levels were informed by comparing modeled oil prices to the prices that would be required to support expected levels of oil sands capacity growth. Figure ES-8 illustrates existing oil sands capacity, the estimated supply costs of announced capacity, and the capacity growth that will be required to meet EIA and Canadian Association of Petroleum Producers production projections. Projected prices generally exceed supply costs for the projects responsible for future oil sands production growth. Modeling results indicate that severe pipeline constraints reduce the prices received by bitumen producers by up to \$8/bbl, but not enough to curtail most oil sands growth plans or to shut-in existing production (based on expected oil prices, oil-sands supply costs, transport costs, and supply-demand scenarios). These conclusions are based on conservative assumptions about rail costs, which likely overstate the cost penalty producers pay for shipping by rail if more economic methods currently under consideration to ship bitumen by rail are utilized.

Several analysts and financial institutions have stated that denying the proposed Project would have significant impacts on oil sands production. To the extent that other assessments appear to differ from the analysis in this report, they typically do so because they have different focuses, near-term time scales, or production expectations, and/or include less detailed data and analysis about rail than this report. While short-term physical transportation constraints introduce uncertainty to industry outlooks over the next decade, new data and analysis in Section 1.4, Market Analysis, indicate that rail will likely be able to accommodate new production if new pipelines are delayed or not constructed.

Over the long term, lower-than-expected oil prices could affect the outlook for oil sands production, and in certain scenarios higher transportation costs resulting from pipeline constraints could exacerbate the impacts of low prices. The primary assumptions required to create conditions under which production growth would slow due to transportation constraints include: 1) that prices persist below current or most projected levels in the long run; and 2) that all new and expanded Canadian and cross-border pipeline capacity, beyond just the proposed Project, is not constructed.

Above approximately \$75 per barrel for West Texas Intermediate (WTI)-equivalent oil, revenues to oil sands producers are likely to remain above the long-run supply costs of most projects responsible for expected levels of oil sands production growth. Transport penalties could reduce the returns to producers and, as with any increase in supply costs, potentially affect investment decisions about individual projects on the margins. However, at these prices, enough relatively low-cost *in situ* projects are under development that baseline production projections would likely be met even with constraints on new pipeline capacity. Oil sands production is expected to be most sensitive to increased transport costs in a range of prices around \$65 to \$75 per barrel. Assuming prices fell in this range, higher transportation costs could have a substantial impact on oil sands production levels—possibly in excess of the capacity of the proposed Project—because many *in situ* projects are estimated to break even around these levels. Prices below this range would challenge the supply costs of many projects, regardless of pipeline constraints, but higher transport costs could further curtail production.



Note: The green shaded areas in the *Current and Announced Project Peak Capacity* represent the capacity of projects that are operating or already under construction, which are expected to continue producing and/or remain under development as long as oil prices are above operating costs. The purple shaded areas represent the capacity of potential projects that would likely only go forward with oil prices above the stated ranges.

Figure ES-8 Oil Sands Supply Costs (West Texas Intermediate-Equivalent Dollars per Barrel), Project Capacity, and Production Projections

Oil prices are volatile, particularly over the short-term. In addition, long-term trends, which drive investment decisions, are difficult to predict. Specific supply cost thresholds, Canadian production growth forecasts, and the amount of new capacity needed to meet them are uncertain. As a result, the price threshold above which pipeline constraints are likely to have a limited impact on future production levels could change if supply costs or production expectations prove different than estimated in this analysis.

The dominant drivers of oil sands development are more global than any single infrastructure project. Oil sands production and investment could slow or accelerate depending on oil price trends, regulations, and technological developments, but the potential effects of those factors on the industry's rate of expansion should not be conflated with the more limited effects of individual pipelines.

**ES.4.0 ENVIRONMENTAL
ANALYSIS OF THE
PROPOSED PROJECT**

The Department evaluated the potential construction and operational impacts of the proposed Project and alternatives across a wide range of environmental resources. The analysis discusses public and agency interests and concerns as reflected in the submissions received during the scoping period and on the 2013 Draft Supplemental EIS, and includes:

- Climate change, including lifecycle (well-to-wheels [WTW]) GHG emissions associated with oil sands development, refining, and consumption;
- Potential releases or spills of oil;
- Socioeconomics, including the potential job and revenue benefits of the proposed Project, as well as concerns about environmental justice;
- Water resources, including potential effects on groundwater aquifers (e.g., Ogallala Aquifer) and surface waters;

- Wetlands;
- Threatened and endangered species;
- Potential effects on geology, soils, other biological resources (e.g., vegetation, fish, and wildlife), air quality, noise, land use, recreation, and visual resources; and
- Cultural resources, including tribal consultation.

ES.4.1 Climate Change

Changes to the Earth's climate have been observed over the past century with a global temperature increase of 1.5 degrees Fahrenheit between 1880 and 2012. This warming has coincided with increased levels of GHGs in the atmosphere. In order for the Earth's heat and energy to remain at a steady state, the solar energy that is incoming must equal the energy that is radiated into space (see Figure ES-9). GHGs contribute to trapping outbound radiation within the troposphere (the layer of the atmosphere closest to the Earth's surface), and this is called the greenhouse effect.

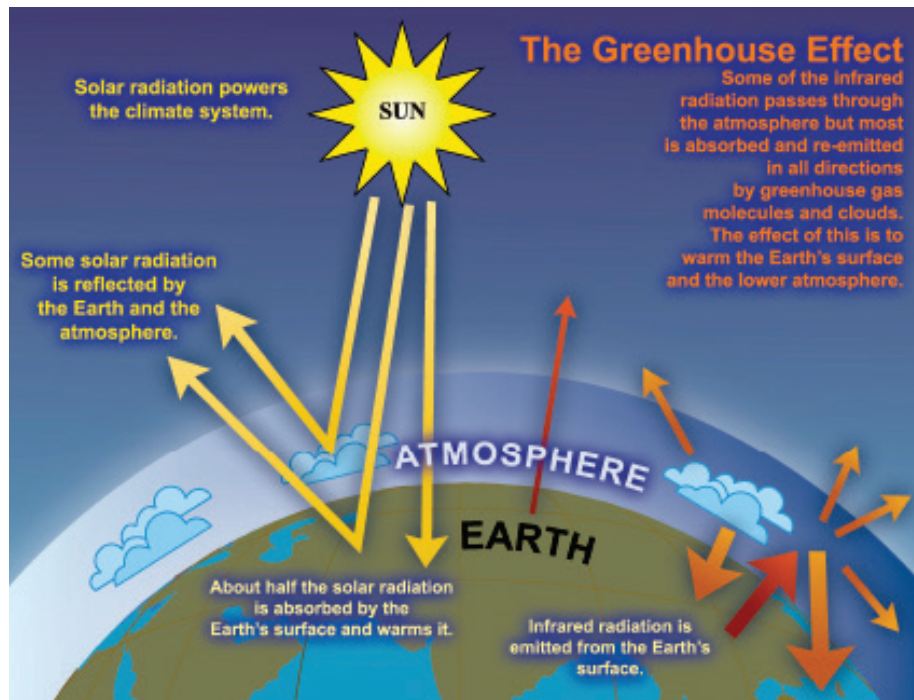


Figure ES-9 The Greenhouse Effect

Since the beginning of the Industrial Revolution, the rate and amount of GHGs have increased as a result of human activity. The additional GHGs intensify the greenhouse effect, resulting in a greater amount of heat being trapped within the atmosphere. The Intergovernmental Panel on Climate Change, a group of 1,300 independent scientific experts from countries around the world, in its Fifth Assessment Report concludes that global warming in the climate system is unequivocal based on measured increases in temperature, decrease in snow cover, and higher sea levels.

This Supplemental EIS evaluates the relationship between the proposed Project with respect to GHG emissions and climate change from the following perspectives:

- The GHG emissions associated with the construction and operation of the proposed Project and its connected actions;
- The potential increase in indirect lifecycle (wells-to-wheels) GHG emissions associated with the WCSB crude oil that would be transported by the proposed Project;
- How the GHG emissions associated with the proposed Project cumulatively contribute to climate change; and
- An assessment of the effects that future projected climate change could have in the proposed Project area and on the proposed Project.

ES.4.1.1 Greenhouse Gas Emissions from the Proposed Project

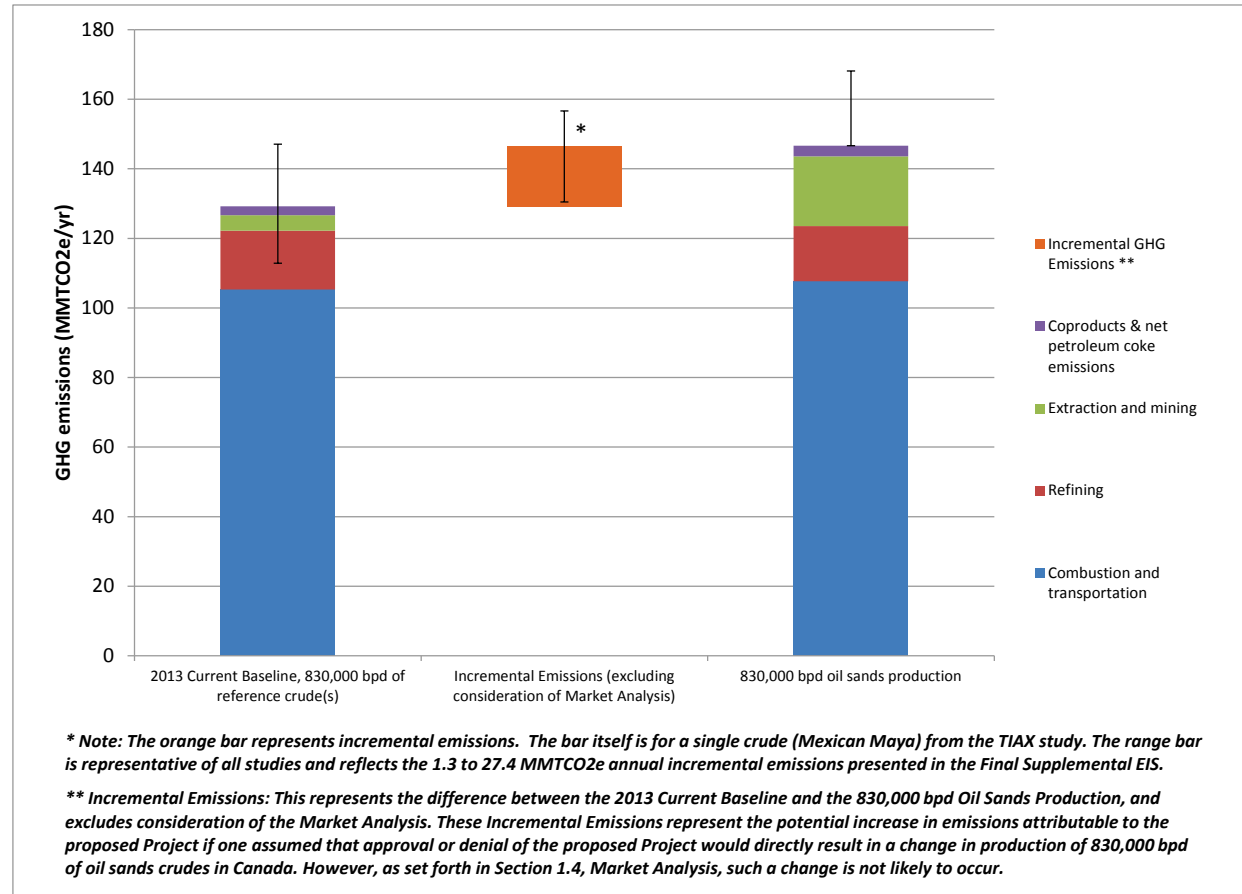
The proposed Project would emit approximately 0.24 million metric tons of carbon dioxide (CO₂) equivalents (MMTCO₂e) per year during the construction period. These emissions would be emitted directly through fuel use in construction vehicles and equipment, as well as, land clearing activities including open burning, and indirectly from electricity usage.

During operations, approximately 1.44 MMTCO₂e would be emitted per year, largely attributable to electricity use for pump station power, fuel for vehicles and aircraft for maintenance and inspections, and fugitive methane emissions at connections. The 1.44 MMTCO₂e emissions would be equivalent to GHG emissions from approximately 300,000 passenger vehicles operating for 1 year, or 71,928 homes using electricity for 1 year.

ES.4.1.2 Lifecycle Analysis

To enable a more comprehensive understanding of the potential indirect GHG impact of the proposed Project, it is important to also consider the wider GHG emissions associated with the crude oil being transported by the proposed Project. A lifecycle approach was used to evaluate the GHG implications of the WCSB crudes that would be transported by the proposed Project compared to other crude oils that would likely be replaced or displaced by those WCSB crudes in U.S. refineries. A lifecycle analysis is a technique used to evaluate the environmental aspects and impacts (in this case GHGs) that are associated with a product, process, or service from raw materials acquisition through production, use, and end-of-life. The lifecycle analysis considered wells-to-wheels GHG emissions, including extraction, processing, transportation, refining, and refined product use (such as combustion of gasoline in cars) of WCSB crudes compared to other reference heavy crudes. The lifecycle analysis also considered the implications associated with other generated products during the lifecycle stages (so-called *co-products*) such as petroleum coke. WCSB crudes are generally more GHG intensive than other heavy crudes they would replace or displace in U.S. refineries, and emit an estimated 17 percent more GHGs on a lifecycle basis than the average barrel of crude oil refined in the United States in 2005. The largest single source of GHG emissions in the lifecycle analysis is the finished-fuel combustion of refined petroleum fuel products, which is consistent for different crude oils, as shown in Figure ES-10.

The total lifecycle emissions associated with production, refining, and combustion of 830,000 bpd of oil sands crude oil transported through the proposed Project is approximately 147 to 168 MMTCO₂e per year. The annual lifecycle GHG emissions from 830,000 bpd of the four reference crudes examined in this Supplemental EIS are estimated to be 124 to 159 MMTCO₂e. The range of incremental GHG emissions for crude oil that would be transported by the proposed Project is estimated to be 1.3 to 27.4 MMTCO₂e annually. The estimated range of potential emissions is large because there are many variables such as which reference crude is used for the comparison and which study is used for the comparison.



Note: See Figure 4.14.3-7 in Section 4.14.3.5, Incremental GHG Emissions, for a full description of the information presented in this figure.

Figure ES-10 Incremental Well-to-Wheels GHG Emissions from WCSB Oil Sands Crudes Compared to Well-to-Wheels GHG Emissions from Displacing Reference Crudes

The above estimates represent the total incremental emissions associated with production and consumption of 830,000 bpd of oil sands crude compared to the reference crudes. These estimates represent the potential increase in emissions attributable to the proposed Project if one assumed that approval or denial of the proposed Project would directly result in a change in production of 830,000 bpd of oil sands crudes in Canada (See Section 4.14.4.2, Emissions and Impacts in Context, for additional information on emissions associated with increases in oil sands production). However, as set forth in Section 1.4, Market Analysis, such a change is not likely to occur under expected market conditions. Section 1.4 notes that approval or denial of any one crude oil transport project, including the proposed Project, is unlikely to significantly impact the rate of extraction in the oil sands or the continued demand for heavy crude oil at refineries in the United States based on expected oil

prices, oil-sands supply costs, transport costs, and supply-demand scenarios.

The 2013 Draft Supplemental EIS estimated how oil sands production would be affected by long-term constraints on pipeline capacity (if such constraints resulted in higher transportation costs) if long-term WTI-equivalent oil prices were less than \$100 per barrel. The Draft Supplemental EIS also estimated a change in GHG emissions associated with such changes in production. The additional data and analysis included in this Supplemental EIS provide greater insights into supply costs and the range of prices in which pipeline constraints would be most likely to impact production. If WTI-equivalent prices fell to around approximately \$65 to \$75 per barrel, if there were long-term constraints on any new pipeline capacity, and if such constraints resulted in higher transportation costs, then there could be a substantial impact on oil sands

production levels. As noted in E.S.3.1, Summary of Market Analysis, this estimated price threshold could change if supply costs or production expectations prove different than estimated in this analysis. This is discussed in Section 1.4.5.4, Implications for Production.

ES.4.1.3 Climate Change Effects

The total direct and indirect emissions associated with the proposed Project would contribute to cumulative global GHG emissions. However, emissions associated with the proposed Project are only one source of relevant GHG emissions. In that way, GHG emissions differ from other impact categories discussed in this Supplemental EIS in that all GHG emissions of the same magnitude contribute to global climate change equally, regardless of the source or geographic location where they are emitted.

As part of this Supplemental EIS, future climate change scenarios and projections developed by the Intergovernmental Panel on Climate Change and peer-reviewed downscaled models were used to evaluate the effects that climate change could have on the proposed Project, as well as the environmental consequences from the proposed Project.

Assuming construction of the proposed Project were to occur in the next few years, climate conditions during the construction period would not differ substantially from current conditions. However, during the subsequent operational time period, the following climate changes are anticipated to occur regardless of any potential effects from the proposed Project:

- Warmer winter temperatures;
- A shorter cool season;
- A longer duration of frost-free periods;
- More freeze-thaw cycles per year (which could lead to an increased number of episodes of soil contraction and expansion);
- Warmer summer temperatures;
- Increased number of hot days and consecutive hot days; and
- Longer summers (which could lead to impacts associated with heat stress and wildfire risks).

This Supplemental EIS assessed whether the projected changes in the climate could further influence the impacts and effects attributable to the proposed Project. Elevated effects due to projected climate change could occur to water resources, wetlands, terrestrial vegetation, fisheries, and endangered species, and could also contribute to air quality impacts. In addition, the statistical risk of a pipeline spill could be increased by secondary effects brought on by climatic change such as increased flooding and drought. However, this increased risk would still be much less than the risk of spills from other causes (such as third-party damage). Climate change could have an effect on the severity of a spill such that it could be reduced in drought conditions but increased during periods of increased precipitation and flooding.

ES.4.2 Potential Releases

The proposed Project would include processes, procedures, and systems to prevent, detect, and mitigate potential oil spills.

Many commenters raised concerns regarding the potential environmental effects of a pipeline release, leak, and/or spill. Impacts from potential releases from the proposed Project were evaluated by analyzing historical spill data. The analysis identified the types of pipeline system components that historically have been the source of spills, the sizes of those spills, and the distances those spills would likely travel. The resulting potential impacts to natural resources, such as surface waters and groundwater, were also evaluated as well as planned mitigation measures designed to prevent, minimize, and respond to spills.

ES.4.2.1 Historical Pipeline Performance

In response to numerous comments regarding pipeline performance, the Department analyzed historical incident data within the PHMSA and National Response Center incident databases to understand what has occurred with respect to crude oil pipelines and the existing Keystone Pipeline system.

Table ES-1 summarizes hazardous liquid pipeline incidents reported to the PHMSA across the United States from January 2002 through July 2012 and shows the breakdown of incidents by pipeline component. A total of 1,692 incidents occurred, of which 321 were pipe incidents and 1,027 were involving different equipment components such as tanks, valves, or pumps.

Table ES-1 Summary of PHMSA Database Incidents^a (January 2002 to July 2012)

Incident Category	Incidents	Incident Sub-Category	Incidents
Crude oil pipeline	1,692	Crude oil mainline pipe incidents	321
		Crude oil pipeline, equipment incidents (not mainline pipe)	1,027
		Crude oil pipeline system, unspecified elements	344
Crude oil mainline pipe	321	16-inch or greater diameter	71
		8-inch or 15-inch diameter	154
		Less than 8-inch diameter	52
		Diameter not provided	44
Crude oil pipeline, equipment (not mainline pipe)	1,027	Tanks	93
		Valves	25
		Other discrete elements (pumps, fittings, etc.)	909

^a *Incident* as used in the Final Supplemental EIS is in reference to a PHMSA and/or a National Response Center record of a reportable spill or accident found within their respective databases.

To assess the likelihood of releases from the proposed Project, risk assessments were conducted addressing both the potential frequency of releases and the potential crude oil spill volumes associated with the releases. The assessments used three hypothetical spill volumes (small, medium, and large scenarios) to represent the range of reported spills in the PHMSA's spills database. Table ES-2 shows these spill volumes and the probabilities of such volumes.

Most spills are small. Of the 1,692 incidents between 2002 and 2012 (shown in Table ES-1), 79 percent of the incidents were in the small (zero to 50 bbl) range, equivalent to a spill of up to 2,100 gallons (see Table ES-2). Four percent of the incidents were in the large (greater than 1,000 bbl) range.

ES.4.2.1.1 Small and Medium Spills

The potential impacts from small spills of oil would typically be confined to soil immediately surrounding the spill, and would have little effect on nearby natural resources. These types of spills would generally be detected by maintenance or operations personnel and addressed through repair of the leak and remediation of the impacted area by removal of impacted soil and cleaning of stained concrete or containment areas.

With medium spills, a release could occur as a subsurface or surface event depending upon the cause. Similar to a small spill, a slow subsurface leak could potentially reach a groundwater resource and, if the leak is faster than the soil can absorb the oil, could seep to the ground surface. Once the migrating oil leaves the release site, impacts to soil, vegetation, wildlife, and surface water along the flow path would occur. Depending on how quickly it is remediated, some of the oil might tend to pool in low areas and potentially infiltrate back into the soil and to groundwater depending on the depth to groundwater.

ES.4.2.1.2 Large Spills

With a large spill, the majority of the spill volume would migrate away from the release site. The potential impacts from a large spill would be similar to the impacts from the medium-sized spill, but on a much larger scale. More oil would seep into the soil over a larger area and could infiltrate deeper into the soil. Once the spill reaches the surface, the oil would flow following topographic gradient or lows (e.g., gullies, roadside drainage ditches, culverts, or storm sewers) and eventually to surface water features.

Table ES-2 Spill Scenarios Evaluated in Supplemental EIS

Spill Volume Scenario	Frequency^a
Small: Less than 50 bbl (2,100 gallons)	79%
Medium: 50–1,000 bbl (2,100–42,000 gallons)	17%
Large: >1,000 bbl (>42,000 gallons)	4%

^a Indicates the share of all releases reported in the PHMSA database that fit each spill volume scenario.

If the release enters flowing water or other surface water features, the extent of the release could become very large, potentially affecting soil, wildlife, and vegetation along miles of river and shoreline. As has been seen in recent large spills, sinking oil can be deposited in river or stream bottoms and become a continual source of oil release over time.

ES.4.2.2 Prevention and Mitigation

In order to reduce the risk of spills, if permitted Keystone has agreed to incorporate additional mitigation measures in the design, construction, and operation of the proposed Keystone XL Project, in some instances above what is normally required, including:

- 59 Special Conditions recommended by PHMSA;
- 25 mitigation measures recommended in the Battelle and Exponent risk reports; and
- 11 additional mitigation measures.

Many of these mitigation measures relate to reductions in the likelihood of a release occurring. Other measures provide mitigation that reduces the consequences and impact of a spill should such an event occur. Mitigation measures are compiled in Appendix Z, Compiled Mitigation Measures, of this Supplemental EIS. Mitigation measures are actions that, if the proposed Project is determined to be in the national interest, Keystone would comply with as conditions of a Presidential Permit.

