Urgent Motion Under Circuit Rule 27-3(b)

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

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

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INDIGENOUS ENVIRONMENTAL NETWORK, ET AL.,
*Plaintiffs-Appellees-Cross-Appellants*,

v.

UNITED STATES DEPARTMENT OF STATE, ET AL.,
*Defendants-Appellants-Cross-Appellees,*

and

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

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On Appeal from the United States District Court
for the District of Montana
Nos. 4:17-cv-00029-BMM and 4:17-cv-0031-BMM

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# REPLY IN SUPPORT OF MOTION OF APPELLANTS FOR STAY PENDING APPEAL
**URGENT MOTION UNDER CIRCUIT RULE 27-3(b)**
**Action Necessary by March 15, 2019**

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Plaintiffs and their amici submit new evidence, not considered below, and repetitive arguments to try to show that TransCanada is not entitled to a stay. None of these materials refutes TransCanada's showings that it is likely to succeed on its claims that the decision of the State Department ("State") to issue a Presidential Permit is not subject to judicial review, that the district court's injunction is overbroad, and that the balance of hardships and the public interest support TransCanada's request for a stay of that injunction pending appeal.

## I. TRANSCANADA IS LIKELY TO SUCCEED ON THE MERITS.

### A. State's Issuance Of A Presidential Permit Is Not Subject To Review Under The APA, NEPA, Or The ESA.

State engaged in *presidential*—not agency—action by exercising the President's power to issue a permit under Executive Order ("E.O.") 13337. *Jensen v. Nat'l Marine Fisheries Serv.*, 512 F.2d 1189 (9th Cir. 1975), is controlling on this issue. And, under *Franklin v. Massachusetts*, 505 U.S. 788 (1992), presidential action is not subject to review under the APA, NEPA and the ESA.

In *Jensen*, the relevant Executive Order empowered State to exercise the President's power under a treaty "to approve or reject actions of the international Pacific Halibut Commission." E.O. 11467, § 1(2). This Court held that State's actions approving the Commission's regulations "*[we]re those of the President*." *Jensen*, 512 F.2d at 1191 (emphasis added). That holding is directly applicable—and controlling—here. *See White Earth Nation v. Kerry*, No. 14-4726 (MJD/LIB),

2015 WL 8483278, at *6 (D. Minn. Dec. 9, 2015) (citing *Jensen* for the principle that, "[e]ven where the President delegates his inherent constitutional authority to an agency head, the action remains the action of the President"); *NRDC, Inc. v. U.S. Dep't of State*, 658 F. Supp. 2d 105, 111 (D.D.C. 2009) (citing *Jensen* as support for the principle that State "stands in the President's shoes by exercising" his authority to issue Presidential Permit).[1]

It is irrelevant that *Jensen* was not a NEPA case. NP Br. 10. *Jensen* establishes that State's exercise of delegated presidential authority is *presidential* action. That holding does not depend on the statute plaintiffs invoke to challenge State's action.

**1. Issuance of a Presidential Permit under Executive Order 13337 is presidential action.**

Plaintiffs claim that State's actions constitute agency action because E.O. 13337 "acknowledges Congress's parallel authority to regulate international commerce" and relies on authority vested in the President by federal laws, "including Section 301 of Title 3." IEN Br. 8-9. But Congress also had authority over international halibut fishing, and the Executive Order in *Jensen* also invoked the President's authority under section 301 of Title 3. *See* E.O. 11467, preamb.

[1] *Jensen* does not stand alone. *See Ludecke v. Watkins*, 335 U.S. 160, 165 (1948) (Attorney General's exercise of presidential authority to remove alien enemies, done "at the President's behest, was … not to be subjected to the scrutiny of the courts" under the APA).

Those factors did not alter the reality that State's action were "those of the President."

Plaintiffs argue that the President neither issued TransCanada's permit nor directed State to do so. NP Br. 11. But, in *Jensen*, State approved the Commission's regulations, 512 F.2d at 1191, and the Executive Order empowered it to do so "without the approval, ratification, or other action of the President." E.O. 11467, § 1.

Plaintiffs erroneously contend that President Trump waived his authority over State's decision. IEN Br. 12-13; NP Br. 10. The President's 2017 memorandum waived the rights of *other agencies* to object to State's decision, not his inherent power to override State's decision. *See* 82 Fed. Reg. 8663, 8663-64, § 3(a)(ii)(B)(iv) (Jan. 24, 2017).[2] In all events, the Executive Order in *Jensen* did not recite that the President could override State's actions or refer disputes to the President.

