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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,	CV 17-29-GF-BMM **TRANSCANADA KEYSTONE PIPELINE, LP AND TRANSCANADA CORPORATION'S REPLY IN SUPPORT OF SUPPLEMENTAL MOTION TO DISMISS**

Federal Defendants,

and

TRANSCANADA KEYSTONE PIPELINE and TRANSCANADA CORPORATION,

Defendant-Intervenors.

ARGUMENT

Plaintiffs Indigenous Environmental Network and North Coast Rivers Alliance (collectively, "IEN") moved to amend their complaint on July 14, 2017,[1] and added a claim alleging that the Department of State ("State Department") and the United States Fish and Wildlife Service ("FWS") violated the Endangered Species Act, 16 U.S.C. §§ 1531-1544 ("ESA"), and Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA") (ECF No. 61). In response, both the Federal Defendants and TransCanada moved to dismiss this new claim because it contains the same jurisdictional infirmities as those identified in the earlier-filed Motions to Dismiss. IEN has responded, raising many of the same arguments it presented in the first round of briefing on the Motions to Dismiss. As we now demonstrate, the same jurisdictional defects that doom IEN's original complaint are also manifest in

[1] The Court ruled on IEN's motion on August 29, 2017, accepting Plaintiffs' First Amended Complaint as the operative complaint for this case. (ECF No. 72).

its latest amended version, and therefore, the Plaintiffs' case must be dismissed in its totality.

I. The State Department's Exercise of Delegated Presidential Authority Is Presidential Action, not "Agency Action."

IEN first argues that because the State Department, not the President, issued the Presidential Permit for Keystone XL, the State Department's issuance of the permit was "agency action" under both the ESA and the APA. IEN asserts that it is "irrelevant whether the ESA citizen suit provision applies to *presidential* action because in this case, plaintiffs' claim challenges *agency* action." (ECF 74 at 11, emphasis original).[2] IEN is mistaken.

When the Under Secretary of State issued the Presidential Permit to TransCanada, there was no statutory authority to authorize that deed. Instead, the State Department acted pursuant to delegated authority from the President under Executive Order 13337 ("E.O. 13337"). Unlike some Executive Orders, the President's authority to issue E.O. 13337 is not grounded in any statute. It is, instead, a pure exercise of the President's inherent constitutional powers over foreign affairs. As such, the President's delegation of the power to act pursuant to E.O. 13337 must also be considered presidential action. Indeed, the Ninth Circuit has found in analogous circumstances – where the Secretary approved fishing

[2] Citations to ECF documents use ECF page numbering.

regulations pursuant to a treaty between the United States and Canada – that "the Secretary's actions are those of the President." *Jensen v. Nat'l Marine Fisheries Serv.*, 512 F.2d 1189, 1191 (9th Cir. 1975).

As a result, IEN gains nothing by invoking State Department regulations that describe how it will implement the ESA. As we argued earlier, if the Keystone XL Pipeline had been proposed as a domestic oil pipeline, transporting crude oil from one point in the United States to another place in this country, the State Department would have no role in these actions because there would be no crossing of the United States border and no need for a presidential permit. (ECF No. 65 at 7). Allegations that State had failed to comply with NEPA, ESA, or other statutes triggered by "federal action" would have never arisen because State would have had no role. TransCanada's need for a presidential border crossing permit and the State Department's exercise of delegated presidential authority provides the sole basis for the State Department's responsibility for Keystone XL. Critically, the sole source of that responsibility is the inherent constitutional authority of the President, a power neither created by nor constrained by statute.

In contrast to the Department of State, the Bureau of Land Management ("BLM") has been involved in the Keystone XL regulatory approval process because it has a *statutory* mandate to do so. Under the Mineral Leasing Act, 30 U.S.C. § 185(a), BLM must issue TransCanada a right-of-way permit in order for

the pipeline to cross over federal lands.[3] Before BLM can take final action, it conducts a review process that includes application of applicable environmental statutes (*e.g.*, NEPA, ESA). BLM's statutory obligations under the Mineral Leasing Act apply whenever a right-of-way over federal land is sought, regardless of whether the application is for an international or domestic pipeline. BLM's role is very different from that of the State Department, factually and as a matter of law.

IEN argues that that the Presidential Permit was agency action because both State and the President "acknowledged that the BA [Biological Assessment] was … issued *pursuant to the ESA's requirements*." (ECF No. 74 at 13, emphasis original). That is not a correct statement. Rather, the Record of Decision/National Interest Determination carefully stated that State's actions, implementing E.O. 13337, were taken "*consistent* with . . . Section 7 of the ESA." Record of Decision/National Interest Determination (ECF No. 44-6 at 4, emphasis added). If State had been acting under its own statutory authority and was taking an action with ESA implications, we expect it would have said it was acting "pursuant" to the ESA requirements. Here, State chose different language to underscore the unique nature of its authority.

[3] The Keystone XL Pipeline, as currently proposed, will cross approximately 46 miles of federal lands in Montana. (ECF No. 49 at 18).