If a spill occurred, the degree of impact to water, people, livestock, soil, and other natural resources would depend on the distance from the spill source. A large spill of 20,000 bbl, for example, could have a combined overland and groundwater spreading of up to 2,264 feet (or 0.42 miles) from a release point. Oil could spread on flat ground up to 1,214 feet from the proposed pipeline, depending on the volume spilled. If oil reached groundwater, components in the oil, such as benzene, could spread in groundwater up to an additional 1,050 feet downgradient (essentially, downhill underground and on land) of the spill point.

The proposed Project would, if permitted, include processes, procedures, and systems to prevent, detect, and mitigate potential oil spills that could occur during construction and operation of the pipeline. These would include a Spill Prevention, Control, and Countermeasure Plan as well as a Construction, Mitigation, and Reclamation Plan (CMRP). In the event of a large leak, Supervisory Control and Data Acquisition sensors would automatically detect noticeable changes in pipeline pressure and flow rates. Leaks and spills could also be identified during routine

aerial surveillance along the pipeline ROW. In addition, Keystone would be required, if permitted, to prepare an Emergency Response Plan that would contain further detail on response procedures and would be reviewed by the PHMSA prior to granting permission to operate the proposed pipeline. Keystone would incorporate into these plans lessons learned from past spills such as the pipeline rupture in 2010 that affected the Kalamazoo River (Marshall, Michigan). For example, Keystone would, if permitted, procure equipment required to respond to sunken and submerged oil and ensure personnel are appropriately trained.

ES.4.3 Socioeconomics

ES.4.3.1 Economic Activity Overview

During construction, proposed Project spending would support approximately 42,100 jobs (direct, indirect, and induced), and approximately \$2 billion in earnings throughout the United States. Of these jobs, approximately 3,900 would be direct construction jobs in the proposed Project area in Montana, South Dakota, Nebraska, and Kansas (3,900 over 1 year of construction, or 1,950 per year if construction took 2 years). Construction of the proposed Project would contribute approximately \$3.4 billion (or 0.02 percent) to the U.S. gross domestic product (GDP). The proposed Project would generate approximately 50 jobs during operations. Property tax revenue during operations would be substantial for many counties, with an increase of 10 percent or more in 17 of the 27 counties with proposed Project facilities.

The jobs and earnings analysis recognizes three distinct components of economic activity and job creation: direct, indirect, and induced.

- Direct economic activity associated with construction includes all jobs and earnings at firms that are awarded contracts for goods and services, including construction, directly by Keystone.
- Indirect economic activity includes all goods and services purchased by these construction contractors in the conduct of their services to the proposed Project. Examples of these types of activities related to pipeline construction include the goods and services purchased to produce inputs such as concrete, fuel, surveying, welding materials, and earth-moving equipment.
- Induced economic activity includes the spending of earnings received by employees working for either the construction contractor or for any supplier of goods and services required in the construction process. Examples of induced activities include

spending by access road construction crews, welders, employees of pipe manufacturers, and ranchers providing beef for restaurants and construction camps.

ES.4.3.2 Pipeline Geography, Population

Of the land area near the proposed pipeline route, approximately 17 percent intersects areas with low-income or minority populations, including Indian tribes. Such populations could potentially be disproportionately affected by the proposed Project.

The proposed pipeline route would go through 27 counties: six in Montana, nine in South Dakota, and 12 in Nebraska. These counties are referred to as the *pipeline corridor counties* and would be expected to experience most of the direct socioeconomic effects of the proposed Project.

The 27 pipeline corridor counties are predominantly rural and sparsely populated, with a total population of approximately 263,300 (2010 Census). Population density (number of persons per square mile) is low.

ES.4.3.3 Economic Activity During Construction

Construction contracts, materials, and support purchased in the United States would total approximately \$3.1 billion. Another approximately \$233 million would be spent on construction camps for workers in remote locations of Montana, South Dakota, and northern Nebraska.

Construction of the proposed Project would contribute approximately \$3.4 billion to the U.S. GDP. This figure includes not only earnings by workers, but all other income earned by businesses and individuals engaged in the production of goods and services demanded by the proposed Project, such as profits, rent, interest, and dividends. When compared with the GDP in 2012, the proposed Project's contribution represents approximately 0.02 percent of annual economic activity across the nation.

Construction spending would support a combined total of approximately 42,100 jobs throughout the United States for the up to 2-year construction period. A *job* consists of one position that is filled for one year. The term *support* means jobs ranging from new jobs (i.e., not previously existing) to the continuity of existing jobs in current or new locations. The specific number of jobs at any location would result from the individual decisions of employers across the country affected by the proposed Project based on their labor needs, work backlog, and local hiring conditions. Of these jobs, approximately 16,100 would be direct jobs at firms that are awarded contracts for goods and

services, including construction, by Keystone. The other approximately 26,000 jobs would result from indirect and induced spending; this would consist of goods and services purchased by the construction contractors and spending by employees working for either the construction contractor or for any supplier of goods and services required in the construction process.

About 12,000 jobs, or 29 percent of the total 42,100 jobs, would be supported in Montana, South Dakota, Nebraska, and Kansas. Also, of the 42,100 jobs, approximately 3,900 (or 1,950 per year if construction took 2 years) would comprise a direct, temporary, construction workforce in the proposed Project area.

Employment supported by construction of the proposed Project would translate to approximately \$2.05 billion in employee earnings. Of this, approximately 20 percent (\$405 million in earnings) would be allocated to workers in the proposed Project area states. The remaining 80 percent, or \$1.6 billion, would occur in other locations around the country.

ES.4.3.4 Economic Activity During Operations

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

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

ES.4.4 Environmental Justice

EO 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, directs federal agencies to identify and address, as appropriate, disproportionately high and adverse health or environmental effects of their programs, policies, and activities on minority populations and low-income populations. Environmental justice refers to the "fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies" (USEPA 2007). The CEQ has provided guidance for addressing environmental justice.

Within the socioeconomic analysis area identified for the proposed Project, 16 census groupings contain minority populations that are meaningfully greater (equal or greater than 120 percent) than the share in the surrounding state, and five census tracts have larger shares of low-income populations. Four of these areas contain meaningfully greater populations of both minority and low income residents. Two minority populations are located on Indian lands: the Cheyenne River Indian Reservation and the Rosebud Indian Reservation.

Impacts during construction could include exposure to construction dust and noise, disruption to traffic patterns, and increased competition for medical or health services. Typical proposed Project operations are unlikely to disproportionately adversely impact the environmental justice populations present. Because the risk of a potential release is roughly equal at all points along the pipeline, the risks associated with such releases would not be disproportionately borne by minority or low-income populations. However, such populations could be more vulnerable should a release occur.

If permitted, Keystone has agreed to avoidance and mitigation measures to minimize negative impacts to all populations in the proposed Project area. Specific mitigation for environmental justice communities during construction would involve ensuring that adequate communication in the form of public awareness materials regarding the construction schedule and construction activities is provided.

ES.4.5 Water Resources

The proposed Project route would avoid surface water whenever possible, but would cross approximately 1,073 surface waterbodies including 56 perennial rivers and streams as well as approximately 24 miles of mapped floodplains. If permitted, Keystone would drill underneath major rivers to mitigate construction impacts as described below and in Section 4.3, Water Resources.

The proposed pipeline would cross important aquifers such as the Northern High Plains Aquifer (NHPAQ) (which includes the Ogallala Aquifer) and the Great Plains Aquifer (GPA). Modeling indicates that aquifer characteristics would inhibit the spread of released oil, and impacts from a release on water quality would be limited.

Nevertheless, within 1 mile of the proposed Project route are 2,537 wells, including 39 public water supply wells. Wells that are in the vicinity could be affected by a release from the proposed Project.

ES.4.5.1 Surface Water

ES.4.5.1.1 Construction

Construction of the proposed Project could result in temporary and permanent impacts such as:

- Stream sedimentation;
- Changes in stream channel morphology (shape) and stability;
- Temporary reduction in stream flow; and
- Potential for hazardous material spills.

Open-cut methods would be used at most waterbody crossings. However, impacts to surface waterbodies would be mitigated through various means. Horizontal directional drill (HDD) methods would be used at 14 major and sensitive waterbody crossings (see Figure ES-11). Waterbody banks would be restored to preconstruction contours or to a stable slope. Seeding, erosion control fabric, and other erosion control measures would be installed, as specified in the CMRP and permit documents.

ES.4.5.1.2 Operations

Surface water impacts associated with potential releases of crude oil and other hazardous liquid spills are addressed in detail in the Potential Releases section. Other potential impacts during the operations phase would include:

- Channel migration or streambed degradation that exposes the pipeline;
- Channel incision that increases bank heights to the point where slopes are destabilized, ultimately widening the stream; and
- Sedimentation within a channel that triggers lateral bank erosion.

Mitigation measures to address these impacts would include those specified in the CMRP. The proposed pipeline would be at least 5 feet below the bottom of waterbodies and at least 3 to 4 feet below the bottom of waterbodies in rocky areas, and that depth would be maintained at least 15 feet from either waterbody edge.

Where an HDD method is used, the crossing depth would be up to 55 feet below the stream bed. Potential bank protection measures could include installing rock, wood, or other materials keyed into the bank to provide protection from further erosion or regrading the banks to reduce the bank slope.

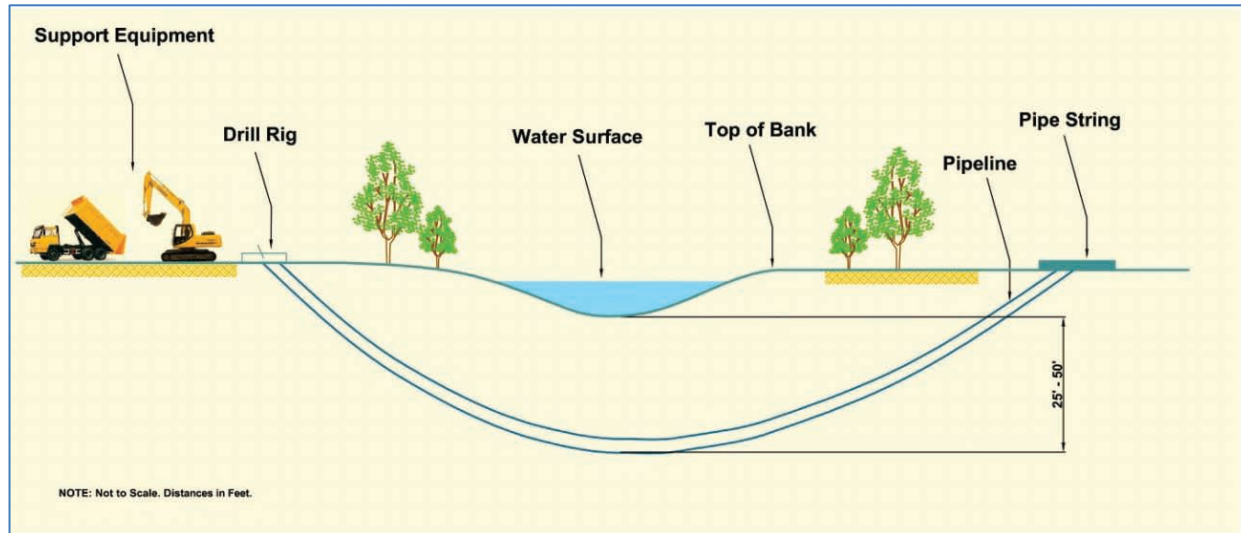


Figure ES-11 Cross Section of the Horizontal Directional Drilling Method

ES.4.5.2 Floodplains

The proposed pipeline would cross mapped and unmapped floodplains in Montana, South Dakota, and Nebraska. In floodplain areas adjacent to waterbody crossings, contours would be restored to as close to previously existing contours as practical, and the disturbed area would be revegetated during construction of the ROW in accordance with the CMRP. After construction, the proposed pipeline would not obstruct flows over designated floodplains, and any changes to topography would be minimal and thus would not affect local flood elevations.

ES.4.5.3 Groundwater

The primary source of groundwater impacts from the proposed Project would be potential releases of petroleum during pipeline operation and, to a lesser extent, from fuel spills from equipment. Any petroleum releases from construction or operation could potentially impact groundwater where the overlying soils are permeable and/or the depth to groundwater is shallow. Table ES-3 summarizes the anticipated effects of potential releases from the proposed Project on aquifers along the proposed Project route.

ES.4.6 Wetlands

The proposed Project would affect approximately 383 acres of wetlands. Potential impacts include:

- Impacts to wetland functions and values;
- Conversion from one wetland type to another; and
- Permanent loss of wetlands due to fill for permanent project-related facilities.

An estimated 2 acres of permanent wetland loss is anticipated. Remaining wetlands affected by the proposed Project would remain as functioning wetlands, provided that impact minimization and restoration efforts described in the CMRP are successful.

Wetlands are regulated primarily by Section 404 of the Clean Water Act, but other regulations could apply if, for example, a wetland area provides important habitat for federally listed species and species protected by the Migratory Bird Treaty Act and Bald and Golden Eagle Protection Act. Section 404 requires that wetland impacts are avoided, minimized, and mitigated to the greatest practicable extent possible. Keystone has made route modifications to avoid wetland areas (such as the NDEQ-identified Sand Hills Region) and has prepared a CMRP that summarizes the proposed wetland avoidance, minimization, and mitigation measures. In addition, various agencies, such as U.S. Army Corps of Engineers, could require additional mitigation in accordance with American Indian tribal, local, state, and federal permits and regulations.

Table ES-3 Effects of Potential Releases on Aquifers

Aquifer	Effects
Alluvial Aquifers and Northern High Plains Aquifer (NHPAQ), including the Ogallala Aquifer	Aquifer conditions in the NHPAQ in the proposed Project area indicate that shallow groundwater generally discharges to local surface waterbodies, and typically does not flow downward in significant amounts or flow horizontally over long distances. Analysis of historic spills and groundwater modeling indicate that contaminant plumes from a large-scale release that reaches groundwater in the NHPAQ and alluvial aquifers could be expected to affect groundwater quality up to approximately 1,000 feet downgradient of the source. This localized effect indicates that petroleum releases from the proposed Project is unlikely to extensively affect water quality in this aquifer group.
Great Plains Aquifer (GPA)	Across most of the proposed pipeline area where the GPA is present, it is very unlikely that any releases from the proposed pipeline would affect groundwater quality in the aquifer because the aquifer is typically deeply buried beneath younger, water-bearing sediments and/or aquitard units. The exception is in southern Nebraska, where the aquifer is closer to the surface. Water quality in the GPA could be affected by releases in this area, but groundwater flow patterns in the vicinity of the proposed Project route make such effects unlikely. Overall, it is very unlikely that the proposed pipeline area would affect water quality in the GPA due to weak downward gradients (downward groundwater flows) in the aquifers overlying the GPA.
Northern Great Plains Aquifer System (NGPAS)	As with the GPA, petroleum releases from the proposed Project would only affect water quality in portions of the NGPAS near the ground surface. In the case of a large-scale release, these impacts would typically be limited to within several hundred feet of the source, and would not affect groundwater within areas that provide groundwater recharge to large portions of the NGPAS.
Western Interior Plains Aquifer	The depth to this aquifer is several hundred feet below the ground surface in the proposed Project area; therefore, there is an extremely low probability that a petroleum release from the proposed Project would affect water quality in this aquifer.
Shallow Groundwater and Water Wells	There are 2,537 wells within 1 mile of the proposed Project, including 39 public water supply wells and 20 private wells within 100 feet of the pipeline ROW. The majority of these wells are in Nebraska. Those wells that are in the vicinity of a petroleum release from the proposed Project may be affected.

ES.4.7 Threatened and Endangered Species

Consultation and coordination with the U.S. Fish and Wildlife Service (USFWS) identified 14 federally protected, proposed, and candidate species that could be affected by the proposed Project: 11 federally-listed threatened or endangered species, as defined under the ESA, one proposed species for listing as endangered, and two candidate species for listing as threatened or endangered. Of the federally listed, proposed, and candidate species, the endangered American burying beetle (*Nicrophorus americanus*) is the only species that is likely to be adversely affected by the proposed Project (see Figure ES-12). Other species could potentially be affected by the proposed Project; among these are whooping cranes (*Grus americana*), greater sage-grouse (*Centrocercus urophasianus*), and Western prairie fringed orchids (*Platanthera praeclara*).

In consultation with the USFWS, the Department prepared a Biological Assessment to evaluate the proposed Project's potential impacts to federally listed and candidate species and designated critical habitat. In addition, USFWS has developed a Biological Opinion for the proposed Project, which includes recommended conservation measures and compensatory mitigation for unavoidable impacts that were assessed during the formal consultation process. The Biological Opinion is attached in Appendix H, 2012 Biological Assessment, 2013 USFWS Biological Opinion, and Associated Documents.



Figure ES-12 American Burying Beetle

Approximately 83 miles of the proposed Project Route in South Dakota and Nebraska would affect suitable American burying beetle habitat. Consultation between the Department and USFWS resulted in development of conservation measures and compensatory mitigation, such as trapping and relocating beetles, special lighting restrictions (the beetles are attracted to light), and establishment of a habitat conservation trust.

Even with these measures, the proposed Project would be likely to adversely affect the American burying beetle, resulting in incidental take (such as unintended death or harm of individual beetles) during construction or operation. The combination of Keystone's American burying beetle monitoring program and Reclamation Performance Bond would provide assurances that the acres disturbed by the proposed Project would be restored appropriately. The USFWS concluded in the 2013 USFWS Biological Opinion that the proposed Project is not likely to jeopardize the continued existence of the American burying beetle.

ES.4.8 Geology and Soils

The proposed route extends through relatively flat and stable areas, and the potential for seismic hazards (earthquakes), landslides, or subsidence (sink holes), is low. The pipeline would not cross any known active faults. During construction, land clearing could increase the risk of landslides and erosion. Keystone would, if permitted, construct temporary erosion control systems and restore the ROW after construction.

The proposed Project route would avoid the NDEQ-identified Sand Hills Region, where soils are particularly susceptible to damage from pipeline construction. Potential impacts to soils resources in other areas associated with construction or operation of the proposed Project and connected actions could include soil erosion, loss of topsoil, soil compaction, an increase in the proportion of large rocks in the topsoil, soil mixing, soil contamination, and related reductions

in the productivity of desirable vegetation or crops. Construction also could result in damage to existing tile drainage systems (an agriculture practice that removes excess water from soil subsurface), irrigation systems, and shelterbelts.

To mitigate and minimize these impacts, Keystone would, if permitted, put in place procedures for construction and operation that are designed to reduce the likelihood and severity of proposed Project impacts to soils and sediments, including topsoil segregation methods, and to mitigate impacts to the extent practicable. After construction, areas of erosion or settling would be monitored.

ES.4.9 Terrestrial Vegetation

Potential construction- and operations-related impacts to general terrestrial vegetation resources associated with the proposed Project include impacts to cultivated crops, developed land, grassland/pasture, upland forest, open water, forested wetlands, emergent herbaceous wetlands, and shrub-scrub communities. In addition, the proposed Project route would result in impacts to biologically unique landscapes and vegetation communities of conservation concern.

Keystone would, if permitted, restore topsoil, slopes, contours, and drainage patterns to preconstruction conditions as practicable and to reseed disturbed areas to restore vegetation cover, prevent erosion, and control noxious weeds. Because disturbed prairie areas are difficult to restore to existing (pre-disturbance) conditions, Keystone would, if permitted, use specific best management practices and procedures to minimize and mitigate the potential impacts to native prairie areas and coordinate with appropriate agencies as necessary to monitor progress.

ES.4.10 Wildlife

Potential impacts to wildlife associated with construction of the proposed Project could include habitat loss, alteration, and fragmentation; direct mortality during construction and operation (e.g., vehicle collisions, power line/power pole collisions, etc.); indirect mortality because of stress or avoidance of feeding due to exposure to construction and operations noise, low-level helicopter or airplane monitoring overflights, and from increased human activity; reduced breeding success from exposure to construction and operations noise and from increased human activity; reduced survival or reproduction due to decreased availability of edible plants, reduced cover, and increased exotics and invasives; and increased predation (i.e., nest parasitism, creation of predator travel corridors, and poaching).

To reduce potential construction- and operations-related effects where habitat is crossed, Keystone would, if permitted, implement measures to minimize adverse effects to wildlife habitats, including shelterbelts, windbreaks, and living snow fences. Pipeline construction would be conducted in accordance with required permits.

ES.4.11 Fisheries

The proposed route would cross rivers and streams, including perennial streams that support recreational or commercial fisheries. Most potential impacts to fisheries resources would occur during construction and would be temporary or short term. Potential impacts from construction of stream crossings include siltation, sedimentation, bank erosion, sediment deposition, short-term delays in movements of fish, and transport and spread of aquatic invasive animals and plants. Keystone would, if permitted, minimize vehicle contact with surface waters and clean equipment to prevent transportation of aquatic invasive animals and plants. Impacts associated with potential releases of oil are described in Section 4.13, Potential Releases.

Most streams would be crossed using one of several open-cut (trenching) methods. Most stream crossings would be completed in less than 2 days, grading and disturbance to waterbody banks would be minimized, and crossings would be timed to avoid sensitive spawning periods, such that resulting stream bed disturbance and sediment impacts would be temporary and minimized.

Most large rivers would be crossed using HDD methods, which would install the pipeline well below the active river bed. As a result, direct disturbance to the river bed, fish, aquatic animals and plants, and river banks would be avoided. If permitted, Keystone has agreed to develop site-specific contingency plans to address unintended releases of drilling fluids that include preventative measures and a spill response plan.

ES.4.12 Land Use

Construction of the proposed Project would disturb approximately 15,427 acres of land. Approximately 90 percent of that land is privately owned while the remaining is owned by federal, state, or local governments. Rangeland (approximately 9,695 acres) and agriculture (approximately 4,975 acres) comprise the vast majority of land use types that would be affected by construction.

After construction, approximately 5,569 acres would be retained within permanent easements or acquired for operation of the proposed Project; this includes the pipeline ROW and aboveground facilities. Nearly all agricultural land and rangeland along the ROW would

be allowed to return to production with little impact on production levels in the long term. However, there would be restrictions on growing woody vegetation and installing structures within the 50-foot-wide permanent ROW. Keystone has agreed to compensate landowners for crop losses on a case-by-case basis.

Keystone would if permitted use construction measures designed to reduce impacts to existing land uses such as topsoil protection, avoiding interference with irrigation systems, repairing or restoring drain tiles, assisting with livestock access and safety, and restoring disturbed areas with custom native seed mixes.

ES.4.13 Air Quality and Noise

Dust and emissions from construction equipment would impact air quality. Construction emissions typically would be localized, intermittent, and temporary since proposed pipeline construction would move through an area relatively quickly. Mitigation measures would be employed and enforced by an environmental inspector assigned to each construction spread.

All pump stations would be electrically powered by local utility providers. As a result, during normal operation there would be only minor emissions from valves and pumping equipment at the pump stations. The proposed Project would not be expected to cause or contribute to a violation of any federal, state, or local air quality standards, and it would not require a Clean Air Act Title V operating permit.

Construction activities would result in intermittent, temporary, and localized increases in noise levels. To reduce construction noise impacts, Keystone would, if permitted, limit the hours during which activities with high-decibel noise levels are conducted in residential areas, require noise mitigation procedures, monitor sound levels, and develop site-specific mitigation plans to comply with regulations.