Finally, plaintiffs argue that State's action was "final" and thus "agency action." IEN Br. 7; NP Br. 7-8. This conflates the finality of an action with its underlying nature. *NRDC*, 658 F. Supp. 2d at 109. In *Franklin*, the agency performed functions assigned by statute—not by the President—and the APA

[2] Accordingly, plaintiffs' "waiver" theory provides no basis for distinguishing the district court cases holding that State's issuance of Presidential Permits is non-reviewable presidential action. NP Br. 10.

permits review of an agency's performance of its statutory functions once its action is "final." *See* 505 U.S. at 797-98 (agency's actions under the statute non-final). Here, State exercised no authority conferred on it by statute. By issuing TransCanada's permit, therefore, State engaged in final *presidential* action.

**2. State's exercise of presidential authority is not subject to judicial review.**

Plaintiffs likewise cannot show that, even if presidential, State's actions are subject to judicial review.

They claim it "makes no difference" whether State exercised delegated presidential authority. NP Br. 8. But the sentence they quote from *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996), is dicta: no APA claim was asserted there. *See id.* at 1326. And *Ground Zero Center for Non-Violent Action v. United States Department of Navy*, 383 F.3d 1082 (9th Cir. 2004), did not involve an agency exercising delegated Presidential power; it involved the Navy's exercise of its authority to operate a Naval base following the President's decision to deploy Trident II missiles there. This Court held that, although the President's deployment decision was not subject to NEPA, the Navy's decisions about storing, transporting, and handling the missiles were. *Id.* at 1089-91.

Nor have plaintiffs identified any concessions that State's actions are subject to judicial review. Plaintiffs claim that E.O. 13337 itself "requires that presidential permits 'compl[y] with applicable laws and regulations.'" IEN Br. 6. In fact, E.O.

13337 says that it shall not be construed "to relieve a person from any requirement to obtain authorization from any other [agency] in compliance with applicable laws and regulation subject to the jurisdiction of that [agency]." E.O. 13337, § 5. This means that a "person" that obtains a presidential permit is not excused from obtaining authorizations from other agencies, like the Army Corps of Engineers, in compliance with the regulations of those agencies. It does not say that Presidential Permits must comply with any laws or regulations.

The fact that E.O. 13337 does not "supersede or replace" other legal requirements, IEN Br. 9, is irrelevant. Because NEPA and the APA do not govern the *President's* discretionary exercise of his powers, neither is "superseded or replaced" when State exercises the President's discretionary powers.

Plaintiffs' reliance on State's NEPA regulations and statements that issuance of the permit constituted a "major federal action," NP Br. 8-9; IEN Br. 10-11, is equally misplaced. Plaintiffs ignore State's formal pronouncements, during both the Obama and Trump Administrations, that (1) issuance of a permit "is *Presidential* in nature," thus "NEPA [and] the ESA … *are inapplicable*," and (2) that State reviews the environmental impacts of a cross-border project "*as a matter of policy*," "in order to inform [its] determination regarding the national interest." Appx187 (emphases added); Appx156 (same).

The fact that State issued regulations requiring preparation of environmental assessments for Presidential Permits, 22 C.F.R. § 161.7(c)(1), and treated TransCanada's permit as triggering review under those regulations are consistent with the *discretionary* policy described in State's 2015 and 2017 pronouncements. Those pronouncements are entitled to deference and make clear that State's NEPA and ESA regulations apply to Presidential Permits as a matter of agency discretion, not as a matter of legal obligation. Those pronouncements are also consistent with State's 2012 statement that it "*intend[ed]* to evaluate the potential environmental effects … *consistent* with … [NEPA] … and implementing regulations," 77 Fed. Reg. 27,533, 27,534 (May 10, 2012) (emphases added)—not that it "*must*" do so. NP Br. 9 (emphasis added).[3] Moreover, as TransCanada previously explained, State cannot—by supposed "concessions"—alter the nature of presidential actions delegated to it. Mot. 12.

