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

INDIGENOUS ENVIRONMENTAL NETWORK and NORTH COAST RIVER ALLIANCE, Plaintiff, vs. UNITED STATES DEPARTMENT OF STATE; THOMAS A. SHANNON, JR., in his Official Capacity as U.S. Under Secretary of State; UNITED STATES FISH AND WILDLIFE SERVICE, a federal agency; JAMES W. KURTH, in his official Capacity as Acting Director of the U.S. Fish and Wildlife Service; and RYAN KEITH ZINKE, in his official Capacity as Secretary of the Interior, Federal Defendants,	CV 17-29-GF-BMM **TRANSCANADA'S REPLY TO PLAINTIFF'S RESPONSE TO MOTION TO DISMISS**

and

TRANSCANADA KEYSTONE PIPELINE and TRANSCANADA CORPORATION,

Defendant-Intervenors.

ARGUMENT

I. Because the Record of Decision/National Interest Determination is a presidential action, the waiver of sovereign immunity in the Administrative Procedure Act is not available here.

In our Motion to Dismiss, TransCanada argued that this Court lacks jurisdiction under the Administrative Procedure Act ("APA") to adjudicate the State Department's exercise of delegated presidential authority over the Keystone XL Pipeline because it is not "final agency action." In response, Indigenous Environmental Network and other Plaintiffs ("IEN") recognize that judicial review is available only through the APA. According to IEN, that review is available because the decision is "final agency action" since the State Department decided to issue the presidential permit and the President had no role in the final permitting determination. IEN further claims that judicial review is available because the President's Memorandum of January 24, 2017 to the Secretary of State and others ("January 24 Memorandum") transformed the President's inherent, Constitutional

authority over international border crossings into routine administrative decision-making, making it susceptible to judicial review.

A. The ROD/NID is presidential action because the Department of State has power over Keystone XL solely from the President's exercise of his constitutional authority over national security and foreign policy concerns associated with border-crossing projects.

IEN contends that "[b]ecause State's issuance of the ROD/NID marks the conclusion of its review and has legal consequences, it is a 'final' action under the APA," allowing it to be reviewed. (ECF No. 60, at 17). Of course, "finality" is not enough; IEN must also demonstrate that the ROD/NID was "agency action."

To show that the ROD/NID was agency action, IEN invokes a State Department NEPA regulation to assert that issuance of this presidential permit is "a 'major Departmental action.'" (*Id.* at 18). However, as demonstrated by the Federal Defendants in their reply brief filed in support of their Motion to Dismiss the related case, *N. Plains Res. Council v. Shannon* (No. 4:17-CV-00031-BMM) (ECF No. 56, at 10-11), the Department's regulations do not require a NEPA analysis here. Moreover, IEN cannot show how a regulation intended to implement NEPA, a procedural statute, could effectively amend substantive law and provide the Department with statutory power over border-crossing matters.

Critically, IEN can point to no substantive law conferring authority upon the Department of State to administer border-crossing permits; there is none. The Department of State, for instance, has no power equivalent to that in the Mineral

Leasing Act, 30 U.S.C. § 185(a), the law that requires TransCanada to apply to the Bureau of Land Management to obtain a right-of-way permit over federal lands. Likewise, the State Department has no regulatory authority equivalent to that of the Army Corps of Engineers, pursuant to 33 U.S.C. § 1344, directing the Corps to regulate Keystone XL's activities that implicate waters of the United States. Instead, the **sole** authority authorizing the Department of State to take any action involving the Keystone XL pipeline is E.O. 13337. What is more, that order is not grounded in any statute. Its legitimacy is found in the President's inherent constitutional power over foreign affairs and national security, preventing any authority resulting from it as being agency action.

B. The President's decision to expedite Keystone XL's permit process did not result in a relinquishment of presidential authority converting it to agency action.

In the face of this statutory vacuum, IEN contends that when the President waived the provisions of Executive Order 13337 governing inter-agency review, he also expressly and irrevocably relinquished the inherent constitutional powers of his Office. IEN believes this limited amendment to a presidentially-created process somehow stripped the President of any further role and converted the State Department permit decision into routine agency action. However, the proper interpretation of the January 24 Memorandum, dictating the terms of the State

Department's process, proves that the President indeed retains his constitutional authority and can choose how, and whether to, delegate such authority.