ES.4.14 Cultural Resources

The proposed Project route would cross various private, state, and federal lands in Montana, South Dakota, and Nebraska where cultural resources would be encountered. Literature searches were conducted to locate previously identified cultural resources within the designated area of potential effects. Field studies were conducted between 2008 and 2013 to identify cultural resources and assess archaeological resources (i.e., sites), historic resources (i.e., buildings, structures, objects, and districts), and properties of religious and cultural significance, including traditional cultural properties.

As of December 2013, most of the proposed Project area has been surveyed for cultural resources. The proposed Project area of potential effects is approximately 39,500 acres, of which approximately 1,038 acres remain unsurveyed and are the subject of ongoing field studies. As part of this Supplemental EIS route evaluation process, consistent with the National Historic Preservation Act, the Programmatic Agreement (PA) that was signed in 2011 has been amended, finalized, and re-signed. Signatory parties to this agreement were the Department, Advisory Council on Historic Preservation, Bureau of Land Management, U.S. Army Corps of Engineers, U.S. Bureau of Reclamation, National Park Service, Western, Rural Utilities Service, Natural Resources Conservation Service, Farm Service Agency, Bureau of Indian Affairs, and the State Historic Preservation Offices of Montana, South Dakota, Nebraska, and Kansas. Invited signatories included the Montana Department of Natural Resources and Conservation, Montana Department of Environmental Quality, and Keystone. Indian tribes that participated in consultation were asked in 2013 to sign as Concurring Parties, consistent with 36 Code of Federal Regulations §§ 800.2(c)(2) and 800.6(c)(3).

Pursuant to the stipulations outlined in the PA, Keystone is required to complete cultural resources surveys on all areas that would be potentially impacted by the proposed Project, make recommendations on National Register of Historic Places eligibility, provide information on potential effects of the proposed Project, and provide adequate mitigation in consultation with the Department, state and federal agencies, and Indian tribes. Construction would not be allowed to commence on any areas of the proposed Project until these stipulations are met. The PA, therefore, would ensure that appropriate consultation procedures are followed and that cultural resources surveys would be completed prior to construction. If unanticipated cultural materials or human remains were encountered during the construction phase of the proposed Project, Keystone would implement Unanticipated Discovery Plans pursuant to the PA.

ES.4.14.1 Tribal Consultation

Upon receiving a new application, the Department reached out directly to 84 Indian tribes throughout the United States with potential interest in the cultural resources potentially affected by the proposed Project (see Figure ES-13). Of the 84 Indian tribes, 67 tribes notified the Department that they would like to consult or were undecided as to whether they would become consulting parties. All Indian tribes that participated in consultation were asked in 2013 to sign the amended PA.

The Department has conducted a broad range of tribal consultations, ranging from group meetings involving many Indian tribes and discussion topics to individual discussions on specific topics via letter, phone, and email. In addition to communication by phone, email, and letter, high-level Department officials travelled to areas near the proposed Project route to hold four face-to-face consultations, to which all Indian tribes were invited and whose participation was funded by Keystone, and one teleconference. Tribal meetings were held in October 2012 (three meetings), May 2013 (one meeting), and July 2013 (teleconference). Face-to-face meetings were held in four locations: Billings, Montana; Pierre, South Dakota; Rapid City, South Dakota; and Lincoln, Nebraska.

The Department engaged in discussions with the tribes and Tribal Historic Preservation Officers on issues relating to cultural resources. Consultations included discussions of cultural resources, in general, as well as cultural resources surveys, Traditional Cultural Properties surveys, effects to cultural resources, and mitigation. The Department has continued government-to-government consultations to build on previous work, to ensure that tribal issues of concern are addressed in the consultation process, and to amend and incorporate comments and modifications to the PA, as appropriate, in consultation with the tribes to conclude the Section 106 consistent process for the proposed Project. Additionally, tribes were provided proposed Project cultural resources survey reports and opportunities to conduct Traditional Cultural Property surveys funded by Keystone.

ES.4.15 Cumulative Effects

The cumulative effects analysis evaluates the way that the proposed Project's impacts interact with the impact of other past, present, or reasonably foreseeable future actions or projects. The goal of the cumulative impacts analysis is to identify situations where sets of comparatively small individual impacts, taken together, constitute a larger collective impact.

Cumulative impacts associated with the proposed Project and connected actions vary among individual environmental resources and locations. Generally, where long-term or permanent impacts from the proposed Project are absent, the potential for additive cumulative effects with other past, present, and reasonably foreseeable future projects is negligible.

Keystone's CMRP and planned mitigation measures, individual federal and state agency permitting conditions, and/or existing laws and regulations would, if permitted, work to control potential impacts and reduce the proposed Project's contribution to cumulative effects.

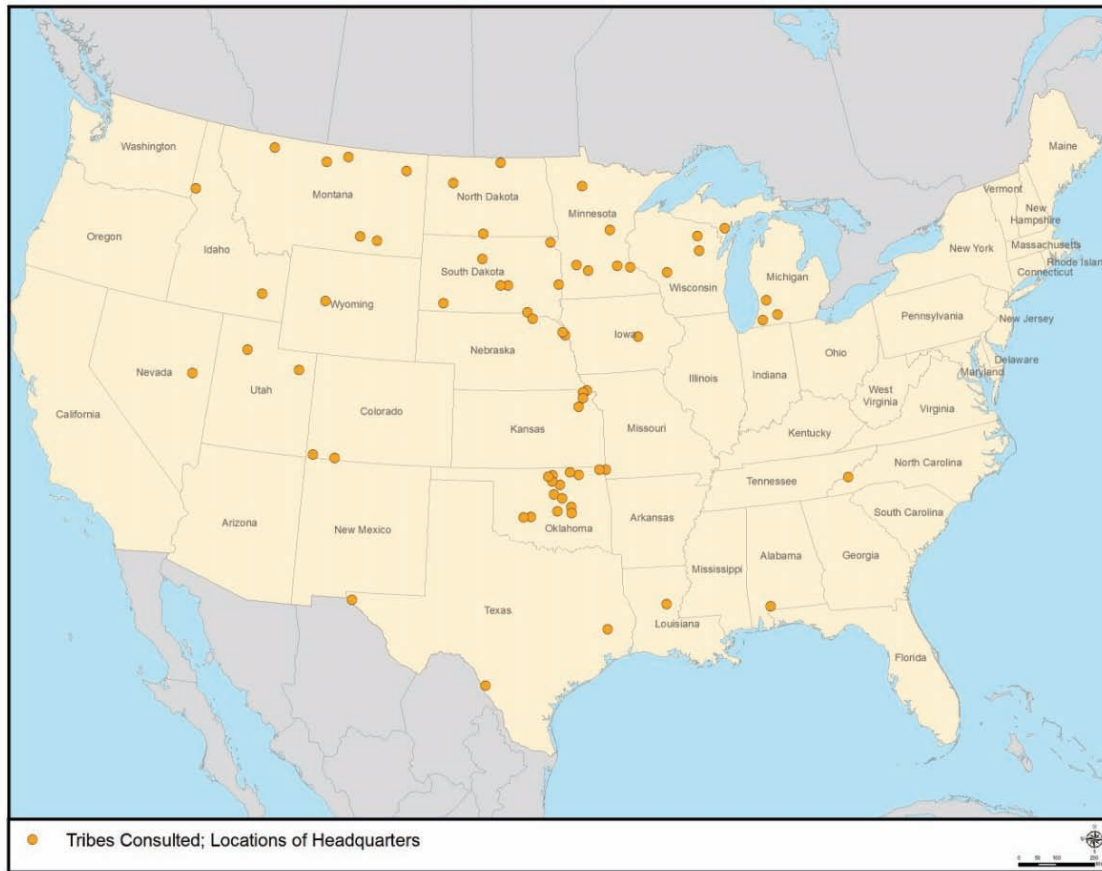


Figure ES-13 Indian Tribes Consulted

ES.4.16 Environmental Impacts in Canada

While the proposed Project analyzed in this Supplemental EIS begins at the international boundary where the pipeline would exit at Saskatchewan, Canada, and enter the United States through Montana, the origination point of the pipeline system would be in Alberta, Canada. In addition to the environmental analysis of the proposed Project in the United States, the Department monitored and obtained information from the environmental analysis of the Canadian portion of the proposed Project. The Canadian government, not the Department, conducted an environmental review of the portion of the proposed Project within Canada. However, the Department has included information from the Canadian government's assessment in this Supplemental EIS and has continued to monitor information from Canada as it becomes available.

On March 11, 2010, the Canadian National Energy Board issued its 168-page Reasons for Decision

granting Keystone's application to build the Canadian portion of the proposed Project. This document provided a rationale for the approval of the pipeline by Canadian regulatory authorities and a description of the National Energy Board's analysis of the following topics: economic feasibility, commercial impacts, tolls and tariffs, engineering, land matters, public consultation, aboriginal consultation, and environmental and socioeconomic matters.

Moreover, analysis and mitigation of environmental impacts in Canada more generally are ongoing by Canadian officials. For example, on September 1, 2012, the Government of Alberta's development plan for the Lower Athabaskan oil sands region became effective. The plan requires cancellation of about 10 oil sands leases, sets aside nearly 20,000 square kilometers (7,700 square miles) for conservation, and sets new environmental standards for the region in an effort to protect sensitive habitat, wildlife, and forest land.

ES.5.0 ALTERNATIVES

Detailed analysis was conducted on three broad categories of alternatives to the proposed Project, consistent with NEPA:

- No Action Alternative—which addresses potential market responses that could result if the Presidential Permit is denied or the proposed Project is not otherwise implemented;
- Major Route Alternatives—which includes other potential pipeline routes for transporting WCSB and Bakken crude oil to Steele City, Nebraska; and
- Other Alternatives—which include minor route variations, alternative pipeline designs, and alternative sites for aboveground facilities.

Several alternatives exist for the transport of WCSB and Bakken crude oil to Gulf Coast refineries, including many that were not carried forward for detailed analysis. This Supplemental EIS provides a detailed description of the categories of alternatives, the alternative screening process, and the detailed alternatives identified for further evaluation.

ES.5.1 No Action Alternative

The No Action Alternative analysis considers what would likely happen if the Presidential Permit is denied or the proposed Project is not otherwise implemented. It includes the Status Quo Baseline, which serves as a benchmark against which other alternatives are evaluated. Under the Status Quo Baseline, the proposed Project would not be constructed and the resulting direct, indirect, and cumulative impacts that are described in this Supplemental EIS would not occur. The Status Quo Baseline is a snapshot of the crude oil production and delivery systems at current levels – in other words, no change at all – irrespective of likely alternative transport scenarios to transport WCSB and Bakken crude.

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

Keystone XL pipeline. These three alternative transport scenarios (i.e., the Rail and Pipeline Scenario, Rail and Tanker Scenario, and Rail Direct to the Gulf Coast Scenario) are described below and illustrated on Figure ES-14.

ES.5.1.1 Rail and Pipeline Scenario

Under this scenario, WCSB and Bakken crude oil (in the form of dilbit or synbit) would be shipped via rail from Lloydminster, Saskatchewan (the nearest rail terminal served by two Class I rail companies), to Stroud, Oklahoma, where it would be temporarily stored and then transported via existing and expanded pipelines approximately 17 miles to Cushing, Oklahoma, where the crude oil would interconnect with the interstate oil pipeline system.

This scenario would require the construction of two new or expanded rail loading terminals in Lloydminster, Saskatchewan (the possible loading point for WCSB crude oil), one new terminal in Epping, North Dakota (the representative loading point for Bakken crude oil), seven new terminals in Stroud, and up to 14 unit trains (consisting of approximately 100 cars carrying the same material and destined for the same delivery location) per day (12 from Lloydminster and two from Epping) to transport the equivalent volume of crude oil as would be transported by the proposed Project.

ES.5.1.2 Rail and Tanker Scenario

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



Figure ES-14 Representative No Action Alternative Scenarios

ES.5.1.3 Rail Direct to the Gulf Coast Scenario

The third transportation scenario assumes that WCSB and Bakken crude oil (as dilbit) would be shipped by rail from Lloydminster, Saskatchewan, and Epping, North Dakota, directly to existing rail facilities in the Gulf Coast region capable of off-loading up to 14 unit trains per day. These existing facilities would then either ship the crude oil by pipeline or barge the short distance to nearby refineries. It would largely rely on existing rail terminals in Lloydminster, but would likely require construction of up to two new or expanded terminals to accommodate the additional WCSB shipments out of Canada. One new rail loading terminal would be needed in Epping to ship Bakken crude oil. Sufficient off-loading rail facilities currently exist or are proposed in the Gulf Coast area such that no new terminals would need to be built under this scenario.

ES.5.2 Major Pipeline Route Alternatives

The Department considered potential alternative pipeline routes to assess whether or not route alternatives could avoid or reduce impacts to environmentally sensitive resources while also meeting the proposed Project's purpose. Consistent with NEPA, a two-phase screening process was used to evaluate

prospective alternatives using a set of criteria to determine their technical, environmental, and economic viability. Alternatives that failed to meet the screening criteria were not brought forward for detailed analysis in this Supplemental EIS. The initial (Phase I) screening of other major route alternatives considered the following criteria:

- Meeting the proposed Project's purpose and need, including whether the alternative would require additional infrastructure such as a pipeline to access Bakken crude oil;
- Availability;
- Reliability;
- Length within the United States;
- Total length of the pipeline, including both the United States and Canada;
- Estimated number of aboveground facilities;
- Length co-located within an existing corridor;
- Acres of land directly affected during construction; and
- Acres of land directly affected permanently.

Pipeline length was used as an important screening criterion because it has a relatively direct relationship with:

- System reliability, in that the longer the pipeline the greater risk that some portion may become inoperable at some point, thereby delaying shipments.
- Environmental impacts, including:
 - Risk of spills and leaks, which represent the greatest potential threat to water and aquatic resources;
 - Temporary construction-related disturbance to natural habitat (e.g., wetlands, forests, native prairie); and
 - Permanent habitat fragmentation.
- Construction and operational costs, which generally increase in proportion to overall pipeline length.

All other factors being equal, longer pipelines are less desirable because they represent greater risks to system reliability, environmental impacts, and project costs.

As a result of this Phase I screening process, the following alternatives were eliminated because they would not meet the project purpose and/or were significantly longer than other viable options (see Figure ES-15):

- Western Alternative (to Cushing);
- Express Platte Alternative; and
- Existing Keystone Corridor
 - Option 1: Proposed Border Crossing (near Morgan, Montana)

- Option 2: Existing Keystone Pipeline Border Crossing (at Pembina, North Dakota).

Several commenters recommended that the proposed Project parallel the existing Keystone Pipeline rather than the proposed route. The Department considered these comments, but ultimately concluded that the existing Keystone Pipeline Route was not a reasonable alternative because it would not meet the proposed Project's purpose and need (i.e., would not meet Keystone's contractual obligations to transport 100,000 bpd of Bakken crude oil). Further, the existing Keystone Pipeline Corridor would be longer (taking into consideration pipeline length in both Canada and the United States), which represents an increased spill risk. The 2011 Steele City Segment, the I-90 Corridor, and the Steele City Segment A1A alternatives, however, were retained for further screening.

The Phase II screening used a desktop data review of key environmental and other features (e.g., wetlands and waterbodies crossed, total acreage affected). After this Phase II screening, the Steele City Segment A1A Alternative was eliminated because this route would be longer with an associated increased risk for spills and leaks, would cross more miles of principal aquifer and wetlands, and would require a second major crossing of the Missouri River, relative to the proposed Project. For these reasons, the Steele City A1A Alternative would not offer any offsetting environmental advantages relative to the proposed Project to warrant further consideration. However, both the 2011 Steele City Segment and I-90 Corridor alternatives were considered reasonable alternatives and were retained for full evaluation in this Supplemental EIS. These two route alternatives are described below and depicted in Figure ES-15. Table ES-4 summarizes key aspects of the major pipeline route alternatives.

Table ES-4 Summary of Major Pipeline Route Alternatives

	Proposed Project	2011 Steele City Segment Alternative	I-90 Corridor Alternative
New Pipeline Length (miles)	875	854	927
Number of Aboveground Facilities ^a	73	71	77
Length Co-Located with Existing Keystone Pipeline (miles)	0	0	254
NDEQ-Identified Sand Hills Region Crossed (miles)	0	89	0
Highly Erodible Soil (Wind) Crossed (miles)	73	116	36
Perennial Waterbody Crossings	56	53	61
Wetlands Affected during Construction (acres)	262	544	223
Average Annual Employment During Construction	3,900	3,900	4,100
Property Tax Revenues (millions)	\$55.6	\$53.7	\$59.3
Construction Land Area Affected (acres)	11,593	11,387	12,360
Operations (Permanent) Land Area Required (acres)	5,569	5,176	4,818

^a Does not include 2 pump stations for the Cushing Extension in Kansas

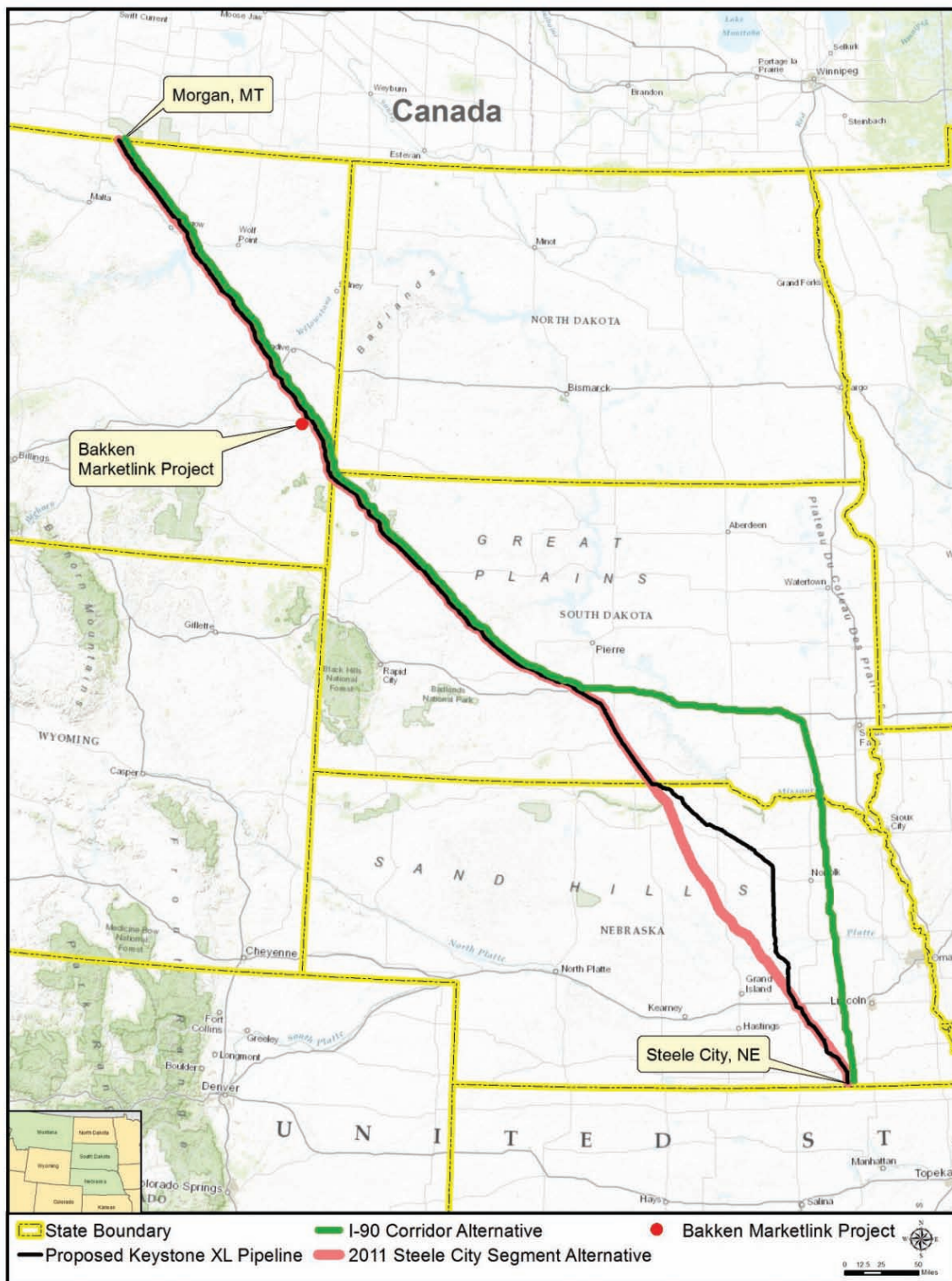


Figure ES-15 Preliminary Pipeline Route Alternatives

ES.5.2.1 Keystone XL 2011 Steele City Segment Alternative

The Keystone XL 2011 Steele City Segment Alternative evaluates the impacts of constructing the route proposed in the 2011 Final EIS as a comparison against which other route alternatives, including the proposed Project, can be made. This alternative would follow Keystone's proposed Project route from the Canadian border, designated Milepost (MP) 0, south to approximately MP 204, where it would connect with the Bakken Marketlink Project onramp at the same location as the proposed Project and continue to approximately MP 615 in northern Nebraska near the South Dakota state line. At that location, the Keystone XL 2011 Steele City Segment Alternative would divert from the current proposed Project and would continue southeasterly for another 240 miles to the southern terminus at Steele City, Nebraska. For approximately 89 miles, the Keystone XL 2011 Steele City Segment Alternative would cross the NDEQ-identified Sand Hills Region.

ES.5.2.2 I-90 Corridor Alternative

Keystone's proposed Project route starts at the Canadian Border (MP 0) and stretches south through Montana and into South Dakota to approximately MP 516, where the proposed pipeline route intersects Interstate 90 (I-90). From this point, this alternative pipeline route would diverge from the proposed Project route, following the ROW of I-90 and State Highway 262 for 157 miles, where it would then intersect and follow the ROW of the existing Keystone pipeline to Steele City, Nebraska.

The I-90 Corridor would avoid crossing the NDEQ-identified Sand Hills Region, and would reduce the length of pipeline crossing the NHPAQ system, which includes the Ogallala Aquifer.

ES.5.3 Other Alternatives Considered

In addition to the major route alternatives, the Department reviewed proposed variations—relatively short deviations—to the proposed route that were designed to avoid or minimize construction impacts to specific resources (e.g., cultural resource sites, wetlands, recreational lands, residences) or that minimize constructability issues (e.g., shallow bedrock, difficult waterbody crossings, steep terrain).

The Department also considered two alternative pipeline designs in response to public comments: an aboveground pipeline and an alternative using a smaller-diameter pipe. The Department determined that both alternative designs were not reasonable alternatives for the proposed Project because they would not meet the proposed Project purpose and need and/or because of safety and security reasons; therefore, they were not considered further in this Supplemental EIS.

This Supplemental EIS considered renewable energy sources and energy conservation as alternatives to the proposed Project. As noted in Section 1.4, Market Analysis, the crude oil would be used largely for transportation fuels and, therefore, any alternatives to the crude oil would need to fulfill the same purpose. The analysis found that even with renewable energy and conservation, there would still be a demand for oil sands-derived crude oil. Based on this evaluation, these alternatives were not carried forward for further analysis as alternatives to the proposed Project.

ES.5.4 Comparison of Alternatives

Consistent with NEPA and the CEQ regulations, the Department compared the proposed Project with the alternatives that met the proposed Project's purpose and need, and that were carried forward for detailed analysis in this Supplemental EIS. The alternatives carried forward for detailed analysis were: the 2011 Steele City Segment Alternative, the I-90 Corridor Alternative, and the three identified No Action Alternative scenarios (i.e., the Rail and Pipeline Scenario, the Rail and Tanker Scenario, and the Rail Direct to the Gulf Coast Scenario).