Finally, plaintiffs claim that compliance with NEPA, the APA and the ESA "is the price of delegat[ing]" presidential powers to an agency. NP Br. 11. But Congress must provide "an express statement" that it intends a statute to govern presidential actions. *Franklin*, 505 U.S. at 801. The fact that NEPA applies to all

[3] In directing State to rely on its prior EIS "[t]o the maximum extent permitted by law," President Trump did not acknowledge that NEPA applied. IEN Br. 14. He directed State to decide that question, which State did by reiterating that NEPA is inapplicable.

"major Federal actions" falls short. *See* 40 C.F.R. § 1508.12 (President not subject to NEPA). And whatever its breadth, NP Br. 15, the ESA's cause of action does not expressly mention the President.

### B. Issuance Of A Presidential Permit Is Entirely Discretionary And Thus Unreviewable Under The APA.

Courts lack "a standard to review" decisions under E.O. 13337's "national interest" standard. *Detroit Int'l Bridge v. Canada*, 883 F.3d 895, 903-04 (D.C. Cir. 2018). Plaintiffs say they do not contest State's national interest determination. NP Br. 12. But, at their request, the district court invalidated that determination based on State's alleged failure to explain why it changed its prior determination. Appx104. And, there is no law to apply to assess the validity of that determination (or of State's change).

Indeed, in claiming that NEPA provides the relevant legal standard, plaintiffs seek to *alter* the national interest standard. As State has explained, the President or his delegate may take into account *any* factors they "deem[] germane." Appx187. Yet here, the district court held that State *must* consider various environmental factors, and cannot decide what best promotes the national interest until it does. This untoward interference with a decision "rife with executive

discretion," *Detroit Int'l Bridge*, 883 F.3d at 904, epitomizes why Congress precluded judicial review of action committed to discretion by law.[4]

### C. The District Court's Injunction Is Impermissibly Overbroad.

The district court's injunction is also overbroad, both as a jurisdictional and remedial matter.

State is "empowered" to grant permits for oil pipelines "*at the borders of the United States*," E.O. 13337, § 1 (emphasis added). To the extent State imposes conditions beyond that area, IEN Br. 21, those conditions reflect its leverage, not its permitting authority. And the district court's authority to enjoin actions by TransCanada "extends only so far as the [agency's] permitting authority." *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1123 (9th Cir. 2005).

Plaintiffs argue that *Sonoran* upheld an injunction of an entire project "because of the 'interconnected nature of the [desert] washes and the surrounding area,'" where the project was to be built. IEN Br. 23 (quoting *Sonoran*, 408 F.3d at 1123-24). But this proves TransCanada's point. Because the jurisdictional desert washes could not be *physically segregated* from the non-jurisdictional land through which the washes ran, the agency's *permitting authority* extended to that non-segregable land. The border-crossing corridor over which State has permitting

[4] Nothing in *Heckler v. Chaney*, 470 U.S. 821 (1985), casts doubt on this conclusion. Indeed, *Detroit Int'l Bridge* post-dates that decision.

authority *is* segregated *physically* from pipeline rights-of-way hundreds of miles from the border. State's permitting authority therefore does not extend to those segregable lands. Attempting to obscure this fatal problem, plaintiffs claim that all "sections of the pipeline are components of one continuous project." NP Br. 17. That is irrelevant. Plaintiffs' logic impermissibly re-writes E.O. 13337 to empower State to grant permits for "the entire length of oil pipelines that cross the borders of the United States."

Even if the district court can enjoin activities outside the border-crossing corridor, its injunction had to be tethered to State's NEPA violations. The court's finding that State failed to assess the environmental impacts of the pipeline's *operation* does not justify enjoining its *construction*. Its findings that State failed to study the alternative route in Nebraska and potential cultural impacts to 1,038 acres of privately-held land do not justify enjoining construction *outside* these areas.[5]

Plaintiffs' contention that an injunction need not be tethered to specific violations, IEN Br. 24, contradicts binding precedent. *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("scope of injunctive relief is dictated by the extent of

[5] Moreover, TransCanada's Programmatic Agreement with State ensures "minimization of impacts to as-yet-unknown cultural resources that might be inadvertently encountered during construction." Appx176. This agreement satisfies any obligation to consider the potential effects on cultural resources, *Te-Moak Tribe of W. Shoshone v. U.S. Dep't of Interior*, 608 F.3d 592, 600-01 (9th Cir. 2010).