Specifically, IEN's waiver argument cannot be squared with *Jensen v. National Marine Fisheries Service*, 512 F. 2d 1189, 1190-91 (9th Cir. 1975). There, the Ninth Circuit upheld a presidential delegation where an Executive Order delegated authority to the Secretary of State "without the approval, ratification, or other action of the President." E.O. 11467 § 1, 34 Fed. Reg. 7271 (May 1, 1969). *Jensen* teaches that retention of presidential authority is not determinative, once it is clear that the initial delegation is grounded in presidential control over the process. As a result, a waiver of an inter-agency review provision in an Executive Order hardly constitutes a permanent, irrevocable relinquishment of the President's inherent constitutional powers. In other words, for IEN to prevail on this point, it must demonstrate that the President surrendered all of his authority over the Keystone XL permit process. It has not done that. Moreover, IEN cannot show that as a *prospective* matter, the President has surrendered his authority over Keystone XL for whatever the future may reveal.

Equally important, it is doubtful that any waiver of inherent constitutional powers envisioned by IEN is even possible. *See New York v. United States*, 505 U.S. 144, 182 (1992) ("The constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby

narrowed, whether that unit is the Executive Branch or the States."). But, if such a waiver is permissible, the waiver of unwritten, inherent constitutional authority should be interpreted narrowly, according to the explicit terms of the waiver. Such are the requirements for statutory waivers of sovereign immunity. *See Lane v. Pena*, 518 U.S. 187, 192 (1996), and those criteria should also apply here, if any type of a waiver is deemed permissible.

C. IEN's claim that NEPA and other environmental statutes convert presidential action into agency decision-making is meritless.

IEN argues that State's ROD/NID cannot be presidential action because NEPA and other environmental statutes are applicable to the State Department, thereby placing the permitting process for cross-border facilities in a "zone of twilight" over which the President and Congress "have concurrent authority." (ECF No. 60, at 24).

We do not dispute the authority of Congress to regulate in this area, if Congress decides to do so. However, IEN's claim that NEPA and other environmental statutes have curtailed presidential discretion over cross-border permitting (*id.* at 26) is senseless because NEPA does not apply to the President. Instead, NEPA and these other measures apply to *federal agency actions.*

These laws create ancillary duties that arise only if the agency's organic statutory powers are triggered by a proposed action. As we have repeatedly noted, there is no federal law giving any federal agency jurisdiction over the siting and

location of interstate oil pipelines. If the Keystone XL Pipeline traveled from Montana to Nebraska, there would be no role for the Department of State and, of course, there would be no EIS or Biological Assessment for the Department of State to prepare.

Having acknowledged that the President is not subject to NEPA because he is not an agency, IEN's invocation of NEPA and other environmental statutes does not address the question of whether delegated authority over Keystone XL is presidential or agency-based. The proper inquiry on this issue, then, is whether the President retained his office's inherent authority over the Keystone XL border-crossing permitting decision.

The issuance of the January 24 Memorandum, dictating the terms of the State Department's process proves that the President indeed retains this authority and can choose how, and whether to, delegate such authority. Of course, Congress has authority to regulate cross-border facilities if it chooses to do so. But currently, there is simply no law constraining the President's inherent authority over these matters.

IEN finds no support for its position by citing *Detroit International Bridge Co. v. Government of Canada*, 189 F. Supp. 3d 85 (D.D.C. 2016) ("*Detroit Bridge*"); (ECF No. 60, at 20-21). There, State's exercise of delegated presidential authority to approve a new bridge between the U.S. and Canada was held to be

non-reviewable because, like the ROD/NID here, that approval involved the exercise of unconstrained, discretionary presidential authority. Moreover, as in E.O. 13337, the Executive Order applicable to the Detroit Bridge was simply a "device for managing the President's decision-making process." *Detroit Bridge*, 189 F. Supp. 3d at 103. Thus, "[n]o permit can issue without, at the very least, the President's acquiescence, and *the President's acquiescence is itself an exercise of discretion that constitutes unreviewable presidential action*." *Id.* (emphasis in original).