The two pipeline alternatives compare different routes that meet the purpose and need of the proposed Project, and the No Action Alternative scenarios describe the likely potential impacts associated with transport of crude oil from the WCSB and the Bakken formations if the Presidential Permit is denied or if the proposed Project is not otherwise implemented. The comparison focuses on three categories of impacts: physical disturbance, GHG emissions, and potential releases.

ES.5.4.1 Physical Disturbance Impacts Alternatives Comparison

The primary differences between the proposed Project and the alternatives related to physical disturbance are summarized in Table ES-5.

Table ES-5 Physical Disturbance Impacts Associated with New Construction and Operations for the Proposed Project and Alternatives

	Status Quo Baseline	Proposed Project	2011 Steele City Segment Alternative	I-90 Corridor Alternative	No Action Rail/Pipeline Scenario	No Action Rail/Tanker Scenario	No Action Rail Direct to the Gulf Coast Scenario
New Pipeline Length (miles)	0	875	854	927	17	32	0
Number of New Aboveground Facilities	0	73	71	77	33	33	19
Length Co-located with Existing Keystone Pipeline (miles)	0	0	0	254	NA	NA	NA
NDEQ-Identified Sand Hills Region Crossed (miles)	0	0	89	0	0	0	0
New Highly Erodible Soil (Wind) Crossed (miles)	0	73	116	36	0	0	0
Perennial Waterbody Crossings	0	56	53	61	1,216	330	711
Major Water Crossings ^a	0	62	60	61	42	14	40
Number of Shallow Wells in Proximity ^b	0	113	97	42	NA	NA	NA
New NHPAQ Crossed (miles)	0	294	247	145	NA	NA	NA
Wetland Affected during Construction (acres)	0	262	544	223	193	351	NQ ^c
Communities within 2 Miles	0	17	16	37	350	182	669
Construction (Temporary) Land Area Affected (acres)	0	11,599	11,387	12,360	5,227	6,427	1,500
Operations (Permanent) Land Area Required (acres)	0	5,309	5,176	4,818	5,103	6,303	1,500

Notes: This table does not include Canadian impacts for pipeline alternatives.

NA = not applicable

NQ = not quantified; insufficient design data

NDEQ = Nebraska Department of Environmental Quality

NHPAQ = Northern High Plains Aquifer

^a This is defined as channel crossings of waterbodies that delineate U.S. Geological Survey National Hydrography Dataset Level 4 (HUC4) Hydrologic Unit watershed basins.

^b A shallow well is defined as a well with a depth of 50 feet or less, but does not include wells with zero depth; proximity is defined as within ¼ mile of the centerline.

^c Specific facility footprints for this scenario are not known at this time. However, impacts would be generally similar to the other rail scenarios.

**ES.5.4.2 Greenhouse Gas Emissions
Alternatives Comparison**

To facilitate comparison of GHG emissions across all alternatives for operational GHG emissions, an assessment was made for all alternatives along the entire route from Hardisty, Alberta, to the Gulf Coast (including pipelines in Canada and from Steele City to the Gulf Coast). GHG emissions from the two pipeline route alternatives would be similar in scale to those of the proposed Project. The direct emissions during the operation phase of the 2011 Steele City Segment Alternative would be essentially the same as those generated by the proposed Project because they would have the same number of pump stations (20). The I-90 Corridor Alternative is expected to have similar but slightly higher GHG emissions because it would have one more pump station than the proposed Project and

could generate slightly higher amounts of indirect GHG emissions from electricity consumption.

During operation of all No Action rail scenarios, the increased number of unit trains along the scenario routes would result in GHG emissions from both diesel fuel combustion and electricity generation to support rail terminal operations (as well as for pump station operations for the Rail/Pipeline Scenario). The total annual GHG emissions (direct and indirect) attributed to the No Action scenarios range from 28 to 42 percent greater than for the proposed Project (see Table ES-6).

The indirect GHG emissions over the lifecycle of oil sands crude oil production, transportation, refining, and product use are compared between the proposed Project and the evaluated alternatives in Section ES.4.1.2, Lifecycle Analysis.

Table ES-6 Annual Greenhouse Gas Emissions from Crude Transport (from Hardisty/Lloydminster, Alberta, to the Gulf Coast Area) Associated with the Proposed Project and Alternatives (per 100,000 bpd)

	Overall Proposed Project Route^a	Overall 2011 Steele City Segment Alternative Route^b	Overall I-90 Corridor Alternative Route^c	No Action Rail/Pipeline Scenario	No Action Rail/Tanker Scenario	No Action Rail Direct to the Gulf Coast Scenario
Operation (direct and indirect)—Transportation, Not Extraction						
MTCO ₂ e/Year per 830,000 bpd	3,123,859	3,123,844	3,211,946	4,428,902	4,364,611	3,991,472
MTCO ₂ e/Year per 100,000 bpd	376,369	376,367	386,981	533,603	525,857	480,900
% Difference from Proposed Project	NA	0.0%	2.8%	41.8%	39.7%	27.8%

^a Canadian, Proposed Project, and Gulf Coast

^b Canadian, Steele City Segment, and Gulf Coast

^c Canadian, I-90, and Gulf Coast

Notes: The emissions shown for the overall proposed Project differ from those shown for the proposed Project in Section ES.4.1.1, Greenhouse Gas Emissions from the Proposed Project, in order to present a full comparison of the overall proposed Project route to the other alternatives. All data include train emissions for return trips as well.

MTCO₂e = metric tons of CO₂ equivalents

NA = not applicable

bpd = barrels per day

ES.5.4.3 Potential Spill Risk Alternatives Comparison

Similar to the GHG emissions comparison, potential spill risk was evaluated for alternatives along the entire route from Hardisty, Alberta, to the Gulf Coast (including portions of the route in Canada and including existing pipelines from Steele City to the Gulf Coast). Table ES-7 provides a summary of calculated potential release impacts for the various alternatives analyzed in terms of the number of potential releases per year and the potential volume of oil released per year.

Both of the major route alternatives would begin at the same border crossing as the proposed Project (near Morgan, Montana) and end at the same location as the proposed Project (near Steele City, Nebraska); as such, the pipelines in Canada north of the border crossing and the pipelines south of Steele City down to the Gulf Coast would be identical for all three overall pipeline routes. Compared to the proposed Project, the two major pipeline route alternatives would have similar potential spill risks (see Table ES-7). In addition, both of these major route alternatives would require aboveground facilities that are similar to those for the proposed Project; therefore, potential releases impact areas would be similar. Because the I-90 Corridor Alternative is slightly longer than the proposed Project, it would carry a slightly higher spill risk (with an estimated 533 bbl released per year compared to 518 annual bbl released for the proposed Project).

The three No Action Alternative scenarios differ from the proposed Project in that they would use alternative modes of transportation to deliver crude oil to refinery markets in the Gulf Coast rather than just a pipeline (although one of the three scenarios includes a pipeline as a significant part of its delivery system). Potential spill risks for these alternative modes differ from the proposed Project in terms of both average spill frequency and average spill size.

Volume of crude oil transportation by rail in the No Action Alternative scenarios would generally be limited to the volume contained within individual railcars. This volume constrains the total volume of crude oil that could potentially impact groundwater relative to the proposed Project in the event of a release. This constraint is offset by the increased statistical likelihood of spills associated with these alternative modes of crude oil transport relative to pipelines.

Historical rail incident data were analyzed to evaluate potential releases associated with rail transport in the United States. The results help provide insight into what could potentially occur with respect to spill volume, incident cause, and incident frequency for the No Action Alternative scenarios that involve rail transport. In addition, rail incident frequencies were compared to frequencies for other modes of transport (i.e., pipeline, marine tanker). Although the product to be transported by the proposed Project is crude oil, incidents for petroleum products were also analyzed to provide a comparison to a larger dataset. In order to make comparisons between the modes of transportation, the statistics regarding releases are expressed in terms of *ton-miles* (1 ton-mile is transporting 1 ton of product 1 mile; to calculate total ton-miles in a given year, one multiplies the total tons transported by the total number of miles transported).

The rates of releases and average size of releases vary between modes of transportation. For instance, rail transport has more reported releases of crude oil per ton-mile than pipeline or marine transport but, overall, pipeline transport has the highest number of barrels released per ton-mile. Comprehensive data from 2010 to 2013 are not yet available and therefore this analysis does not include incidents subsequent to 2009 such as the 2013 Lac-Mégantic rail tragedy or the Tesoro Logistics pipeline incident. The number of barrels released per year for the No Action scenarios is higher than what is projected for the proposed Project or the other pipeline alternatives (as detailed in Table ES-7) because of the alternate modes of transport in the No Action scenarios.

There is also a greater potential for injuries and fatalities associated with rail transport relative to pipelines. Adding 830,000 bpd to the yearly transport mode volume would result in an estimated 49 additional injuries and six additional fatalities for the No Action rail scenarios compared to one additional injury and no fatalities for the proposed Project on an annual basis.

Table ES-7 Potential Releases Impacts (Full Pathway) Associated with the Proposed Project and Alternatives

	Overall Proposed Project Route ^a	Overall 2011 Steele City Segment Alternative Route ^b	Overall I-90 Corridor Alternative Route ^c	No Action Rail/Pipeline Scenario	No Action Rail/Tanker Scenario	No Action Rail Direct to the Gulf Coast Scenario	
						Option 1 ^g	Option 2 ^g
Miles for Transport (Overall Route)	1,938	1,917	1,990	3,902	14,014	4,624	5,375
Releases per Year ^{d,e}	0.46	0.46	0.48	294	276	383	455
Barrels Released per Year ^f	518	513	533	1,227	4,633	1,335	1,606

^a Canadian, Proposed Project, and Gulf Coast^b Canadian, Steele City Segment, and Gulf Coast^c Canadian, I-90, and Gulf Coast^d Releases per year frequency was calculated using databases from the U.S. Department of Transportation covering U.S. transportation in the years 2002 to 2009. The pipeline spill frequency was based on a 16-inch diameter crude oil pipeline.^e Releases per Year = (16-inch U.S. crude pipeline spill frequency * total pipeline ton-miles) + (U.S. rail spill frequency * total rail ton-miles) + (U.S. marine spill frequency * total rail ton-miles) + (U.S. truck spill frequency * total truck ton-miles).^f Barrels Released per Year = (average 16-inch U.S. crude pipeline barrels (bbl) released * total pipeline ton-miles) + (average rail bbl released * total rail ton-miles) + (average marine bbl) released * total rail ton-miles) + (average truck bbl released * total truck ton-miles).^g The Option 1 route goes through Lloydminster while Option 2 routes through Fort McMurray.

ES.6.0 GUIDE TO READING THE SUPPLEMENTAL EIS

The Supplemental EIS consists of 11 volumes and is available electronically for viewing or download at www.keystonepipeline-xl.state.gov. Various sections of this document contain bibliographies with full lists of references and citations. A list of where to find printed copies of the complete Supplemental EIS can be found at www.keystonepipeline-xl.state.gov or by mail inquiry to:

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APPENDIX

7

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

INDIGENOUS ENVIRONMENTAL
NETWORK and NORTH COAST RIVERS
ALLIANCE,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF
STATE,
et al.,

Federal Defendants,

) CV 17-29-GF-BMM
) CV 17-31-GF-BMM

) **IEN PLAINTIFFS’**
) **OPPOSITION TO**
) **TRANSCANADA’S**
) **MOTION TO AMEND THE**
) **COURT’S ORDER ON**
) **SUMMARY JUDGMENT**

) Judge: Hon. Brian M. Morris
)
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)

and
TRANSCANADA KEYSTONE PIPELINE
and TRANSCANADA CORPORATION,
Defendant-Intervenors.

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USGCRP, 2018: <i>Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II</i> [Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, and B.C. Stewart (eds.)]. U.S. Global Change Research Program, Washington, DC, USA. doi: 10.7930/NCA4.2018; Chapter 29	29

I. INTRODUCTION

Plaintiffs Indigenous Environmental Network and North Coast Rivers Alliance (collectively, “Plaintiffs”) respectfully submit this Memorandum in opposition to TransCanada’s motion and supporting memorandum (ECF 222) (“TC”). TransCanada seeks to continue activities in furtherance of the Keystone XL Pipeline on the premise that “none of these activities has the potential to cause injury[,] . . . affect ongoing federal decision-making or to taint pending permitting [, or] . . . implicate the purported deficiencies that the Court identified in the State Department’s environmental review.” TC 1. But TransCanada contemplates actions that would do just that. For this reason as discussed below, Plaintiffs urge this Court to deny the motion.

This Court has twice ruled that the State Department (“State”) violated the National Environmental Policy Act (“NEPA”) when it approved the cross-border permit for the Keystone XL Pipeline and subsequent rerouting of the project through Nebraska. Partial Order on Summary Judgment Regarding NEPA Compliance filed August 8, 2018 (ECF 210) and Order Granting and Denying Motions and Cross-Motions for Summary Judgment In Part and Denying Them In Part filed November 8, 2018 (ECF 218). In its latter Order, this Court also ruled that State violated the Endangered Species Act (ESA) and the Administrative Procedure Act (APA) when it approved Keystone XL. Based on these rulings, the Court “ordered that [State’s] ROD issued on March 23, 2017 is VACATED” and that “Plaintiffs’ request for injunctive relief is GRANTED.” ECF 218 at 54. This

Court “enjoin[ed] Federal Defendants and TransCanada from engaging in any activity in furtherance of the construction or operation of Keystone and associated facilities until [State] has completed a supplement to the 2014 SEIS that complies with the requirements of NEPA and the APA.” *Id.*

Despite this Court’s repeated, and thoroughly documented, rulings declaring State’s approval of Keystone XL unlawful and ordering detailed further environmental reviews before it may even be considered for approval, TransCanada has moved this Court to amend its Judgment to allow TransCanada to continue with its “preconstruction” activities as if this Court’s rulings have no effect on TransCanada’s construction schedule and claimed entitlement to ultimately build and operate its project.

By Minute Entry for the Telephonic Status Conference held November 28, 2018, this Court clarified that the permanent Injunction ordered on November 8, 2018 was not intended to prevent TransCanada from engaging in the “activities stated in paragraphs 16 and 17” of the Declaration of Norrie Ramsay submitted in support of TransCanada’s Motion to Amend Judgment (“Ramsay”) – i.e., “project engineering and . . . planning and related office work . . . includ[ing] submitting reports and other administrative actions required . . . [by] valid state and local permits” and “pursuing remaining outstanding permits; interfacing with land owners and acquiring necessary land rights; acquiring pipe, materials and equipment . . .; inspecting and refurbishing work force camp modules, pipe and associated materials and equipment previously purchased; engaging with

communities . . . [and] federal, state and local governmental entities . . . ; hiring additional project staff; soliciting, engaging, and contracting with potential construction contractors, speciality service providers and suppliers; and other *non-construction, non-destructive* planning activities” Ramsay ¶ 17 (emphasis added).

In clarifying the scope of the injunction to allow “non-construction, non-destructive planning activities” as described by TransCanada, this Court took TransCanada at its word. And, this Court was guided by settled law that in undertaking the activities described in paragraphs 16 and 17, “TransCanada would be taking [those actions] at its peril” in that if “the State Department made a different determination” after further environmental review as ordered by the Court, “that’s [TransCanada’s] tough luck” Transcript of Telephonic Status Conference November 28, 2018 at 7:17-21. *See, e.g., Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 979 (holding financial injury was “self-inflicted” because parties who “jump the gun” or “anticipate[] a pro forma result” on their permit applications become “largely responsible for their own harm” (quoting *Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002), abrogated on other gds.)).

Critically, however, this Court declined to grant TransCanada’s additional request that it be permitted to conduct “field activities” including “preparation of off-right-of-way pipe storage and contractor yards; transportation, receipt and off-loading of pipe at off-right-of-way storage yards; preparation of sites for off-right-

of-way worker camps; and mowing and patrolling areas of the right-of-way to discourage migratory bird nesting.” Ramsay ¶ 18. Instead, this Court decided to “defer final decision in regards to paragraph 18” until Plaintiffs have filed their responses. As shown below, with the sole exception of “cultural, biological, civil and other surveys” and “maintaining security at project sites to ensure public safety and maintaining environmental protections as required by permits,” none of the activities described in paragraph 18 should be allowed. Those activities would cause irreparable environmental harm, and prejudice ongoing federal decision-making. Accordingly, this Court should deny TransCanada’s motion to amend the injunction to allow these activities.

II. BACKGROUND

Plaintiffs detailed the numerous severe and irreparable environmental and cultural impacts of Keystone XL in their summary judgment briefing. ECF 146 at 28-42; ECF 182 at 23-52. This Court addressed many of these impacts in its Orders granting partial, and subsequently full, summary judgment to Plaintiffs, finding that State had failed to address the cumulative effects of greenhouse gas emissions from Keystone XL and other projects (ECF 218 at 19-22), failed to conduct an adequate survey of potentially impacted cultural resources (*id.* at 26-27), failed to conduct updated modeling of potential oil spills and based thereon, recommend appropriate mitigation measures to prevent them (*id.* at 28-31) and failed to examine the effects of current oil prices on the viability of Keystone XL (*id.* at 17-18).

Because State’s 2012 Biological Assessment, and the U.S. Fish and Wildlife Service’s (FWS’s) 2013 Biological Opinion, had not examined the potential hazardous impacts to endangered species from oil spills associated with Keystone XL in light of the need for updated modeling and data on oil spills and leaks, this Court set aside State’s Biological Assessment and FWS’s Biological Opinion, and directed FWS to conduct an updated analysis of the oil spill data. *Id.* at 53. Most importantly of all, the Court held that “[t]he Department failed to comply with NEPA and the APA when it disregarded prior factual findings related to climate change and reversed course.” *Id.* at 52, and prior discussion at 31-35. Rather than conducting the public interest analysis required by the APA, “[t]he Department instead simply discarded prior factual findings related to climate change to support its course reversal” in approving Keystone XL, despite former Secretary of State John Kerry’s detailed analysis compelling rejection of this project. *Id.* at 35.

And, in its August 2018 Order finding the Department’s approval of a different route through Nebraska violated NEPA, this Court ruled that “Federal Defendants have yet to analyze the Mainline Alternative route” through Nebraska despite the fact that this significant route change was a “connected action” to the proposed action and known to the Department of State “before it issued the Presidential Permit on March 23, 2017.” ECF 210 at 8-12. For each of these reasons, this Court properly set aside State’s approval of Keystone XL and enjoined both the Federal Defendants and TransCanada from “engaging in any activity in furtherance of the construction or operation of Keystone and associated

facilities until the Department has completed a supplement to the 2014 SEIS that complies with the requirements of NEPA and the APA.” ECF 218 at 54.

Citing uncertainty regarding the specific scope of the injunctive relief provided in the Court’s Judgment, on November 15, 2018 TransCanada filed its Motion to Amend the Court’s Order on Summary Judgment. ECF 222. Its witness, Mr. Ramsay, described three somewhat overlapping categories of self-described “pre-construction activities” that TransCanada sought to implement provided the Court first confirmed it would be permissible to do so. ECF 222-1 at ¶¶ 16-18. As noted, following the Court’s Telephonic Status Conference on November 28, 2018, the Court clarified the scope of its injunctive relief by expressly allowing TransCanada to proceed with the activities described in paragraphs 16 and 17. The Court deferred ruling with regard to the activities described in paragraph 18 until after considering Plaintiffs’ responses to TransCanada’s motion.

As explained below, with the sole exception of “cultural, biological, civil and other surveys” and “maintaining security at project sites,” none of the “pre-construction” activities described in paragraph 18 should be allowed, as all of them will cause irreparable environmental and cultural harm, and prejudice the Federal Defendants’ future decision-making pursuant to this Court’s orders.

III. STANDARD OF REVIEW

Two standards of review govern this Court’s decision on TransCanada’s motion – the procedural standard applicable to requested amendments to judgments, and the substantive standard applicable to orders determining the scope of permanent injunctive relief. As to the first, procedural standard, amendments to judgments made pursuant to Rule 59(e) of the Federal Rules of Civil Procedure “are appropriate if the district court ‘(1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law.’” *Dixon v. Wallowa County*, 336 F.3d 1013, 1022 (9th Cir. 2003) (quoting *School Dist No. 1J, Multnomah County v. AcandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993)). It appears that TransCanada bases its motion on grounds that this Court either “committed clear error” or that its “initial decision was manifestly unjust.” TC 5.

Under Rule 60(b), “relief should be granted ‘sparingly’ to avoid ‘manifest injustice’ and ‘only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment.’” *Navajo Nation v. Department of the Interior*, 876 F.3d 1144, 1173 (9th Cir. 2017) (quoting *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993)); see also *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) (“a movant seeking relief under Rule 60(b)(6)” is required “to show ‘extraordinary circumstances’ justifying the reopening of a final judgment”).

Applying the foregoing procedural standards, Plaintiffs agree with

TransCanada that clarification of the scope of the injunctive relief ordered by the Court is appropriate, and that analysis of the four-factor test that governs issuance of permanent injunctive relief should be provided as discussed below.

As for the second, substantive standard of review governing the scope of permanent injunctive relief, Plaintiffs agree with TransCanada that the Supreme Court has ruled that an “injunction should issue only if the traditional four-factor test is satisfied.” *Monsanto Co. v. Geerston Seed Farms* (“*Monsanto*”), 561 U.S. 139, 156-157 (2010). For a permanent injunction to issue, a plaintiff must demonstrate: “(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *Monsanto*, 561 U.S. at 156-157 (citation omitted).

As shown below, Plaintiffs satisfy each of the four factors of this test for issuance of permanent injunctive relief.

IV. ARGUMENT

The Court’s November 8, 2018 Order (ECF 218) and subsequent Order filed November 15, 2018 directing the Court Clerk to enter Judgment (ECF 219) vacated the Record of Decision issued on March 23, 2017, and remanded the matter to the Department of State “for further consideration consistent with” the Court’s Order. ECF 218 at 54. Thus, the Court set aside State’s unlawful

approval of Keystone XL. *Id.* Pending compliance with the Court’s Order, and the issuance of a new Record of Decision either approving or disapproving this project, under NEPA “no action concerning [the Project] shall be taken which would: (1) [h]ave an adverse environmental impact; or (2) [l]imit the choice of reasonable alternatives.” 40 C.F.R. § 1506.1(a). Most of the activities listed in paragraph 18 of the Ramsay Declaration would offend both of these limitations.

TransCanada argues that the Court failed to evaluate the mandatory factors that must be addressed prior to granting a permanent injunction, and failed to tailor the relief to Plaintiffs’ injuries. TC 5-6. But all four factors favor the Court’s permanent injunction forbidding most of the activities sought to be conducted by TransCanada in furtherance of Keystone XL. And, as the Court has set aside the Department of State’s approval of the project pending compliance with NEPA, allowing TransCanada to proceed with these injurious activities would directly undermine and prejudice the ongoing NEPA, APA and ESA reviews ordered by the Court, and irreparably harm Plaintiffs and the environment.

A. TRANSCANADA’S PROPOSED AMENDMENTS TO THE JUDGMENT WILL CAUSE IRREPARABLE INJURY

TransCanada contends that Plaintiffs “cannot suffer an irreparable injury as a result of the limited activity TransCanada has been conducting to prepare for the construction of Keystone XL.” TC 9. But the Administrative Record and TransCanada’s own evidence show the contrary to be true.