the violation established"). Even if establishing irreparable harm is ordinarily not onerous in environmental cases, IEN Br. 24, that does not mean it can be unrelated to the statutory violation. Moreover, the claims that construction will cause carbon emissions and could harm wildlife, forests, plants, rivers, and wetlands, and that worker camps could create traffic, noise, and crime, NP Br. 20-21; IEN Br. 28; Amicus Br. 6-9, are irrelevant. The district court did not find that State violated NEPA by inadequately studying these impacts, and it is settled that, "[i]f the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). It is therefore appropriate to "limit[] the injunction to specific areas" where supplementation of an SEIS is needed. *League of Wilderness Defenders v. Connaughton*, 752 F.3d 755, 767 (9th Cir. 2014). Under that principle, TransCanada can be enjoined from constructing only in Nebraska and the un-surveyed acres outside Nebraska. By definition, such an injunction would *preclude*, not cause, the "impacts that State has yet to study." IEN Br. 26.

Plaintiffs reprise their "bureaucratic momentum" theory. NP Br. 23; *see also* IEN Br. 25-26. But this Court "presume[s] that agencies will follow the law," *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1082 (9th Cir. 2010), and plaintiffs ignore the added protection that comes from TransCanada's

acknowledgement that it is proceeding at its own risk, Mot. 2. That acknowledgement "function[s] as a protective barrier against any potential political pressure that otherwise might exist" for State to skew its analysis after construction has begun. *North Carolina v. City of Va. Beach*, 951 F.2d 596, 602 (4th Cir. 1991). *See also N. Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988) (ordering agency "not to consider" investments made before supplemental review completed).

## II. THE BALANCE OF HARDSHIPS WEIGHS IN FAVOR OF A STAY

Absent a stay, thousands of jobs will be lost, hundreds of millions of dollars in taxes and contractors payments will not occur, and TransCanada will lose earnings of over $900 million. Mot. 22. Plaintiffs denigrate these harms as "self-inflicted." NP Br. 17; IEN Br. 27. But "[e]liminating consideration of hardship" because TransCanada began the Project "is inconsistent with the court's duty to 'balance the interests of all parties and weigh the damages to each." *United States v. BNS, Inc.*, 858 F.2d 456, 465 (9th Cir. 1988). Plaintiffs cite *Sierra Club v. Army Corps of Engineers*, 645 F.3d 978, 997 (8th Cir. 2011), where the defendant began work without a permit. Here, TransCanada *received* a permit and was entitled to move forward until it was (erroneously) enjoined.[6] Nor is TransCanada's revenue

[6] Plaintiffs wrongly suggest that, even without the injunction, TransCanada cannot build anywhere until State completes the court-ordered supplementation. NP Br. 18. Until the injunction issued, TransCanada could construct various portions of

loss "temporary." NP Br. 18; IEN Br. 27. On a net-present value basis, TransCanada will lose about $708 million. Mot. 22.

By contrast, plaintiffs have not demonstrated that a stay would cause them irreparable harm. They cite declarations concerning harms that pipeline *operation* would have on carbon emissions and "in the event of a spill." NP Br. 20-21. These declarations were not presented below, and in all events, are irrelevant to whether the injunction should be stayed to permit *construction*. And, as explained above, the various construction-related harms plaintiffs and their amici cite, NP Br. 20-21; IEN Br. 28; Amicus Br. 6-9, are not attributable to any deficiencies the district court found in State's analysis. *See* Mot. 22-23.[7]

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the route outside the border-crossing segment where it met applicable requirements. In all events, TransCanada seeks a stay to allow it to engage in construction and pre-construction while State completes the court-ordered supplementation.

[7] Moreover, no injunction is needed to protect rivers, wetlands, and other waters, as TransCanada must obtain federal, and in some cases, state permits before constructing in those areas. NP Br. 17; Amicus Br. 6-9.

## CONCLUSION

For the foregoing reasons, the district court's injunction should be stayed in its entirety, or at least insofar as it prohibits preconstruction and construction of the pipeline outside of Nebraska and the 1,038 acres for which State had not completed its cultural review at the time the Permit was granted.

Respectfully submitted,

Date: March 11, 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. 27(d)(1)-(2). 32(a)(5), and 9th Cir. R. 32-3(2) because this brief contains 2,792 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 32(f).

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 Word 2016 Times New Roman 14-point font.

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## CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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