IEN reads this decision to require that Congress must "statutorily delegate[] *its* powers to the President" (ECF No. 60, at 21) (emphasis added) to make Keystone XL's permit decision non-reviewable. But, there is nothing in *Detroit Bridge* to suggest such a requirement, especially since that court relied largely upon the reasoning in *NRDC* where, as we know, that exercise of presidential authority was unconstrained by statute.

D. IEN's attack on the three pipeline cases on which the Federal Defendants and TransCanada rely to demonstrate that the ROD/NID is presidential action suffers from the same flaws as the balance of its arguments.

IEN rejects the authority of *Natural Resources Defense Council v. U.S. Department of State*, 658 F. Supp. 2d 105 (D.D.C. 2009) ("*NRDC*"), which holds that the Department of State's power to authorize a cross-border pipeline derived solely from "the President's inherent constitutional authority over foreign affairs."

Id. at 109. IEN also attacks the holding that "[n]o statute curtails the President's authority to direct whether the State Department . . . issues a presidential permit." *Id.* at 111. IEN says these holdings are wrong because Congress has power over foreign and domestic commerce, and because Congress has curtailed presidential power through the enactment of NEPA. (ECF No. 60, at 28).

Congress' power over international commerce is irrelevant if it has not acted to regulate border-crossing pipelines. Since NEPA does not apply to the President, IEN's claim that NEPA curtails presidential discretion is also unpersuasive.

IEN's attempt to distinguish *Sisseton-Wahpeton Oyate v. U.S. Department of State*, 659 F. Supp. 2d 1071 (D.S.D. 2009) is equally unpersuasive. In addition to reiterating its notion that NEPA constrains presidential power, IEN also asserts that the South Dakota case is inapplicable because here the President waived his constitutional powers over Keystone XL. We have addressed each of these contentions earlier and demonstrated them to be without merit.

IEN claims that the third pipeline case relied upon by the Federal Defendants and TransCanada is inapposite because it involved a State Department interpretation of a presidential permit rather than the grant of a new permit, and did not implicate NEPA. *White Earth Nation v. Kerry*, No. 14-4726, 2015 WL 8483278 (D. Minn. Dec. 9, 2015). Because we contend that NEPA is equally inapplicable here, we find the *White Earth Nation* case instructive.

II. IEN's Response fails to rehabilitate its generalized, non-specific allegations of harm to listed species as the basis for claiming that Federal Defendants have violated the Endangered Species Act.

IEN has not cured the fatal, jurisdictional defects pervading its claim that the Federal Defendants violated the ESA and APA when they satisfied their duties under the ESA. It is not enough to express disagreement with the findings in the Biological Assessment and Biological Opinion that Keystone XL was not likely to adversely affect endangered species without providing the Court and the parties with some basis for that disagreement. In our Motion to Dismiss, we argued that whether viewed as a failure to demonstrate standing, or pursuant to *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) in a Rule 12 motion to dismiss, Plaintiffs' highly generalized claims of harm lack the requisite specificity that would make them justiciable in federal court. (ECF No. 44-1, at 21-24). For this reason, we adopt the reply of the Federal Defendants that identifies the Plaintiffs' continued, constitutional standing defects.

Although IEN's amended complaint attempts to address the standing concerns of the Federal Defendants, IEN has not attempted to rehabilitate the jurisdictional flaw TransCanada identified. IEN still fails to provide any explanation of why or how the Biological Opinion is incorrect. It offers no facts as to any specific harm, only "'naked assertion[s]' devoid of 'further factual enhancement,'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Unaddressed by IEN,

our contention remains that IEN's ESA claim does not satisfy Rule 8(a)(2) and therefore this claim must be dismissed.

Dated this 11th day of August, 2017.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1(d)(2) of the United States Local Rules, I certify that this Brief contains 2046 words, excluding caption and certificates of service and compliance, printed in at least 14 points and is double spaced, including for footnotes and indented quotations.

DATED this 11th day of August, 2017.

By /s/ Jeffery J. Oven

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the following counsel of record, by the means designated below, this 11th day of August, 2017:

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