TransCanada argues that “[p]reconstruction activities, of the type described

in the Ramsay Declaration, will not cause harm or impact federal decision-making.” TC 9. Yet the Ramsay Declaration (ECF 222-1, hereinafter “Ramsay”) establishes that TransCanada intends to conduct activities that would do both.

Ramsay states that TransCanada intends to conduct the following activities, among others: (1) “mowing and patrolling areas of the right-of-way to discourage migratory bird nesting;” (2) preparation of off-right-of-way pipe storage yards; (3) preparation of sites for off-right-of-way worker camps; (4) preparation of off-right-of-way contractor yards; and (5) transportation, receipt and off-loading of pipe at storage yards. Ramsay ¶ 18. But Ramsay avoids quantifying the acres of land that this work will disturb. *Id.* His omission hides the vast scale of the impacts of these activities.

TransCanada plans to mow its intended right-of-way in order to discourage its use by migratory birds. Ramsay ¶ 18. Ramsay does not clarify how many miles or acres of right-of-way TransCanada intends to mow, but the 2014 Final Supplemental Environmental Impact Statement (“FSEIS”) states that the construction right-of-way will be 110 feet wide, along approximately 875 miles of pipeline. DOS 5952. This equates to: $110 \text{ feet} \times 5,280 \text{ feet per mile} \times 875 \text{ miles} = 580,800 \text{ square feet per mile} \times 875 \text{ miles} = 508,200,000 \text{ square feet}$. Divided by 43,560 square feet per acre yields 11,666 acres – an area roughly the size of 8,800 *football fields*.

Mowing in the construction right-of-way would have significant impacts on the environment. For example, more than 9 square miles of the right-of-way will

be permanently converted from scrub-shrub and forest wetlands to emergent wetlands. DOS 6781. And the remaining area would be subject to “long-term impact[s] based on the slower growth rate of trees and shrubs, which may require decades for complete regeneration.” *Id.* These wetlands that will be permanently (or near-permanently) and irreparably destroyed provide important habitat for aquatic and terrestrial species, protect natural drainage patterns and root systems, reduce erosion, and maintain water quality, among other functions. DOS 6782. Yet TransCanada’s preconstruction activities will cause irreparable harm to these important habitats, including but not limited to “[p]ermanent loss of wetlands,” “permanent modification of surface and subsurface flow patterns,” “permanent modification of wetland vegetation,” and “[l]oss or alternation of wetland soil integrity.” DOS 6782-6784.

Furthermore, the FSEIS reveals that “biologically unique landscapes and vegetation communities of conservation concern” exist along the pipeline’s proposed route and will face significant impacts from pre-construction and construction-stage clearing. DOS 6809. The construction right-of-way will “cross an estimated 356 miles of native grassland,” much of which has never been tilled, and which may take decades to recover. DOS 6809. Further, it will take between five and 15 years for sagebrush shrubland disturbed in the construction phase to become re-established. DOS 6810. It may take up to 50 years for disturbed bottomland forest and upland and wetland forest communities in the construction right-of-way to reestablish. DOS 6810-6811. The loss of these essential habitats

is both significant and irreparable.

Further, this mowing appears similar to the mowing and windrowing that the U.S. Fish and Wildlife Service determined TransCanada may *not* perform in South Dakota, as it could cause impermissible “habitat loss for other species, including grassland birds.” FWS 2062; *see also* FWS 39 (South Dakota Field Office concerned about clearing for pipeline right-of-way harming grassland bird habitat, and the need for mitigation to address “grassland birds that are disappearing”).

Indeed, there can be no debate about mowing’s pernicious effects, since mowing is specifically intended to *degrade* the habitat sufficiently to *prevent* species from nesting along TransCanada’s preferred right-of-way, and thereby, interfering with TransCanada’s construction schedule. Ramsay ¶ 18. Forcing species to abandon, and thereafter avoid, the pipeline’s proposed right-of-way will cause significant and irreparable environmental harm. *See, e.g., National Wildlife Federation v. National Marine Fisheries Service (“NWF v. NMFS”),* 235 F.Supp.2d 1143, 1159 (W.D. Wash. 2002) (activity that degrades critical habitat when species are not present still harms those species, because it “mak[es] the species’ return less likely”).

TransCanada’s preconstruction work “off of “TransCanada’s requested right-of-way will likewise cause irreparable harm. The FSEIS states that pipe storage yards “would be required at 30- to 80-mile intervals,” and should be located near the pipeline right-of-way. DOS 5979. Each pipe storage yard would

be 30 to 40 acres. *Id.* The Project includes 355.9 acres of pipe storage yards in Montana, 345.6 acres of pipe storage yards in South Dakota, and 56.1 acres for pipe storage in North Dakota. DOS 5980. The 2018 DSEIS for the Keystone Mainline Alternative Route (“DSEIS”) contemplates 280.0 acres of pipe storage yard in Nebraska. DSEIS 2-4. Aggregating these acreages yields a total of 1,037.6 acres to be cleared for pipe storage yards alone. This is roughly equivalent to the size of 780 football fields.

“[C]ontractor yards would be required at approximately 60-mile intervals.” DOS 5979. Each contractor yard “would occupy approximately 30 acres.” *Id.* Suitable sites would need to be level, without structures, and not forested. . . .” *Id.* While the FSEIS states that TransCanada would “[w]here practicable, seek out sites that have been previously disturbed,” it does not quantify what portion of sites would fall into that category. DOS 5979. The FSEIS discloses 161.3 acres of contractor yards in Montana, and 258.6 acres of contractor yards in South Dakota. DOS 5980. In addition, the DSEIS contemplates 59.1 acres of contractor yards in Nebraska. DSEIS 2-4. This totals 479 acres of contractor yards, roughly equivalent to 360 football fields.

Plaintiffs and the environment will clearly be harmed by these “pre-construction” activities. The February 8, 2018 Declaration of Kathleen Meyer (ECF 153) establishes that she is “familiar with the exceptional scenery and fish and wildlife that would be harmed by construction of the Keystone XL Pipeline project and its associated land clearing, access road building and maintenance”

and related workers' camps. *Id.* ¶7. And the February 7, 2018, Declaration of Joye Braun (ECF 150) ("Braun") establishes that native ecosystems along the pipeline route provide food and medicine for her people, and that the threatened degradation of those habitats would endanger their culture and health as important plants are lost. Braun ¶¶ 3-4. Likewise the February 9, 2018, Declaration of Tom B.K. Goldtooth (ECF 148) ("Goldtooth") notes that the impacts from infrastructure "that would be built to support construction and operation of the pipeline . . . would harm the surface and groundwater supplies, fish and wildlife, clean air and aesthetic and spiritual resources on which Indigenous Peoples rely for their sustenance and survival." Goldtooth ¶10. And the February 8, 2018, Declaration of Frank Egger (ECF 154) ("Egger") discusses how activities that will remove native vegetation and disturb wildlife habitat would harm his enjoyment of Montana's outstanding watershed resources. Egger ¶¶ 15, 17.

The FSEIS states approximately eight temporary construction camps will be established (DOS 5982), each between 50 and 100 acres, so "the construction worker camps may be the most visible evidence of the proposed Project, particularly for camps sited amid agricultural or rangeland areas." DOS 6937. While the FSEIS assumes four camps in Montana, three in South Dakota, and one in Nebraska, it also states that "the final number and size of camps would be determined based on the *time available to complete construction and to meet [TransCanada's] commercial commitments.*" DOS 5982 (emphasis added).

The FSEIS assumes that approximately 50 acres of each camp "would be

used for housing and administration facilities” using “modular units.” DOS 5983. Each camp includes a “convenience store; recreational and fitness facilities; entertainment rooms and facilities; telecommunications/media rooms; kitchen/dining facilities; laundry facilities; and security units,” as well as an infirmary. *Id.* Each camp’s housing will include “dormitory-like units that house roughly 28 occupants per unit,” with 600 beds per camp, and 300 recreational vehicles, which will also be used to house up to 400 people. DOS 5983. And each camp will include a wastewater treatment facility. *Id.* Collectively, the contractor camps will be able to house up to *8,000 people*, and occupy between 400 and 800 acres. *Id.* Picking the middle of this range, the acreage of the existing vegetation to be removed and occupied by these camps would be roughly equivalent to 300 football fields.

As detailed in Joye Braun’s February 7, 2018, Declaration, the influx of workers to these work camps will harm her local tribal community as the workers bring increased drug use and crime, including increased violence against women. Braun ¶ 5; *see also* Goldtooth ¶ 14 (workers at work camps will cause “socially and environmentally disruptive activities [that] degrade the natural beauty and tranquility of the lands and waters, displace wildlife, destroy the delicate balance of man with Nature, and threaten the health, safety and well being of the Tribal community”).

The site preparation of 1,916 to 2,316 acres for pipe storage yards, construction yards and worker camps, as with TransCanada’s mowing work, will

likewise remove available habitat for nesting birds and other wildlife as each site is made barren. To prepare these sites, TransCanada will use borrow materials, such as gravel, to level and prepare the ground, and compact the existing soil. DOS 5969. The FSEIS indicates that 134,400 total cubic yards of borrow material will be used at contractor yards. DOS 5971. It states that TransCanada will use “about 7,000 cubic yards of gravel . . . for each pipe yard.” DOS 5969. Thus, TransCanada will be acquiring and spreading approximately 210,000 cubic yards of gravel for the pipe storage yards.¹ DOS 5969. These 1,916 to 2,316 acres of land, once leveled and graveled, will be rendered inhospitable for native plants and animals indefinitely.

The proposed clearing and preparation of off-right-of-way storage yards, contractor yards and worker camps would also cause irreparable greenhouse gas emission impacts before the Department of State has had a chance to re-analyze the Project’s global warming impacts pursuant to this Court’s Order. ECF 218 at 19-23, 31-35. The FSEIS fails to estimate the greenhouse gas emissions from these off-right-of-way activities, but its discussion of other Project-related emissions indicates that the impacts could be substantial.

For example, the FSEIS estimates that the planned open-burning clearing of about 75 of the acres in the proposed right-of-way would alone emit 55.1 metric

¹ 1,037.6 acres of pipe storage yards, divided by approximately 35 acres per yard equals 30 pipe storage yards. 30 multiplied by 7,000 equals 210,000 cubic yards.

tons of CO₂-equivalent. DOS 7209-7210.² Off-right-of-way site clearing through open burning would likely cause similar greenhouse gas emissions per acre.

In addition, to the extent that preparation of the off-right-of-way yards and camps involves manufacturing or construction of buildings or equipment proposed for erection or use on the sites, that “capital equipment” also has substantial lifecycle greenhouse gas emission impacts. Capital equipment includes “buildings, equipment, pipelines, rolling stock” and related materials. DOS 18651. While “[n]one” of the lifecycle studies cited in the FSEIS “included the GHG impacts associated with capital equipment and construction of facilities, machinery, and infrastructure needed to produce oil sands,” according to “Bergerson and Keith, the relative percentage increase to [wells-to-wheels] GHG emissions from incorporating capital equipment is between 9 and 11 percent (Bergerson and Keith 2006).” DOS 12376. That is in the ballpark of 15 million metric tons of annual CO₂e emissions from capital equipment (9-11 percent of the 2014 FSEIS’ estimated 147-168 million metric tons of annual CO₂e emissions). DOS 7235.

Thus, the activities discussed in paragraph 18 are sufficiently damaging that granting TransCanada’s motion would cause massive irreparable harm. Should State determine that it no longer wishes to approve the pipeline, TransCanada will

² Table 4.14-1, note “e,” explains that clearing by open burning is proposed for approximately 0.5 percent – or just over 76 acres – of the approximately “15,296 acres of land [that] are expected to be disturbed in total.” DOS 7210.

have irreparably disturbed, and in many cases destroyed, thousands of acres of existing vegetation and wildlife habitat.

B. PLAINTIFFS HAVE NO AVAILABLE REMEDY AT LAW

TransCanada asserts that “there is no need to assess” whether other remedies are available. TC 9. By so arguing, TransCanada attempts to avoid the explicit concession that there is no available and adequate remedy at law. But that concession cannot be avoided. Courts have repeatedly and expressly held that “[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.” *Amoco Productions Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 545 (1987); *see also League of Wilderness Defenders / Blue Mountains Biodiversity Project v. Connaughton* (“*League of Wilderness Defenders*”), 752 F.3d 755, 764-767 (9th Cir. 2014). So too here, the irreparable injury caused by TransCanada’s construction preparation activities cannot be adequately remedied by any other available remedy. *Amoco Productions*, 480 U.S. at 545.

C. THE BALANCE OF HARDSHIPS TIPS IN PLAINTIFFS’ FAVOR

TransCanada erroneously argues that a temporary delay in creating preconstruction jobs, and missing the 2019 construction season creates “significant irreparable harm,” tipping the balance of the hardships in its favor.

TC 10-11. But TransCanada's argument fails for two reasons.

First, TransCanada's claimed harms are temporary in nature. Therefore, as numerous courts – including the Ninth Circuit – have held, the balance of hardships tips toward plaintiffs “because the harms they face are permanent, while the intervenors face temporary delay.” *League of Wilderness Defenders*, 752 F.3d at 765 (citing *Amoco Production Co.*, 480 U.S. at 545).

As shown above, Plaintiffs will suffer irreparable injury from TransCanada's preconstruction activity. For example, TransCanada will conduct site preparation activities on 1,916 to 2,316 acres for pipe storage yards, construction yards and worker camps, and will acquire approximately 300,000 cubic yards of gravel to prepare those sites. DOS 5969, 5983; Ramsay ¶ 18. Furthermore, if TransCanada is allowed to proceed it would mow the right-of-way, which would convert scrub-shrub and forested wetlands to emergent wetlands (DOS 6781), create long-term impacts on shrublands (DOS 6800), and disturb native vegetation communities (DOS 6801). These activities would create irreparable impacts that could not “be adequately remedied by money damages and [are] often permanent or at least of long duration.” *Amoco Production Co.*, 480 U.S. at 545.

By contrast, the potential impacts of an injunction to TransCanada are only *temporary* in nature. TransCanada states that if this Court were to enjoin preconstruction activity, it would “miss[] the 2019 construction season.” TC 10. It attempts to paint this delay as a permanent loss of jobs, but that is simply

incorrect. *Id.* If the Project is approved after adequate environmental review, TransCanada could begin construction a year later. While Ramsay claims that if “TransCanada were to suspend work . . . for a matter of several weeks, the construction season would be lost and these jobs would be lost,” he fails to acknowledge that the loss would be for *one construction season only*. Ramsay ¶ 24.

The financial injury that TransCanada claims is likewise temporary. TC 11. Ramsay manipulates the math to claim a financial impact far greater than would actually occur. Ramsay ¶ 26. Delaying construction by one year would not cause TransCanada’s March 2021 to March 2022 earnings to be delayed by 20 years, as claimed. *Id.* Rather, it would simply delay those earnings by one year – until March 2022 to March 2023. By misstating the delay as continuing until the end of the “current 20-year shipper contract terms,” TransCanada overstates the impact from this minor twelve-month delay. *Id.*

These temporary delays that TransCanada will face pale in comparison to the irreparable and potentially permanent impacts that would occur to the environment if TransCanada were allowed to conduct its preconstruction activities. Furthermore, if TransCanada proceeds with preconstruction activity, it will result in an irretrievable waste of both public and private resources, especially if the Project is not approved after adequate environmental analysis. TransCanada cannot be allowed to irreparably harm the environment on the hope that the State Department will approve the Project after it is adequately reviewed.

Second, all of the cases that TransCanada cites to support its position are inapposite. While this Court “may consider economic harm when determining whether to grant injunctive relief,” unlike the cases cited by TransCanada, here the widespread and irreparable environmental injury clearly outweighs the merely temporary delay in construction that TransCanada may face. TC 11 (citing *Protect Our Communities Foundation v. U.S. Department of Agriculture*, 845 F.Supp.2d 1102, 1118 (S.D.Cal. 2012), *aff’d* 473 F.Appx. 790 (9th Cir. 2012)).

For example, in *Committee of 100 on Federal City v. Foxx* (“*Committee of 100*”), 87 F.Supp.3d 191, 220 (D.D.C. 2015), the harms cited by plaintiffs had “not established that any environmental effects of the construction activity will be severe or irreparable,” and the harms were “speculative at best.” *Id.* Here, however, TransCanada’s preconstruction activities will cause immediate and irreparable harm by creating thousands of acres of construction yards and other staging areas, destroying vegetation and habitat, and causing permanent impacts to species that utilize those habitats. Unlike *Committee of 100*, the slight construction delay that TransCanada may face here does not outweigh these significant environmental harms. *Id.*; *League of Wilderness Defenders*, 752 F.3d at 765; *Amoco Production Co.*, 480 U.S. at 545.

TransCanada’s reliance on *James River Flood Control Association v. Watt*, 680 F.2d 543, 544 (8th Cir. 1982), likewise fails. TC 11. In that case the court found that there was no identified “factual basis for the conclusion that the [plaintiff] or the public will suffer irreparable harm if construction proceeds.” *Id.*

That conclusion contrasts sharply with the facts here, where the record shows that the Project's preconstruction activities will substantially and irreparably harm the environment. DOS 5969, 5983, 6781, 6800, 6801.

Similarly, in *Alaska Survival v. Surface Transportation Board*, 704 F.3d 615 (9th Cir. 2012), the balance of hardships only tipped toward defendant's economic harms *after* the court had decided to "allow the project to move forward." *Id.* at 616. At that point, "the weight to be given Petitioners' assertions of hardship because of environmental harm [was] weakened." *Id.* Here, by contrast, construction of the Keystone XL Project is *barred* until an adequate environmental analysis is completed and the Project is approved based on that analysis. The irreparable environmental impacts that preconstruction activities would cause are not a foreordained conclusion here and the resources that those activities threaten must be protected.

Furthermore, the Ninth Circuit has made clear that while "[b]oth the economic and environmental interests are relevant factors, and both carry weight in this analysis," where plaintiffs and the public will face permanent irreparable harm and the defendant will face only a temporary delay, the balance of hardships favors the plaintiff. *League of Wilderness Defenders*, 752 F.3d at 765; *see also Sierra Club v. U.S. Forest Service*, 843 F.2d 1190, 1195 (9th Cir. 1988) ("when environmental injury is 'sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment.'" (citing *Amoco Production Co.*, 480 U.S. at 545)); *Save the Yaak Committee v. Block*, 840 F.2d

714, 722 (9th Cir. 1988) (“the risk of environmental injury is sufficiently likely to authorize enjoining further reconstruction and timber sales”).

Finally, should TransCanada choose to continue its efforts to build the Keystone XL Pipeline before it acquires the necessary permits, the economic harm it would suffer would be strictly self-inflicted. If TransCanada chooses to proceed at its own risk, it cannot then rely on that voluntary commitment of resources to claim that the balance of hardships weighs in its favor. *Sierra Club v. U.S. Army Corps of Engineers*, *supra*, 645 F.3d at 997; *Davis v. Mineta*, *supra*, 302 F.3d at 1116.

Because the irreparable harm that the public and Plaintiffs will suffer if TransCanada is allowed to proceed with preconstruction activity far outweighs the modest harms of Project delay, the balance of hardships favors an injunction.

D. THE PERMANENT INJUNCTION SERVES THE PUBLIC INTEREST

TransCanada relies upon the Department of State’s findings regarding the *completed* Keystone XL Pipeline to argue that the injunction is against the public interest. TC 11-12. Yet TransCanada has not asked this Court to amend the judgment to permit construction and operate the Keystone XL Pipeline pending State’s compliance with NEPA. Thus, State’s national interest findings are irrelevant to the preconstruction activities contemplated in paragraph 18.

As shown, TransCanada’s preconstruction activities will alter the landscape of 1,916 to 2,31 acres of pipe storage yards, construction yards and worker camps,

as well as approximately 875 miles of 110-foot-wide pipeline construction right-of-way. TransCanada's mowing, clearing, and leveling of these lands will displace wildlife, alter the quantity and quality of existing habitat, and discourage its future use. If State does not reissue an approval for the Project, the harm stemming from these site preparation activities will continue as the stripped lands will take years to return to their prior condition.

Further, this Court's Order confirms that State failed to analyze the cumulative climate impacts of the Keystone XL Pipeline, and acted arbitrarily when it ignored the 2015 Record of Decision's finding that the Project was not in the national interest, due to climate change considerations, including "the need to keep global temperature below two degrees Celsius above pre-industrial levels." ECF 218 at 21-23, 34-35.

Indeed, the U.S. Global Change Research Program's ("USGCRP's") Fourth National Climate Assessment states that "the impacts and costs of climate change are already being felt in the United States, and recent extreme weather and climate-related events can now be attributed with increasingly higher confidence to human-caused warming."³ It states that "[m]any lines of evidence demonstrate

³ USGCRP, 2018: *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II* [Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, and B.C. Stewart (eds.)]. U.S. Global Change Research Program, Washington, DC, USA. doi: 10.7930/NCA4.2018; Chapter 29, available at <https://nca2018.globalchange.gov/chapter/29/> (last accessed December 4, 2018).

that human activities, especially emissions of greenhouse gases from fossil fuel combustion, deforestation, and land-use change, are primarily responsible for the climate changes observed in the industrial era, especially over the last six decades.” *Id.* It also finds that “[n]et cumulative CO₂ emissions in the industrial era will largely determine long-term global average temperature change and thus the risks and impacts associated with that change in the climate.” *Id.* (footnote omitted). And, importantly, it determines that “[f]ossil fuel combustion accounts for 77 % of the total U.S. GHG emissions.” *Id.*

Impacts associated with human health, such as premature mortality due to extreme temperature and poor air quality, are commonly some of the most economically substantial. While many sectors face large economic risks from climate change, other impacts can have significant implications for societal or cultural resources. Further, some impacts will very likely be irreversible for thousands of years, including those to species, such as corals, or those that involve the exceedance of thresholds, such as the effects of ice sheet disintegration on accelerated sea level rise, leading to widespread effects on coastal development lasting thousands of years.

Id. (internal citations omitted).

Thus, the 2015 Record of Decision’s discussion of the Project’s climate change-related foreign-policy considerations likely *understated* the reasons that the Project is not in the public interest. AR 13007-13010. The overwhelming scientific consensus regarding the near-irreversible impacts of fossil fuel emissions on the planet must outweigh any short-term economic benefit from the Project’s construction.

Should TransCanada choose to move forward with the Keystone XL

Pipeline in the absence of any additional approvals from State, it will be throwing good money after bad. By committing such resources to an uncertain project, TransCanada is neither serving the public interest or its own private interests, and proceeds at its own risk. *Sierra Club v. U.S. Army Corps of Engineers*, *supra*, 645 F.3d at 997.

E. THE INJUNCTION IS NARROWLY TAILORED TO PREVENT HARM TO THE PUBLIC AND PLAINTIFFS

Although TransCanada's motion claims the injunction is overboard, this Court's clarification of the scope of its injunction to allow the activities described in paragraphs 16 and 17 of the Ramsay Declaration eviscerates TransCanada's claim. And, Plaintiffs' clarification in their respective opposition papers that they do not oppose "cultural, biological, civil and other surveys" and "maintaining security at project sites to ensure public safety and maintaining environmental protections" removes any remaining doubt that this Court's injunction is as narrowly tailored as possible to only prevent irreparable harm to the public, the environment and Plaintiffs.

Allowing the surface-disturbing "pre-construction" activities otherwise sought in paragraph 18 would, by contrast, cause direct, widespread and irreparable harm to the public, the environment and Plaintiffs. As shown, Plaintiffs have demonstrated a "sufficient causal connection" between the surface-disturbing activities in paragraph 18 which they oppose, and the irreparable injury that NEPA, the APA and the ESA are intended to prevent until adequate

environmental review is complete. *National Wildlife Federation v. National Marine Fisheries Service*, No. 3:01-cv-0640-SI, 2017; WL 1829588 (D.Or. Apr. 3, 2017).

Furthermore, as shown, allowing the additional “pre-construction” activities sought by TransCanada would prejudice the Federal Defendants’ ongoing environmental reviews as ordered by this Court. Essentially, TransCanada seeks to proceed with resource-impacting pre-construction of Keystone XL despite this Court’s Orders declaring the project unlawful and setting aside its required federal approvals. Indeed, allowing TransCanada to conduct its surface-disturbing activities along the pipeline’s requested route would effectively predetermine the pipeline’s location despite the Federal Defendants’ court-ordered further environmental reviews, rendering the entire court review and remand a “hollow gesture.” *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323, 1327 (4th Cir. 1972).

V. CONCLUSION

For the reasons stated above, this Court must not amend its judgment to allow preconstruction actions that will alter the environment along, and “off-site,” TransCanada’s intended right-of-way.

Dated: December 5, 2018

PATTEN, PETERMAN,
BEKKEDAH & GREEN, PLLC
s/ James A. Patten
JAMES A. PATTEN

Dated: December 5, 2018

LAW OFFICES OF STEPHAN C.
VOLKER

s/ *Stephan C. Volker*

STEPHAN C. VOLKER (Pro Hac
Vice)

Attorneys for Plaintiffs
INDIGENOUS ENVIRONMENTAL
NETWORK and NORTH COAST
RIVERS ALLIANCE

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2) of the District of Montana Local Rules, I certify that this Brief contains 6,422 words, excluding caption, certificates of service and compliance, table of contents and authorities, and exhibit index, as counted by WordPerfect X7, the word processing software used to prepare this brief.

Dated: December 5, 2018

s/ *Stephan C. Volker*

STEPHAN C. VOLKER

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2018, a copy of the foregoing

**IEN PLAINTIFFS' OPPOSITION TO TRANSCANADA'S MOTION TO
AMEND THE COURT'S ORDER ON SUMMARY JUDGMENT**

was electronically served on all counsel of record via the Court's CM/ECF system.

s/ *Stephan C. Volker*

Attorneys for Plaintiffs

INDIGENOUS ENVIRONMENTAL NETWORK
and NORTH COAST RIVERS ALLIANCE

APPENDIX

8

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

INDIGENOUS ENVIRONMENTAL NETWORK }
and NORTH COAST RIVER ALLIANCE, }
and }

NORTHERN PLAINS RESOURCE COUNCIL,
et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF STATE,
et al.,

Defendants,

CV 17-29-GF-BMM
CV 17-31-GF-BMM

**DECLARATION OF JOYE
BRAUN IN SUPPORT OF
IEN PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT**

Hearing: May 24, 2018
Time: 10:00 a.m.
Judge: Hon. Brian M. Morris

TRANSCANADA KEYSTONE PIPELINE and
TRANSCANADA CORPORATION,

Defendant-Intervenors.

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)

I, Joye Braun, hereby declare:

1. I am a member of the Indigenous Environmental Network (“IEN”) and make this declaration based on my personal knowledge.

2. I was born on January 20, 1969 in Winnebago, Nebraska. I am a Native American and member of the Cheyenne River Sioux Tribe. I reside with my family on the Cheyenne River Indian Reservation, which is located just east of the proposed route of the Keystone XL Pipeline. The pipeline passes within one mile of the southwest boundary of our Reservation, and crosses the Cheyenne River and many of its tributaries upstream from our Reservation.

3. If the Keystone XL Pipeline should leak into any of these rivers, our people, our water supply, and our health and safety would be immediately impacted. My family and I would be directly harmed, since I frequently harvest native medicines and berries along the Cheyenne River downstream from where the KXL Pipeline would be constructed. My family and I rely on these foods and medicines for our sustenance and health.

4. When the United States Army Corps of Engineers flooded the Missouri River along our Reservation, it caused flooding of many tributaries of the river which destroyed thousands of acres of native ecosystems that provided food and medicine for our people. Some of these plants are now gone forever. We must hold on to what we have left to preserve our culture and our health.

5. My people have witnessed firsthand the ill effects of oil pipeline development. These pipeline projects house temporary workers in “man camps” that become sources of drugs including methamphetamine and heroin. We have seen an increase in drug use and alcohol abuse within the Native American communities in the vicinity of these man camps in North Dakota, South Dakota and Alberta. We have also seen an increase in the number of missing and murdered Native American women in the vicinity of these camps. And, we have experienced slow-to-no emergency service response from police and medical providers to our Native American communities when they are harmed by the dramatically increased incidents of violence against women that are associated with these man camps.

6. Our Native American communities are impacted by oil pipeline development in ways that may be unseen to others. For example, where the Keystone XL Pipeline is proposed to pass near our Reservation, there are

vulnerable unmarked graves of our ancestors and other cultural sites such as the camp of Chief Bigfoot before he led our people south, only to be massacred by the United States Army at Wounded Knee.

7. Every year we hold a horse ride with prayers along this route of sadness and tragedy. For our people, this is a memorial horse ride to build strength, courage and fortitude among our youth. It is done in quiet, respectful prayer. After the ride is completed, descendants of the survivors of the massacre run back in the freezing cold to my homeland. We fear what will happen to our unmarked graves and other cultural sites if the Keystone XL Pipeline is constructed and “man camps” are installed as is now proposed within five miles from the border of our Reservation.

8. For all of these reasons, I, my family and my community would be harmed if the Keystone XL Pipeline is built and operated.

I declare under penalty of perjury that the foregoing facts are true and correct of my personal knowledge, that I am competent to and if called would so testify, and that this declaration was executed in February 7, 2018 in Eagle Butte, South Dakota.


JOYE BRAUN
4

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

INDIGENOUS ENVIRONMENTAL NETWORK	}	CV 17-29-GF-BMM
and NORTH COAST RIVER ALLIANCE,		CV 17-31-GF-BMM
and	}	
NORTHERN PLAINS RESOURCE COUNCIL,		DECLARATION OF
et al.,		LAVAE HIGH ELK RED
Plaintiffs,		HORSE IN SUPPORT OF
v.		IEN PLAINTIFFS'
UNITED STATES DEPARTMENT OF STATE,	}	MOTION FOR SUMMARY
et al.,		JUDGMENT
Defendants,		Hearing: May 24, 2018
		Time: 10:00 a.m.
		Judge: Hon. Brian M. Morris

TRANSCANADA KEYSTONE PIPELINE and
TRANSCANADA CORPORATION,

Defendant-Intervenors.

)
)
)

I, LaVae High Elk Red Horse, hereby declare:

1. I am a member of the Indigenous Environmental Network (“IEN”) and make this declaration based on my personal knowledge.

2. I was born on September 29, 1962 in Eagle Butte, South Dakota. I am a member of the Cheyenne River Sioux Tribe, and have lived my entire life within the Cheyenne River Indian Reservation. My husband and I live by the Cheyenne River, where we live off the land by fishing, hunting deer, gathering berries and wild turnips, and other native foods. We live simply, and practice our Lakota religion, which emphasizes respect for Mother Earth and for other living creatures.

3. My children and grandchildren also live quietly this way, respecting Mother Earth in all her manifestations. For us, the web of life starts and ends with water, which enables our food to grow, our fish to swim, and our game to thrive. We keep horses that use the river to water and to swim and frolic.

4. Because we cherish the Earth and its natural bounty, and depend on the great Cheyenne River and its tributaries for our sustenance, the Keystone XL

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VOLKER LAW OFFICES

PAGE 04/04

Pipeline would threaten all that we live for and our cultural and religious legacy as we live it every day. The Keystone XL Pipeline would pass less than one mile from the southwest boundary of our Reservation, and cross all of the rivers, including the Cheyenne River and its tributaries, on which we depend for drinking, irrigation, and watering our horses and livestock. Should the KXL Pipeline rupture and leak – as appears to us inevitable and has been predicted by the Final Environmental Impact Statement for the project – the resulting contamination of our water supply would be devastating to our family, our community, and the entire web of life on which our Tribe depends for its survival.

5. For each of these reasons, my family and I would be directly and severely impacted should the Keystone XL Pipeline be built and allowed to operate.

I declare under penalty of perjury that the foregoing facts are true and correct of my personal knowledge, that I am competent to and if called would so testify, and that this declaration was executed in February 7 2018 in

Rapid City, South Dakota.


LAVAE HIGH ELK RED HORSE

CERTIFICATE OF SERVICE

I, Stephan C. Volker, am a citizen of the United States. I am over the age of 18 years and not a party to this action. My business address is the Law Offices of Stephan C. Volker, 1633 University Avenue, Berkeley, California 94703.

On February 9, 2018 I served the following document by electronic filing with the Clerk of the Court using the CM/ECF system, which sends notification of such filing to the email addresses registered in the above entitled action:

**DECLARATION OF LAVAE HIGH ELK RED HORSE IN SUPPORT OF
IEN PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

I declare under penalty of perjury that the foregoing is true and correct.

Dated: February 9, 2019

/s/ Stephan C. Volker

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

INDIGENOUS ENVIRONMENTAL NETWORK)	CV 17-29-GF-BMM
and NORTH COAST RIVER ALLIANCE,)	CV 17-31-GF-BMM
and)	)
	) DECLARATION OF
NORTHERN PLAINS RESOURCE COUNCIL,)	KANDI MOSSETT IN
et al.,)	SUPPORT OF IEN
Plaintiffs,)	PLAINTIFFS' MOTION
v.)	FOR SUMMARY
	JUDGMENT
UNITED STATES DEPARTMENT OF STATE, et)	)
al.,)	Hearing: May 24, 2018
Defendants,)	Time: 10:00 a.m.

TRANSCANADA KEYSTONE PIPELINE and) Judge: Hon. Brian M. Morris
TRANSCANADA CORPORATION,)
)
)
Defendant-Intervenors.)
)
)

I, Kandi Mossett, hereby declare:

1. I am the Director of the Indigenous Environmental Network's ("IEN's") Program on Native Energy and Climate Change. I am a Native American of Mandan, Hidatsa and Arikara heritage. I was born on July 4, 1979 in Hazen North Dakota and grew up in an area known today as the Fort Berthold Reservation. I obtained my undergraduate degree from the University of North Dakota in Natural Resource and Park Management in 2001 and after working for both the State and National Park Service for four years, I earned my Masters Degree in Environmental Management, through the Earth Systems Science and Policy Program, from the University of North Dakota in 2006.

2. I began working for IEN as its Tribal Campus Climate Challenge ("TCCC") Organizer in February 2007. Under my direction, over thirty Tribal colleges have been engaged in the TCCC, and many have worked on projects to reduce climate change ranging from light bulb swaps and community tree plantings to small-scale community solar panel installations and community gardens. The

goals of our programs have been to introduce and support initiatives within Tribal colleges for students to pursue renewable energy alternatives such as solar and wind power, reduce their carbon footprint and global warming pollution, connect students to environmental justice and climate justice issues in their community, promote collaboration between students and communities, and to accomplish all this in line with Indigenous traditional knowledge and belief systems.

3. My expanding work to tackle Global Climate Change has included efforts to expand international awareness of the problem. To this end, I began participating in the United Nations Framework Convention on Climate Change (UNFCCC) Conference of the Parties (COP) in December of 2009 in Copenhagen. While there I spoke out against tar sands development and requested that the United States sign the United Nations Declaration on the Rights of Indigenous Peoples. I also attended the World Peoples Conference on Climate Change and the Rights of Mother Earth in Cochabamba, Bolivia, in April of 2010. I attended the UNFCCC COP16 in Cancun, Mexico in December of 2010; the UNFCCC COP17 in Durban, South Africa; the UNFCCC COP21 in Paris, France and most recently the UNFCCC COP23 in Bonn, Germany. At these gatherings I spoke out against carbon trading schemes that commodified resources considered sacred within Indigenous cultures.

4. I have continued to educate and advocate both locally, in the Northern Great Plains, and on national and international levels, to raise public awareness about the need to improve sustainability and reduce climate change. I currently serve as IEN's Lead Organizer on its Extreme Energy and Just Transition Campaign, which focuses on creating public awareness about the environmentally and socially devastating effects of hydraulic fracturing on Tribal lands as well as ways to move away from our reliance on fossil fuels while still having economic opportunities in our communities. I have testified before the United States Congress on the issue of Climate Change, and its links to the health, identity and well-being of Indigenous Peoples on Tribal lands.

5. As a Native American who has experienced firsthand the devastating impacts of oil pipeline spills, and as an IEN member and organizer who has spoken with hundreds of other Native Americans who would be harmed should the Keystone XL Pipeline be constructed and operate, I have many deep concerns about this pipeline and its impacts on Native American communities. I grew up in North Dakota, which has a long, tragic history of oil pipeline spills. The original Keystone Pipeline, for example, had twelve spills in its first year of operation, 2 of which were in North Dakota.

6. Accordingly to news accounts, the largest spill from the Keystone Pipeline discharged between 17,000 and 22, 000 gallons of crude oil in May, 2011. That spill was discovered by a North Dakota rancher, Bob Banderet, on May 7, 2011, when he saw oil gushing from the Keystone Pipeline's Ludden pumping station near his land. He reportedly called the emergency phone number that TransCanada Corporation had provided him as a volunteer firefighter to alert TransCanada's emergency response dispatcher to the spill. Yet subsequently TransCanada asked the Pipeline and Hazardous Materials Safety Administration to amend its shutdown order to state that TransCanada's internal sensors – rather than Mr. Banderet – had first discovered the leak. TransCanada subsequently referred to this spill as proof that “the system worked as it was designed to do.” The indisputable fact is the the system failed miserably which is why the Keystone 1 pipeline suffered more spills than any other first year pipeline in U.S. history.

7. The Keystone XL Pipeline Final Environmental Impact Statement (“FEIS”) concedes that oil pipeline spills will occur. Whether the spill originates with a malfunctioning valve in a pumping station as occurred with the May, 2011 spill mentioned above, or other cause such as pipeline corrosion due to electrical currents that may travel along steel pipelines such as the KXL Pipeline, the fact remains that it is only a matter of time before an oil pipeline leaks oil. If it is a

slow leak underground, it may never be discovered. If the leak occurs in a river crossing during the winter, when it is covered by ice, it may not be discovered for days or weeks. Even after discovery, it is difficult to locate the source of oil pipeline leaks because the pipes are buried underground or under bodies of water.

8. For these reasons, the Department of State stated in its FSEIS for the KXL Pipeline that oil leaks would average approximately 34,000 gallons per year. The reality is that although leakage from oil pipelines is inevitable, no one can forecast with any precision the location, duration and quantity of these foreseeable oil spills.

9. When an oil pipeline leaks into a river, it causes severe, long term damage to the ecosystem. This is particularly true for dilbit, the toxic mixture of diluent (a petroleum solvent) and the heavy tar sands crude that the KXL Pipeline would transport from Alberta. When dilbit spills, the aromatic fractions contained within the diluent quickly evaporate, forming a toxic gas that requires evacuation of humans from the affected area. After the diluent evaporates, the heavy tar sands crude oil is left behind. Because it is much heavier than water, it sinks to the bottom of riverbeds, where it becomes lodged in the substrate and may remain for decades. As long as it remains in the watercourse, it leaches hydrocarbons which harm the ecosystem and degrade water quality.

10. Contamination of a river in this way is particularly painful for me and my people. As Mandan, Hidatsa, Arikara people, we always lived along waterways and farmed along the fertile floodplains. Consequently, it is very important to us that we remain close to and make frequent use of our rivers. Since my family and I moved to Joliet, Montana five years ago, we have been frequent kayakers on both the Yellowstone and the Missouri Rivers. We love to hike and camp along or near these rivers because, as we think of it, being on or near the water is within our “blood memory.” My husband and I have raised our daughter of nearly five years to be comfortable on the water, and she has spent many a happy hour tucked into her life vest and riding on our family kayak.

11. Our deep relationship with waterways also includes the fish that swim in them, the winged creatures that fly over them, and the four-legged animals that rely on these waters for their survival. I can’t even begin to explain in this declaration how important it is to me and my family to protect the water and its quality not only for my family, but for all future generations of my people, and for the other life forms that swim in, fly over, and float on these waters. For this reason, it pains me deeply to learn of contamination of the rivers we use by pollutants. I have witnessed fish caught in the Missouri River with deformities and cancers. For example, during my cousins’ memorial fishing tournament on Lake

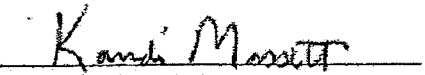
Sakakawea (a man-made reservoir on the Missouri River), we saw deformed fish being pulled out of the water, including a Northern Pike that I photographed.

12. The deep relationship my people have with water extends to many of our cultural and religious practices. For example, in our culture we do not allow the hospital to keep the placenta and dispose of it as hazardous waste. Instead, we lovingly remove the placenta and bury it respectfully. If it is a girl, the woman buries it near the water. If it is a boy, the man takes it to a sacred hill where a fire is lit and it is buried there. I buried my baby girl's placenta along the Yellowstone River with prayers for her health and for the health of the water. I have mourned the loss of innocence when the Yellowstone River has experienced significant oil spills, as occurred in Laurel, MT in 2011 and in Glendive, MT in 2015.

13. For each of these reasons and many others that emanate from our deepest-held belief systems as Native Americans, oil spills from the Keystone XL Pipeline into waters such as the Missouri and Yellowstone Rivers (which the pipeline would cross) would grieve me, my family, and my people, deeply. For these reasons we have opposed the Keystone XL Pipeline since its inception, and urge this Court to overturn its approval.

I declare under penalty of perjury that the foregoing facts are true and correct of my personal knowledge, that I am competent to and if called would so

testify, and that this declaration was executed in February 7, 2018 in Joliet,
Montana.


KANDI MOSSETT

CERTIFICATE OF SERVICE

I, Stephan C. Volker, am a citizen of the United States. I am over the age of 18 years and not a party to this action. My business address is the Law Offices of Stephan C. Volker, 1633 University Avenue, Berkeley, California 94703.

On February 9, 2018 I served the following document by electronic filing with the Clerk of the Court using the CM/ECF system, which sends notification of such filing to the email addresses registered in the above entitled action:

**DECLARATION OF KANDI MOSSETT IN SUPPORT OF IEN
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

I declare under penalty of perjury that the foregoing is true and correct.

Dated: February 9, 2019

/s/ Stephan C. Volker

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
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INDIGENOUS ENVIRONMENTAL NETWORK	}	CV 17-29-GF-BMM
and NORTH COAST RIVER ALLIANCE,		
and	}	CV 17-31-GF-BMM
NORTHERN PLAINS RESOURCE COUNCIL, et	}	DECLARATION OF TOM
al.,		B.K. GOLDTOOTH IN
Plaintiffs,		SUPPORT OF IEN
		PLAINTIFFS' MOTION
v.		FOR SUMMARY
	}	JUDGMENT
UNITED STATES DEPARTMENT OF STATE, et		Hearing: May 24, 2018
al.,		Time: 10:00 a.m.
Defendants,	}	Judge: Hon. Brian M. Morris

TRANSCANADA KEYSTONE PIPELINE and
TRANSCANADA CORPORATION,

Defendant-Intervenors.

I, Tom B.K. Goldtooth, hereby declare:

1. I am the Executive Director of the Indigenous Environmental Network (“IEN”), and make this Declaration in support of its motion for summary judgment in this proceeding. I am a Native American of Dine’ and Dakota (Sioux) heritage and an enrolled member of the Navajo Nation. I was born on July 27, 1953 in Farmington, New Mexico, and am known by my Dakota name of Mato Awanyankapi. Since the late 1980’s, I have worked with tribal governments throughout the western United States and Canada, as well as Indigenous Peoples worldwide, to address the threats posed by mining, energy development, and in particular, massive fossil fuel extraction and transportation projects such as the Keystone XL Pipeline.

2. I am one of the founders of the Durban Group for Climate Justice, co-founder of Climate Justice Now!, a co-founder of the Environmental Justice Climate Change Initiative, a co-founder of the Climate Justice Alliance, a board member of the Science, Environment and Health Network and a member of the

International Indigenous Peoples Forum on Climate Change that operates as the Indigenous Peoples' Caucus within the United Nations Framework Convention on Climate Change. In 2015 I was awarded the Gandhi Peace Award in recognition of my decades of work advocating on behalf of Indigenous Peoples and their right to environmental sustainability throughout the globe, and for humanity to change its treatment of Mother Earth from a position of violence, towards policies of peace and harmony. In 2016 I was awarded the Sierra Club's highest award, the John Muir Award, for my 40 years of environmental justice and leadership with IEN, defending the rights of Indigenous Peoples to protect their land, water, air and health of their people and ecosystems.

3. I currently reside near the headwaters of the Mississippi River in the vicinity of Bemidji, Minnesota, where IEN has its main offices. IEN was established in 1990 by grassroots Indigenous Peoples and individuals to address environmental and economic justice issues both in the United States and throughout the world. IEN is a project of the non-profit Indigenous Educational Network of Turtle Island with headquarters in Bemidji, Minnesota. IEN was formed by grassroots Indigenous Peoples and individual tribal members of American Indian tribes, Alaska Native villages and Canadian First Nations to address environmental and economic justice issues throughout the United States

and in other countries, including Canada. In 1992 I became a member of IEN's National Council, and since 1996 I have served as IEN's Executive Director.

4. IEN has been active in educating the public and state, tribe and federal agencies and legislators about the threat posed to the survival of Mother Earth by fossil fuel extraction and use. One of the most pernicious forms of fossil fuel is tar sands, a thick crude oil extracted from deposits located primarily under boreal forests and wetlands in the Province of Alberta.

5. I have traveled to and am familiar with the proposed route for the Keystone XL Pipeline in Montana, South Dakota and Nebraska. I have visited with IEN members, tribes and supporters who live, work and practice their Indigenous cultural and spiritual practices as their predecessors have been doing for millennia along the pipeline's route in these states. I have discussed with these IEN members and supporters the many way in which the Keystone XL Pipeline would directly harm their cultural resources and legacy, spiritual fulfillment in their native lands and waters, and health and safety of their families and communities.

6. In 2011 IEN joined with leaders of Indigenous Peoples from throughout Canada and the United States to prepare and circulate the Mother Earth Accord, which was adopted by the Great Plains Tribal Chairman's Association in

September and is attached as Exhibit 1. On September 28, 2011 the Great Plains Tribal Chairman's Association adopted a Resolution opposing the Keystone XL Pipeline, which is attached as Exhibit 2.

7. Since 2011 IEN has submitted over 250 pages of detailed comments to the United States Department of State and other state and federal agencies pointing out deficiencies in the Environmental Impact Statements for the Keystone XL Pipeline project, and urging disapproval of that project because of its enormous adverse impacts on the environment, and in particular, on global climate change. Our comments included extensive testimony by Professor Robert R. Curry of the University of California at Santa Cruz, who is a retired Professor of Geology with expertise in the fields of hydrology, fluvial geomorphology, oil pipeline corrosion and leakage, and soil science.

8. IEN submitted detailed comments opposing the Keystone XL Pipeline project to the United States Department of State again on April 22, 2013. In those comments, we joined the Athabasca Chipewyan First Nation of Alberta, Canada, whose people live downstream from the source of the highly corrosive toxic crude oil that would flow through the Keystone XL Pipeline. .

9. IEN submitted comments to the United States Department of State opposing the Keystone XL Pipeline project again on February 24, 2014 and on

February 16, 2017. In support of our comments, we cited and attached many scientific articles, governmental studies and industry disclosures documenting the massive environmental and climate impacts that the Keystone XL Pipeline would unleash.

10. As we have explained in our numerous comment letters to the United States Department of State, development of the Keystone XL Pipeline would harm our communities by exposing them to foreseeable releases of corrosive toxic crude oil and dilbit from the pipeline, which crosses hundreds of water courses and passes over thousands of square miles of aquifers that supply water for their communities, as well as impacts from the many transmission lines and access roads that would be built to support construction and operation of the pipeline. Each of these components of the Keystone XL Pipeline project would harm the surface and groundwater supplies, fish and wildlife, clean air and aesthetic and spiritual resources on which Indigenous Peoples rely for their sustenance and survival

11. The many IEN members and leaders who would be directly impacted by the Keystone XL Pipeline include Harold Frazier, Chairman of the Cheyenne River Sioux Tribe and Joye Braun, who has been working with the Cheyenne River Sioux Tribe in their efforts to educate and advocate against the Keystone XL Pipeline, which is currently proposed to be constructed less one mile upstream

from the boundaries of the Cheyenne River Sioux Reservation, but within the territory of the Great Sioux Nation as recognized in the Fort Laramie Treaty of 1851 and 1868 between the Great Sioux Nation and the United States.

12. The Keystone XL Pipeline would directly impact the Cheyenne River Sioux in several ways. First, it would require noisy, polluting and ugly construction activities involving the use of heavy equipment to build the pipeline and its related infrastructure including access roads and transmission lines to Pumping Stations 17 and 18, which would be located near and upstream from their Reservation. These construction activities would be heard by and visible to Tribal and IEN members.

13. Second, the leakage-prone pipeline would be built upstream from and adjacent to the Cheyenne River Sioux Tribe's Reservation and pose a foreseeable risk of contamination of the Cheyenne River and its tributaries and aquifers that the Cheyenne River Sioux use and that the Pipeline would cross. These affected rivers pass adjacent to and through the Reservation. Contamination of these rivers or their underlying groundwaters by an oil spill from the pipeline would harm IEN members' use of these waters for fishing, hunting, farming, domestic water use, cultural practices, spiritual renewal, habitat and connection with Mother Earth.

14. Third, construction of the pipeline would cause an influx of both temporary workers in work camps and long term maintenance personnel. Their foreseeable use of surrounding areas for off-duty “recreation” such as off-road vehicle use, discharging firearms, drinking, gambling, prostitution, drug use and other anti-social activities poses risks to the Cheyenne River Sioux community. Such destructive activities are associated with non-local workers employed elsewhere in areas impacted by oil and gas construction projects in North and South Dakota. These socially and environmentally disruptive activities would degrade the natural beauty and tranquility of the lands and waters, displace wildlife, destroy the delicate balance of man with Nature, and threaten the health, safety and wellbeing of the Tribal community.

15. Fourth, construction and operation of the pipeline would harm endangered and threatened species. According to the Final Supplemental Environmental Impact Statement and the Biological Assessment and Biological Opinion prepared by the Departments of State and the Interior for the Keystone XL Pipeline, it would affect at least nine imperiled species, including the endangered black-footed ferret, northern swift fox, Whooping crane, interior least tern, pallid sturgeon, and American burying beetle, and the threatened piping plover, northern long-eared bat and western prairie fringed orchid. All of these species are

important to the web of life that supports the ecosystem of the Northern Great Plains and ultimately, of Mother Earth. I have reviewed and share the concerns raised by our expert witness, retired University of Colorado Professor of Conservation Biology Yan Linhart, who has testified that these agencies failed to adequately assess the impacts of the Keystone XL Pipeline on these species. Many of our members, such as LaVae High Elk Red Horse, live off the land and are impacted by the loss of any of these species, all of whom we regard as sacred. For example, the American burying beetle holds particular importance to many of our members who engage in traditional agricultural practices which depend, in part, on the recycling of soil nutrients that this beetle provides. Members of the Yankton Sioux Tribe, for example, submitted comments to the Department of State specifically on this point. I am deeply concerned that the Keystone XL Pipeline will harm each of these imperiled species, potentially pushing them to extinction.

16. All of these foreseeable impacts would harm the Cheyenne River Sioux Tribe's and IEN members' ongoing and historic and cultural use of their ancestral lands and rivers including the Cheyenne River and its tributaries. I also make note that the territories of our IEN tribal and individual members under the Fort Laramie Treaty of 1851 and 1868 include a vast land base that extends beyond the current reservation borders and boundaries. The proposed route of

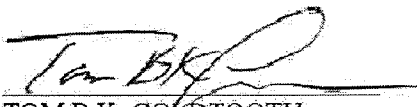
the Keystone XL Pipeline corridor is routed through these treaty lands and territories that have landscapes that retain thousands or more burial sites, ceremonial, and prayer loci, artifacts, petroglyphs and sites of traditional spiritual, religious, cultural and historical significance that have not had adequate cultural assessment, survey, study and inventory.

17. Other prominent IEN members and supporters who would be directly harmed by the Keystone XL Pipeline include Lewis Grassrope, a leader of the Oyate of Wiconi (also known as the Lower Brule Sioux Nation), whose members farm, fish, hunt, live and celebrate the Creator downstream of the Keystone XL Pipeline's route in the vicinity of the Lower Brule Indian Reservation. Impacts on the Oyate of Wiconi from the Keystone XL Pipeline and its related infrastructure including access roads and transmission lines for Pumping Station 19 would be similar to impacts on the Cheyenne River Sioux Tribe summarized above.

18. Our Indigenous communities north of the border in Canada likewise face enormous direct and indirect impacts from the Keystone XL Pipeline and the further development of the Alberta Tar Sands formation that this pipeline is intended to encourage and facilitate. IEN leaders in Canada who would be harmed include Eriel Deranger, Executive Director of Indigenous Climate Action,

and member of the Athabasca Chipewyan First Nations, a Denesuline (Dene) Indigenous Peoples who has been active in the opposition to the Keystone XL Pipeline on behalf of the northern Dene living in the vicinity and downstream of proposed expansions of the existing tar sands mines in Alberta, Canada. The Keystone XL Pipeline would harm them by destroying native prairie and boreal forests with construction of the pipeline and its access roads and transmission lines, and create an unacceptable risk of pipeline spills and resulting contamination of the Indigenous People's lands and water and their fish and wildlife. Thousands of acres of their Native lands and waters have already been poisoned by oil, heavy metals, sulfur and toxic chemicals that are discharged in the development of tar sands, polluting their drinking water and killing their fish and wildlife.

I declare under penalty of perjury that the foregoing facts are true and correct of my personal knowledge, that I am competent to and if called would so testify, and that this declaration was executed in Bemidji, Minnesota on February 9, 2018.


TOM B.K. GOLDTOOTH

CERTIFICATE OF SERVICE

I, Stephan C. Volker, am a citizen of the United States. I am over the age of 18 years and not a party to this action. My business address is the Law Offices of Stephan C. Volker, 1633 University Avenue, Berkeley, California 94703.

On February 9, 2018 I served the following document by electronic filing with the Clerk of the Court using the CM/ECF system, which sends notification of such filing to the email addresses registered in the above entitled action:

**DECLARATION OF TOM B.K. GOLDTOOTH IN SUPPORT OF IEN
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

I declare under penalty of perjury that the foregoing is true and correct.

Dated: February 9, 2019

/s/ Stephan C. Volker

EXHIBIT 1

Mother Earth Accord

The Tribal Government Chairs and Presidents, Traditional Treaty Councils, with First Nation Regional Chiefs of Alberta and Northwest Territories of Canada, impacted by the proposed Keystone XL Pipeline and Tar Sands Development present at the Rosebud Sioux Tribe Emergency Summit on the Protection of Mother Earth and Treaty Territories: [List of Parties]

Being guided by the principles of traditional indigenous knowledge and spiritual values,

Recognizing the existing resolution of the United Tribes of North Dakota International Tribal XV Resolution No. 9-11-07, entitled: *Opposition to Keystone Excel ("Keystone II") Pipeline now being considered for authorization by the United States Department of State, on the basis that construction of such pipeline is not in the national interests of the United States,*

Recognizing the leadership of the Sac & Fox Nation of Oklahoma, and other Tribal Nations opposing the Keystone XL pipeline,

Furthering recognizing the existing resolution of the National Congress of American Indians Resolution #MKE-11-030, entitled: *Opposition to Construction of the Keystone XL Pipeline and Urging the U.S. to Reduce Reliance on Oil from Tar Sands and Instead, to Work towards Cleaner, Sustainable Energy Solutions,*

Further acknowledging the historic political Accord of the Joint Assembly of the Assembly of First Nations and the National Congress of American Indians, July, 1999, Coast Salish Territory, Vancouver, British Canada, Resolution No 1 entitled, *Declaration of Kinship and Cooperation among the Indigenous Peoples and Nations of North America through the Assembly of First Nations and the National Congress of American Indians,*

And, finally recognizing First Nations of Canada that have unanimously passed resolutions supporting a halt on new "tar sands" development and expansion and calling for provisions for full consultation under the principles of "free, prior and informed consent".

Have agreed on this Mother Earth Accord which is operational immediately,

1. We hereby declare, affirm, and assert our inalienable rights as well as responsibilities as members of sovereign Indigenous Nations. In doing so, we expect to be active participants with full representation in United States and Canada bilateral agreements that have effect on our inherent and treaty-defined rights to land and water, and our rights to a safe and healthy environment;
2. We call upon the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indigenous

Nations, rights secured under Indian treaties and agreements with the United States and Canada, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States and laws and Constitution of Canada and all previous agreements between the Crown and Aboriginal peoples of Canada;

3. The Earth is the source of life to be protected, not merely a resource to be exploited. Our ancestors' remains lie within her. We are dependent upon her for our shelter and our sustenance. We have our place and our responsibilities within Creation's sacred order. We feel the sustaining joy as things occur in harmony. We feel the pain of disharmony when we witness the dishonor of the natural order of Creation and the degradation of Mother Earth;
4. Our Indigenous view is that the Earth is our true mother, our grandmother who gives birth to us and maintains our life through hers. She is the mother of all living things. Water is her life blood which courses through her body and maintains all life. Our first environment is water;
5. We have reviewed the proposed Keystone XL pipeline would stretch 1,980 miles, from Hardisty, Alberta, Canada to Nederland, Texas, bringing toxic corrosive synthetic crude oil from areas of northern Alberta that are within the homelands of Cree, Dene and Métis Indigenous communities. The tar sands are a combination of clay, sand and bitumen - heavy thick black sticky oil. The bitumen is the unrefined product excavated from the tar sands that either must be strip-mined or melted and pumped up after the ground has been heated with steam. The steaming process uses large amounts of water;
6. We have learned that both of these methods of tar sands extraction are devastating areas of wilderness the size of small countries, replaced by a landscape of toxic lakes, open pit mines, industrial processing facilities and pipe lines destroying the Boreal forest, killing nesting migratory birds, destroy the habitat of animals, fish and many other forms of life that Indigenous peoples in the region depend on for sustenance. Toxic waste from the mining operations is stored in large man-made dams, called tailings ponds that already cover sixty-five square miles and can be seen by satellites. Tar sands extraction uses large amounts of water from the Athabasca River and underground aquifers and energy primarily natural gas to heat the water to separate the bitumen from the sand. As many as five barrels of water are needed to produce a single barrel of oil;
7. The tar sands of northern Alberta, Canada located downstream of the eastern foothills of the Rocky Mountains are one of the largest remaining deposits of oil in the world. Developing the tar sands has created the biggest industrial development project, the biggest capital investment

project, and the biggest energy project in the world. The region contains some 2 trillion barrels of oil, but getting to it will mean destroying an area larger than the state of Florida;

8. In Canada, the toxic burden on communities near the tar sands is already enormous. In addition to direct human exposure, oil contamination in the local watershed has led to arsenic in moose meat—a dietary staple for First Nations peoples—up to 33 times acceptable levels. Drinking water has also been contaminated;
9. In September 2010, the Assembly of First Nations of Canada called on the United States to take into account in its energy policy the environmental effects of tar sands extraction on First Nations peoples, citing among other concerns the high rates of cancer in the downstream Fort Chipewyan community. These concerns echo the findings of a report published the month before in the *Proceedings of the National Academy of Sciences*, which found that the tar sands industry releases 13 elements considered priority pollutants under the U.S. Clean Water Act—including lead, mercury, and arsenic—into the Athabasca River;
10. We have heard the voices of our Indigenous brothers and sisters who live in the tar sands development zone of northern Alberta. Indigenous peoples have lived in those lands for thousands of years. They are witnessing first hand, the devastation of their lands, water, air, animals, fish, and more recently their people's health, in worse cases the loss of young lives to rare and aggressive cancers. Prominent scientists are telling them their cancers are potentially linked to petroleum products;
11. We have heard similar concerns of our Indigenous brothers and sisters who live further north, in the Northwest Territories of Canada who live downstream of the tar sands. We have learned the rivers that flow through the tar sands travel north endangering the survival of even more Indigenous peoples that still have close cultural lifestyles with the land and water. These peoples in Northwest Territories and Alberta are already feeling the long term negative effects of uranium mining, the recent effects of a changing climate and environment from global warming compounded by historical trauma of abuses from the residential schools when they were children. Industrial development within their homelands has created new forms of environmental injustices and environmental racism tied to Canadian governmental environmental and health policies that don't protect their people;
12. We are learning the tar sands oil is the worst type of oil for the climate, producing three times the greenhouse gas emissions of conventionally produced oil because of the energy required to extract and process tar sands oil. We have learned that increased greenhouse gas emissions associated with tar sands development is the main reason Canada will not meet its Kyoto reduction commitments. In 2010, Canada's greenhouse gas emissions are projected be nearly

35 percent higher than 1990 levels. The tar sands are what unrestrained fossil fuel use and unchecked greenhouse gas emissions look like;

13. International banks and investors are pouring billions of dollars into expansion of the Canadian tar sands, the dirtiest and most desperate attempt yet to profit from and prolong the governments of Canada and the U.S. crippling addiction to oil;
14. The tar sands are being transported to refineries in the United States. Across the United States, oil refineries are seeking permits to expand their facilities to process the heavy crude, corrosive, toxic oil from the tar sands. Processing tar sands oil will mean more asthma and respiratory diseases, more cancer, and more cardiovascular problems to communities living around these refineries. Within Oklahoma and the Texas Gulf Coast region, people of color, Indigenous communities and poor people already are experiencing disproportionate and accumulative impacts from refineries and other toxic polluting industries. Many local communities are opposing refinery expansions;
15. We have learned of the massive tar sands infrastructure building pipelines crossing North America, our traditional homelands like large spider webs. The Keystone XL pipeline is the second oil transmission pipeline to be constructed by the same company that built the first Keystone pipeline, crossing through Indigenous treaty lands and traditional territories in Alberta, Saskatchewan, Montana, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, and Texas near and potentially over, many culturally and historically significant areas for Indigenous Nations. We have heard from our elders and people most knowledgeable of our genesis, our rich history and culture. They have told us there are thousands of ancient and historical cultural resources that would be destroyed if this Keystone XL pipeline crosses our treaty lands and traditional territories that Indigenous peoples have lived on since time immemorial;
16. We acknowledge that our Indigenous Nations living within the great corridor of these pipelines have not had time, or capacity to conduct adequate assessment of impact of the pipeline construction and potential damages that future spills would have to our cultural resources and environment;
17. We acknowledge the relatively poor environmental record of the first Keystone pipeline, which includes numerous spills, U.S. regulators shut the pipeline down in late May, 2011, and, therefore, based on the record of the first Keystone pipeline, and other factors, it is probable that further environmental disasters will occur in our Indigenous treaty lands and traditional

territories if the new pipeline is allowed to be constructed. Our concern is not if a spill will happen, it is when a spill will happen;

18. As sovereign Indigenous Nations of the U.S. and Canada, near the route of the proposed pipeline and who are directly affected by the tar sands development in Canada, we stand in opposition to the Keystone XL pipeline because it would threaten, among other things, water resources, the Ogallala aquifer, water ways, cultural sites, agricultural lands, animal life, public drinking water sources and other resources vital to the peoples of the region in which the pipeline is proposed to be constructed. More than two million people depend on the Ogallala aquifer for drinking water. The aquifer provides roughly 30 percent of all water used for irrigation of U.S. farmlands;
19. We have learned the tar sands and its pipelines will not provide energy security. The tar sand will not reduce dependence on foreign oil. The proposed Keystone XL will not lessen U.S. dependence on foreign oil, but transport Canadian oil to American refineries for export to overseas markets. Keystone XL is an export pipeline. According to presentations to investors, Gulf Coast refiners plan to refine the cheap Canadian crude supplied by the pipeline into diesel and other products for export to Europe and Latin America. Proceeds from these exports are earned tax-free. Much of the fuel refined from the pipeline's heavy crude oil will never reach U.S. drivers' tanks;
20. As Tribal leaders of Indigenous Nations of the U.S., we express our solidarity with Canadian First Nations in their efforts to protect their communities, aboriginal land and treaty rights, and their request for a moratorium and better management practices on expanded tar sands development and opposition to the Keystone XL pipeline and other pipelines proposing to transport dirty oil, such as the Enbridge Northern Gateway pipeline through First Nation territories of British Columbia, Canada;
21. Since the pipeline is designed to cross the U.S. and Canadian border, the United States Department of State is the lead U.S. agency in evaluating whether the pipeline should be allowed to be constructed and whether it is in the best national interests of America;
22. The First Nations of Canada and Tribal Nations within the U.S. have a long history of working to ensure protection of their environment, and the Keystone XL pipeline poses grave dangers if it is constructed;

23. We need to stop the disturbance of the sacred sites and sacred waters on Mother Earth so that she may heal and restore the balance in Creation. The well-being of the natural environment predicts the physical, mental, emotional and spiritual longevity of our Indigenous peoples, Circle of Life and all people. Mother Earth's health and that of our Indigenous peoples are intrinsically intertwined. Unless our homelands are in a state of good health our communities will not be truly healthy. This inseparable relationship must be respected for the sake of our future generations. In this Accord, we invite humanity and the U.S. and Canada governments to join with us to improve our collective human behavior so that we may develop a more sustainable world – a world where the inextricable relationship of biological, and environmental diversity, and cultural diversity is affirmed and protected;
24. The U. S. and other industrialized countries have an addiction to the high consumption of energy. Mother Earth and her natural resources cannot sustain the consumption and production needs of this modern industrialized society and its dominant economic paradigm, which places value on the rapid economic growth, the quest for corporate and individual accumulation of wealth, and a race to exploit natural resources. The non-regenerative production system creates too much waste and toxic pollutions. We recognize the need for the U.S. and Canada to focus on new economies, governed by the absolute limits and boundaries of ecological sustainability, the carrying capacities of the Mother Earth, a more equitable sharing of global and local resources, encouragement and support of self sustaining communities, and respect and support for the rights of Mother Earth;
25. In recognizing the root causes of climate change, we call upon the U.S. and Canada to work towards decreasing dependency on fossil fuels to develop a plan towards the full phase-out of fossil fuels, without nuclear power, with a just transition to sustainable jobs, energy and environment. We take this position and make this recommendation based on our concern over the disproportionate social, cultural, spiritual, environmental and climate impacts on Indigenous peoples, who are the first and the worst affected by the disruption of intact habitats, and the least responsible for such impacts;
26. We will encourage our leadership and assume our role in supporting a just transition into a green economy, freeing ourselves from dependence on a carbon-based fossil fuel economy. This transition will be based upon development of an indigenous agricultural economy comprised of traditional food systems, sustainable buildings and infrastructure, clean energy and energy efficiency, and natural resource management systems based upon indigenous science and traditional knowledge. We are committed to development of economic systems that enable life-enhancement as a core component.
27. We oppose the Keystone XL pipeline and the Exxon-Imperial and ConocoPhillips Heavy Haul shipments, attempting to haul more than 200 oversized loads of heavy oil machinery from the port in Lewiston along Highway 12 into Montana, then north to the tar sands project in Alberta.

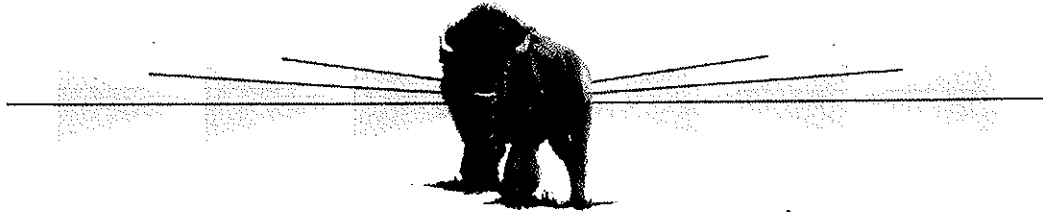
We stand with the Indigenous Nations in that corridor concerned with negative impacts on cultural sites and the environment and safety issues;

28. On August 26, 2011, the U.S. Department of State released a final Environmental Impact Statement (FEIS) on the proposed Keystone XL pipeline saying the pipeline would have "no significant impact" on the environment. According to the U.S. administration, they are saying President Obama now has three months to determine whether the controversial project is in the national interest of America;
29. Our concerns with this FEIS are similar to the concerns of a previous pipeline project called Keystone (with no "XL" attached to it, sometimes called Keystone 1) and its final EIS that was done in 2008. The basic concern was the EIS was incomplete, and didn't thoroughly address all the issues. Keystone XL fails to take seriously the potential damage to American Indian Tribes and their Tribal members in the States of Montana, South Dakota, Nebraska, Kansas, Oklahoma and Texas. These damages could threaten, among other things, water aquifers, water ways, cultural sites, agricultural lands, animal life, public drinking water sources and other resources vital to the Tribal peoples of the region in which the pipeline is proposed to be constructed. Lack of adequate consultation has been a consistent concern expressed by Tribal members of all the affected Tribal Nations who to this day have not been thoroughly informed of the potential effects of this pipeline;
30. We urge all affected Tribal Nations to submit comments to the U.S. Department of State regarding the Keystone XL project. The Final EIS is similar to the Keystone I EIS, and is incomplete. It fails to take seriously the potential damage to South Dakota landowners and their resources;
31. From now to November 2011, and if needed, beyond these U.S. Administration decision-making dates, we ask Hillary Clinton, Secretary of State, U.S. Department of State and President Obama not to approve the Keystone XL. We ask for a comprehensive supplemental assessment of impact to our rich cultural resources and significant historical areas that would be damaged by the proposed pipeline. We are requesting an assessment of pipeline safety laws and regulations on whether they are adequate to manage this increase of pipelines crossing the U.S.;
32. We are asking the right of Free, Prior and Informed Consent be recognized by the U.S. to our Indigenous Nations affected by the pipeline corridor to further strengthen the government-to-government consultation policies between the Tribal Nations and the U.S. government;

33. We demand the United States and Canada reduce its reliance on the world's dirtiest and most environmentally destructive form of oil – the “tar sands” - that threatens the way of life of thousands of citizens of First Nations in Canada and American Indians in the U.S., and requests the U.S. government to take aggressive measures to work towards sustainable energy solutions that include clean alternative energy and improving energy efficiency;
34. We know that the way to end U.S. addiction to oil and fight global warming is not to build a pipeline to the dirtiest oil on Mother Earth;
35. We have many solutions: One simple solution is to redirect the \$70-100 billion dollars the U.S. is set to invest in tar sands infrastructure into research and development of sustainable energy alternatives such as electric vehicles, plug-in hybrids, and solar and wind energy. Other alternative are simple, yet many feel are difficult to achieve. The U.S. and Canada need to break its addiction to oil and fossil fuels. We could be on the road to a new energy future if we simply redirect the investment capital slated for the tar sands into sustainable alternatives. Heightened investments in clean energy also mean the creation of new green jobs. We need to stop investing in dirty fossil fuels and start funding the future;
36. The world needs to understand that the Earth is a living female organism – our Mother and our Grandmother. We are kin. She needs to be loved and protected. The rights of Mother Earth must be recognized and protected. We need to give back what we take from her in respectful mutuality. We need to walk gently. These Original Instructions are the natural spiritual laws, which are supreme. Science can urgently work with traditional knowledge keepers to restore the health and well-being of our Mother and Grandmother Earth;
37. We ask President Obama to do what is right. For the President to approve this pipeline is not in the national interest of US or Canada. Present Obama and Secretary Clinton, your approval of the Keystone XL pipeline, will only compound an already dismal situation for our Indigenous brothers and sisters of the Canadian tar sands region who have the most at stake from this out-of-control development. Your approval will mean with certainty that these First Nations of Canada will continue to see their waters poisoned, their lands contaminated, their skies polluted, their fish deformed, and their people dying unnecessarily. Your approval will guarantee the continued infringements on their Constitutionally protected treaty rights to hunt, fish, and trap and live in a safe and healthy environment.

Signed by: Great Plain Tribal Chairman's Association (GPTCA) in September 2011

EXHIBIT 2



GREAT PLAINS TRIBAL CHAIRMAN'S ASSOCIATION

1926 Stirling St, Rapid City, SD 57702

Phone: 605-388-5375 Fax: 605-343-3074

Resolution No. 30-9-28-11

GREAT PLAINS TRIBAL CHAIRMAN'S ASSOCIATION (GPTCA)

Opposition to Keystone XL ("Keystone II") Pipeline now being considered for authorization by the United States Department of State, on the basis that construction of such pipeline is not in the national interests of the United States

WHEREAS, The Great Plains Tribal Chairman's Association (GPTCA) is composed of the elected Chairs and Presidents of the 16 Sovereign Indian Tribes and Nations recognized by Treaties with the United States that are within the Great Plains Region of the Bureau of Indian Affairs; and

WHEREAS, The Great Plains Tribal Chairman's Association was formed to promote the common interests of the Sovereign Tribes and Nations and their members of the Great Plains Region which comprises the states of North Dakota, South Dakota, Nebraska; and

WHEREAS, The United States has obligated itself both through Treaties entered into with the sovereign Tribes and Nations of the Great Plains Region and through its own federal statutes, the Snyder Act of 1921 as amended, the Indian Self-Determination Act of 1976 as amended, and the Indian Health Care Improvement Act of 1976 as amended; and

WHEREAS, Indian Tribes are governments that pre-date the United States, and through the Indian Commerce, Treaty and Apportionment Clauses and the 14th Amendment, the United States recognizes the status of Indian Tribes as sovereigns and the status of American Indians as tribal citizens; and

WHEREAS, In treaties, the United States pledged to protect Indian Tribes, guaranteed the right of Tribal self-government, and has undertaken a trust responsibility to promote the viability of Indian reservations and lands as permanent homelands for tribes; and,

WHEREAS, On September 28, 2011, the Tribal Chairmen and the Tribal Council representatives from the Tribal Nations that are members of the Great Plains Tribal Chairman's Association, have been meeting at the GPTCA/BIA/USACE Tribal Water Management Summit, discussing issues of great importance to the Indian Tribal Nations of the Great Plains Region and their members; and

WHEREAS, a major oil transmission pipeline is planned to extend from northern Alberta, Canada, from areas that have sand mixed with tar and oil, called "tar sands", to refineries in the United States; and

WHEREAS, the route of the pipeline, called Keystone II, or Keystone XL, because it is the second oil transmission pipeline to be constructed by the same company that built the first Keystone pipeline, crosses through Indian country in northern Alberta, Saskatchewan, Montana, North Dakota, South Dakota and Nebraska, near and potentially over, many culturally significant areas for Tribal Nations within those provinces and states; and

WHEREAS, based on the relatively poor environmental record of the first Keystone pipeline, which includes numerous spills, U.S. regulators shut the pipeline down in late May, 2011, and, therefore, based on the record of the first Keystone pipeline, and other factors, it is probable that further environmental disasters will occur in Indian country if the new pipeline is allowed to be constructed; and

WHEREAS, the First Nations of Canada, representing the vast majority of First Nations impacted by "tar sands" development, have unanimously passed resolutions supporting a moratorium on new "tar sands" development and expansion until a "cumulative effects management system" is in place, and are also in opposition to the pipeline; and

WHEREAS, many U.S. Tribal Nations are also in opposition to the Keystone XL pipeline, including several Tribal Nations in the Great Plains, because it would threaten, among other things, the Oglala aquifer and other major water aquifers, rivers and water ways, public drinking water sources, including the Mni Wiconi Rural Water System, agricultural lands, animal life, cultural sites, and other resources vital to the peoples of the region in which the pipeline is proposed to be constructed; and

WHEREAS, Indian tribes including the Affiliated Tribes of Northwest Indians are also in opposition to the Exxon-Imperial "Heavy Haul" proposal to transport "tar sands" equipment through the Nez Perce Reservation and across scenic highways, and several Indian tribes have joined in litigation to stop this proposal; and

WHEREAS, the pipeline is unnecessary as a number of other pipelines are not at full capacity to carry oil from Canada to refineries in the U.S., and the oil is also not likely to end up on the U.S. market but will be exported to foreign countries; and

WHEREAS, Tribal Nations and First Nations within Indian country near the route of the proposed pipeline have already stated their opposition to the proposed route of the pipeline, and because of earlier opposition from both Tribes and

environmental groups, a supplemental environmental impact statement has been required by the United States Environmental Protection Agency from the proposed operators of the pipeline, a draft of which is now available for public comment; and

WHEREAS, since the pipeline is designed to cross the U.S.-Canadian border, the United States Department of State is the lead U.S. agency in evaluating whether the pipeline should be allowed to be constructed in the U.S.; and

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

WHEREAS, the U.S. Department of State is continuing to accept public comments until October 7, 2011, but despite the concerns of the numerous Tribal Nations and the First Nations of Canada has recently received notice from the U.S. Environmental Protection Agency of a "Finding of No Significant Impact" from the proposed pipeline; and

WHEREAS, the U.S. Department of State did not properly consult with the Tribes along the route of the Keystone XL Pipeline and, as a result of the mechanisms used for what consultation was provided, the affected Tribal Nations were not provided the opportunity for "free and informed consent" regarding the construction of the pipeline; and

WHEREAS, the GPTCA hereby urges all its member Tribal Nations to submit comments to the U.S. Department of State regarding the Keystone XL project as not in the tribal nor the national interest; and

WHEREAS, Tribal Government Chairs and Presidents, Traditional Treaty Councils, and US property owners, met with the First Nations Chiefs of Canada, impacted by TransCanada's proposed Keystone XL tar sands pipeline and tar sands development present at the Rosebud Sioux Tribe Emergency Summit, September 15-16, 2011, on the protection of Mother Earth and Treaty Territories, developed the Mother Earth Accord for sign on by all First Nations and Tribal Nations.

NOW, THEREFORE, BE IT RESOLVED, that the Great Plains Tribal Chairman's Association stands in solidarity with the First Nations of Canada and with Tribal Nations in the United States in opposing the Keystone XL pipeline and the Exxon-Imperial Heavy Haul proposal and their negative impacts on cultural sites and the environment in those portions of Indian country over and through which it is proposed to be constructed, and disagrees with the Finding of No Significant Impact issued by the U.S. Environmental Protection Agency, and agrees to file these comments regarding this opposition to the Keystone XL pipeline with the Secretary of State as soon as possible; , and

BE IT FURTHER RESOLVED that the Great Plains Tribal Chairman's Association approves the Mother Earth Accord among the First Nations of Canada and the Tribal Nations within the United States; and

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

BE IT FINALLY RESOLVED that the Great Plains Tribal Chairman's Association requests a meeting with the Tribal Leaders and Hilary Clinton, Secretary of State, and the Administration to present the Mother Earth Accord and voice the concerns of the US Tribal Nations and the First Nations of Canada opposing the construction of the Keystone XL Pipeline across Treaty Lands as not in the national interest.

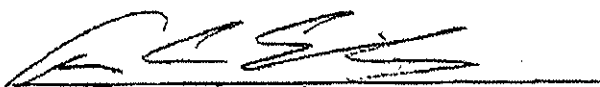
NOW, THEREFORE BE IT FINALLY RESOLVED that this resolution shall be the policy of the Great Plains Tribal Chairman's Association until otherwise amended or rescinded or until the goal of this Resolution has been accomplished.

Resolution No. 30-9-28-11

CERTIFICATION

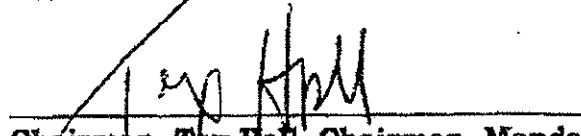
This resolution was enacted at a duly called meeting of the Great Plains Tribal Chairman's Association held at Rapid City, SD on September 28, 2011 at which a quorum was present, with 10 members voting in favor, 0 members opposed, 0 members abstaining, and 6 members not present.

Dated this 28th. Day of September, 2011.



Secretary,
Great Plains Tribal Chairman's Association

Attest:



Chairman, Tex Hall, Chairman, Mandan, Hidatsa and Arikara Nations (Three
Affiliated Tribes)
Great Plains Tribal Chairman's Association

APPENDIX

12

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Attorneys for Plaintiffs
INDIGENOUS
ENVIRONMENTAL
NETWORK and NORTH
COAST RIVERS ALLIANCE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

INDIGENOUS ENVIRONMENTAL
NETWORK and NORTH COAST RIVERS
ALLIANCE,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF
STATE, et al.,

Federal Defendants,

Civ. No. 4:17-cv-00029-BMM

**DECLARATION OF BILL
WHITEHEAD IN SUPPORT
OF IEN PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT**

Hearing: May 24, 2018

Time: 10:00 a.m.

Judge: Hon. Brian M. Morris

and
TRANSCANADA KEYSTONE PIPELINE
and TRANSCANADA CORPORATION,
Defendant-Intervenors.

I, Bill Whitehead, declare as follows:

I am a member of the Board of Directors of plaintiff North Coast Rivers Alliance and have personal knowledge of the following facts.

1. I am a Native American, an enrolled member of the Assiniboiné & Sioux Nations, and born in Poplar, Montana, on the Fort Peck Indian Reservation, on June 10th, 1939. I have resided on the Reservation, on the Missouri River, all my life.

2. For fifty years, I have been active in advancing the interests of Native Americans on the Fort Peck Indian Reservation. I currently serve as Chairman of the Board of Directors of the Assiniboiné & Sioux Rural Water Supply System, on whose Board I have served since 2007. I am also currently Chairman of the Board of the Native American Development Corporation of Billings, Montana, and have been a member of that Board since 1999. I have served two terms on the Fort Peck Tribal Council, and am a former Chairman of the Wolf Point Community Organization, and a former Board Member of the Fort Peck

Community College. And I have served as a state Legislator in the Montana House of Representatives. I am a college graduate with a B.A from University Northeastern Illinois, and a U.S. Army Veteran.

3. I am a member of the Board of Directors of the North Coast Rivers Alliance and have worked with my fellow Board Members through this litigation to oppose and prevent construction and operation of the Keystone XL Pipeline. I oppose this project because it would harm me, my family and my community here on the Fort Peck Indian Reservation, as I explain below.

4. I have worked for fifteen years to provide clean potable water to the Fort Peck Indian Reservation and surrounding rural communities, to remedy contamination of their ground water supplies due to irresponsible oil and gas development permitted by the United States government. Two decades ago, the Assiniboine & Sioux Nations established the Assiniboine & Sioux Rural Water Commission to construct the Wambdi Wahachanka “Eagle Shield” Water Treatment Plan and manage its operation. Upon completion, at an estimated cost of over \$300,000,000, this modern water treatment plant and vast pipeline delivery system will provide clean water to over 30,000 people, including residents, ranchers, and farmers on the Fort Peck Indian Reservation in Montana’s four northeastern counties (Roosevelt, Valley, Daniels, and Sheridan) to the Canadian

border. The project is approximately 70% completed. The intake for this water system is located on the Missouri River (in the town of Wolf Point, on the Fort Peck Indian Reservation) about 58 river miles downstream from the Fort Peck Reservoir.

5. I am familiar with the proposed Keystone XL Pipeline's route through ranch land north of the Milk River (a major tributary of the Missouri River), across the Milk River via a proposed underground pipeline, across extremely fertile farmland located in the Missouri River and Milk River alluvial deltas between those two rivers, and then across the Missouri River via a second proposed underground pipeline. From there it would pass south and east through eastern Montana through extensive ranch and farmlands and across many other tributaries of the Missouri River, including the Yellowstone River, before crossing Montana's eastern border and entering South Dakota.

6. The proposed route of the Keystone XL Pipeline poses a direct threat to the source of water for the Fort Peck Indian Reservation. The Keystone XL Pipeline would cross under the Milk River and the Missouri River just 10 and 14 miles upstream of our Wyota and Frazer irrigation intakes on the Missouri River, which supply the Fort Peck Reservation's extensive irrigation system, providing water to about 19,000 acres of highly productive farmland. Downstream of the

Wyota and Frazer irrigation intakes is the intake for the Wambdi Wahachanka “Eagle Shield” Water Treatment Plant that pumps water from the Missouri River, for potable use, to the inhabitants of the Fort Peck Reservation as well as other communities within Montana’s four northeastern counties.

7. I am familiar with the Wambdi Wahachanka “Eagle Shield” Water Treatment Plant’s vulnerability to contamination of the Missouri River upstream of this water treatment plant’s intake point. The proposed Keystone XL Pipeline poses an unacceptable risk of contamination of our Fort Peck Reservation water supply for at least four reasons. First, our Water Treatment Plant is not designed nor equipped to remove hydrocarbon contaminants such as benzene, ethylbenzene and p-xylene that are present in crude oil and the diluent that is used to facilitate its passage through pipelines.

8. Second, the proposed crossing of the Keystone XL Pipeline under the Missouri River is at a location of the river which is subject to extreme hydrologic pressure and movement for several reasons. It is located in the sediment delta that has formed where the Milk River and the Missouri River meet. The soils of this delta have a high clay component, which means that they expand and shrink greatly depending on their moisture content, and are easily eroded by water movement. The course of the Milk River as it passes through this delta varies

widely over time, as indicated by its extremely meandering path through the delta with many oxbows. Roads maintained by local farmers as well as by the Fort Peck Reservation are subject to extensive erosion due to these frequent meanders of the Milk and Missouri Rivers through the highly erosive clay soil. Consequently, soil erosion and movement of the riverbanks of both the Milk River and the Missouri River, makes for a highly unstable substrate for the proposed Keystone XL Pipeline.

9. The third reason that the Keystone XL Pipeline poses an unacceptable risk to our water supply is that its crossing of the Missouri is located just a few hundred yards downstream from the Fort Peck Reservoir Spillway. This spillway provides emergency relief from high water conditions in the reservoir. The Fort Peck Reservoir is the world's largest earthen-filled dam. It stores approximately 19,000,000 acre-feet of water (i.e., more than four times the size of Shasta Reservoir, California's largest) and thus is one of the largest reservoirs in the world. During high water conditions, when water must be released down the spillway into the Missouri River (immediately upstream of the confluence with the Milk River), the tremendous hydrologic force of the released water can cause extensive erosion of the Missouri River's riverbed and river banks. Thus, the proposed placement of the Keystone XL Pipeline at this location would subject the

pipeline itself to highly erosive forces of the water released from the Fort Peck Spillway during high water conditions.

10. The fourth reason the Keystone XL Pipeline poses an unacceptable risk of contamination to Fort Peck Reservation's water supply is that the Missouri River is subject to freezing during the winter. When it is frozen solid on the surface, it would be virtually impossible to access and repair any breach in an oil pipeline passing underneath the river. It would also be very difficult to locate the specific point at which the pipeline might be breached. The presence of thick ice on this river course also poses hazards during the season of spring breakup, when ice forms dams that can impede the flow of water, resulting in unstable surface conditions on the ice and the potential for the sudden release of waters temporarily dammed behind the ice. Thus, the unpredictable winter conditions on the Missouri River can also cause violent erosion of the riverbed and river banks, and thus pose additional risks for the potential breach of, and contamination from, any underground oil pipeline located here.

11. For each of these reasons, the Water Commission for the Assiniboine & Sioux Rural Water Supply System (of the Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation) voted unanimously to oppose the Keystone XL Pipeline and to support the lawsuits filed against it. A true copy of our Water

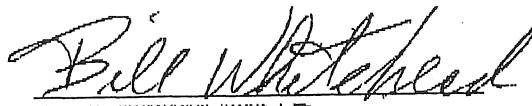
Commission's Resolution opposing the Keystone XL Pipeline is attached as Exhibit 1 to this Declaration.

12. Our Water Commission opposes the Keystone XL Pipeline for several other reasons. As I have explained, the Wambdi Wahachanka "Eagle Shields" Water Treatment Plant is not designed to remove contamination by an upstream pipeline carrying tar sands crude oil. Were there to be a tar sands crude oil leak contaminating the Missouri River, our water treatment plant would have to close, resulting in the loss of the sole water supply for over 30,000 residents of the Fort Peck Reservation and surrounding communities within Valley, Daniels, Sheridan, and Roosevelt counties. The release of tar sands crude oil from the Keystone XL Pipeline would pose particular harm to the Missouri River because tar sands crude is exceptionally difficult to clean up, and could remain in the riverbed and river banks of the Missouri River for decades. Additionally, because tar sands crude is so viscous, it requires thinning with a toxic solvent known as diluent to allow its transport through a pipeline. The resulting mixture is called dilbit. When dilbit escapes from a pipeline, the solvent quickly forms a gas that evaporates in waves of toxic air (which would necessitate evacuation of both the area of the spill and all downstream communities such as Wolf Point and Poplar on the Fort Peck Reservation), while leaving behind the heavy, sticky tar sands crude, which then

sinks to the bottom instead of floating like a lighter conventional oil. Tar sands crude oil leaks in other rivers, such as Michigan's Kalamazoo River, have required many years to clean up, and in some cases, the contamination remains indefinitely.

13. Based on these facts, the proposed Keystone XL Pipeline's construction and operation poses a direct threat to the water supply of the Assiniboine & Sioux Nations, the residents of Montana's four northeastern counties up to the Canadian border—indeed over 30,000 people when our project is completed—as well as to myself, my extended family and relatives, and members of our Assiniboine & Sioux Nations, whose lives are woven tightly with earth's water, air, land, and animals as part our identity. As a member of the Board of Directors of North Coast Rivers Alliance, I join with our membership in adamantly opposing construction and operation of the Keystone XL Pipeline.

I declare under penalty of perjury that the foregoing facts are true and correct of my personal knowledge, that I am competent to and if sworn would so testify, and that this declaration was executed in Poplar, Montana, on February 8, 2018.


BILL WHITEHEAD

CERTIFICATE OF SERVICE

I, Stephan C. Volker, am a citizen of the United States. I am over the age of 18 years and not a party to this action. My business address is the Law Offices of Stephan C. Volker, 1633 University Avenue, Berkeley, California 94703.

On February 9, 2018 I served the following document by electronic filing with the Clerk of the Court using the CM/ECF system, which sends notification of such filing to the email addresses registered in the above entitled action:

**DECLARATION OF BILL WHITEHEAD IN SUPPORT OF IEN
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

I declare under penalty of perjury that the foregoing is true and correct.

Dated: February 9, 2019

/s/ Stephan C. Volker

EXHIBIT 1

**RESOLUTION OF THE WATER COMMISSION
FOR THE ASSINIBOINE & SIOUX RURAL WATER SUPPLY SYSTEM
OF THE ASSINIBOINE & SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION:**

WHEREAS, the proposed Keystone XL Pipeline crosses (1) the Milk River 1.6 miles west of Nashua and (2) the Missouri River 0.3 miles west of the mouth of the Milk River; and

WHEREAS, these pipeline crossings are only 0.3 miles upstream of the Fort Peck Reservation, 10 miles upstream of the Wyota irrigation intake, and 14 miles upstream of the Fraser irrigation intake which together irrigate approximately 19,000 acres of farm and ranch land; and

WHEREAS, these pipeline crossings are 82.7 and 57.4 miles upstream of the intake of the Assiniboine and Sioux Rural Water Supply System (ASWRSS) which serves 30,000 people and irrigates 19,000 acres of farm and ranch land; and

WHEREAS, a spill at or near either river crossing would contaminate the alluvial groundwater and the surface waters with toxic chemicals for many decades; and

WHEREAS, the contaminated water from a spill would reach the intake for the ASWRSS within only 20 to 40 hours, and the ASRWSS water treatment plant is not equipped to remove hydrocarbon contaminants such as benzene, ethylbenzene, and p-xylene; and

WHEREAS, the Assiniboine and Sioux Tribes corresponded with the U.S. Department of State and the President of the United States in 2011, 2013, and 2015 expressing concern that the Keystone XL Pipeline posed a grave threat to our water supply and the health and wellbeing of our citizens, but the U.S. Department of State approved the Keystone XL Pipeline anyway, without addressing our concerns; and

WHEREAS, the Indigenous Environmental Network and the North Coast Rivers Alliance and the Northern Plains Resource Council joined by other organizations have filed lawsuits in federal district court in Great Falls to overturn the Department of State's approval of the Keystone XL Pipeline;

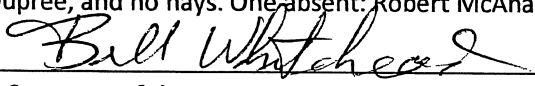
THEREFORE, BE IT RESOLVED that the Water Commission of the Assiniboine and Sioux Tribes hereby expresses its opposition to the Keystone XL Pipeline and its support for the lawsuits filed by the Indigenous Environmental Network and North Coast Rivers Alliance and the Northern Plains Resource Council to set aside the Department of State's approval of the Keystone XL Pipeline.

Moved: A.T. ("Rusty") Stafne

Seconded: Rick Kirn

Approved this second day of October, 2017 by a vote of 4 ayes, Bill Whitehead, A.T. Stafne, Rick Kirn, Peter Dupree, and no nays. One absent: Robert McAnally

Attest:



Secretary of the Water Commission
CHAIRMAN