IEN also asserts that the issuance of this Presidential Permit cannot be presidential action because the President did not take the final act and because Congress has curtailed presidential decision making. (ECF No. 74 at 15). In our opening brief, TransCanada pointed to the three district courts that have recognized that the State Department's issuance of a presidential permit is presidential action. *Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1081 (D.S.D. 2009), *Nat. Res. Def. Council, Inc. v. U.S. Dep't of State (NRDC)*, 658 F. Supp. 2d 105, 109 (D.D.C. 2009); and *White Earth Nation v. Kerry*, Civ. No. 14-4726 (MJD/LIB), 2015 WL 8483278, at *6-8 (D. Minn. Dec. 9, 2015). In each of these cases, the courts clearly found the permit issuance to be presidential action, even though the inherent presidential power to issue cross-border permits is delegated to the State Department. It is the delegation in E.O. 13337 of the President's constitutional power that keeps the ultimate discretion with the President and maintains the presidential nature of the decision to issue a permit.

IEN finds support for its position in *Detroit International Bridge Co. v. Government of Canada* (*DIBC*), 189 F.Supp.3d 85 (D.D.C. 2016), (ECF No. 74 at 16). Of course, the court in that case upheld State's exercise of delegated presidential permitting authority. IEN argues that here "Congress has not statutorily delegated its powers to the President." (ECF No. 74 at 16). But, that argument makes no sense because, as the *DIBC* court found, the President was

exercising inherent power he has always possessed under the Constitution. What is more, the statute that IEN argues is missing here would only augment the ample and abundant presidential authority currently existing over international crossings.

IEN argues that State's permit issuance is really agency action because the President failed to retain his ultimate authority over the Keystone XL Pipeline. IEN relies on the President's January 24, 2017 Memorandum to the Secretary of State and others ("January 24 Memorandum") where the President cancelled a 15-day interagency review process that would have otherwise applied to this application. As detailed in TransCanada's August 11, 2017 reply, this minor adjustment in the E.O. 13337 administrative process did not transform the President's inherent, Constitutional authority over international border crossings into routine administrative agency decision-making that is subject to judicial review. (ECF No. 65 at 4-6). IEN characterizes this step as express relinquishment of presidential decision-making authority. (ECF No. 74 at 18). IEN reads far too much into this minor adjustment of the permitting process. The January 24 Memorandum did not cede any of the President's ultimate authority.

Moreover, this argument calls on the parties and the Court to suspend both common sense and knowledge of the recent past. It is a fact that prior to the 2016 election, the President castigated his predecessor for having denied a Presidential Permit to Keystone XL in 2015. Prior to his election, the President often declared

that granting such a permit would be one of first deeds of his new Administration. But, IEN now contends that when the President issued his Memorandum on the Keystone XL Pipeline on January 24, he used that Memorandum to surrender all presidential decision-making authority. This defies common sense.

IEN's last argument in support of its claim that the issuance of a Presidential Permit to Keystone XL was routine agency action is a non-sequitur: because Congress requires all federal agencies, including State, to comply with the ESA, NEPA and other environmental laws, Congress "substantially curtailed" the President's permitting authority over this project. IEN must admit that because the President is not an "agency," neither NEPA nor ESA is applicable to him or his actions. Thus, the incontrovertible fact that NEPA and ESA apply to the State Department has no significance when State responds to a presidential delegation and acts on behalf of the President.

II. IEN's Attempts to Cure Multiple Standing Deficiencies Fail.

TransCanada and Federal Defendants demonstrated in their supplemental motions to dismiss that IEN's third claim also must be dismissed because IEN has not satisfied any of the three elements of constitutional standing: injury-in-fact, causation, and redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). As such, IEN's third claim should be dismissed for lack of standing.

First, IEN's vague and general claims of injury fail to meet the standard for injury-in-fact. In paragraph 88 of its amended complaint, IEN asserts: "The imperiled species affected include the 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, among others. Plaintiffs highly value *all of these species*, have sought to study and observe them in the wild, and will continue to do so…, and would be directly harmed if the Project hastens their demise…." (ECF No. 61 at 40, emphasis added).

In the Ninth Circuit, there is a recognized principle in the law of standing that if one person or party can establish standing to sue, the court need not examine whether other persons or parties have standing. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004) ("We have jurisdiction if at least one named plaintiff has standing to sue, even if another named plaintiff in the suit does not."). However, there is no authority that permits an ESA plaintiff to litigate ESA compliance issues involving every protected species within the project's scope if it has been able to establish injury with regard to one of those species. Moreover, there is no specific claim by these Plaintiffs as to which persons, or which groups, have studied any particular species. There is no identification of those who have observed these species in the wild, or when they intend to do so again.

Here is one example of why IEN's amended complaint is defective. In its amended complaint, IEN claims that State violated the ESA because its Biological Assessment is defective in its assessment of potential impacts on, among other species, the American Burying Beetle. This protected species spends virtually its entire life underground, seen by no one. Its existence is monitored by largely by biologists who have received permits from FWS to disturb the Beetle's habitat in order to study it. If Plaintiffs observe and study this animal, they, too, would need a permit or face prosecution for harming a protected species. Although IEN mentions no permit that would allow the Plaintiffs to study this beetle, it expects the defendants to accept these generalizations of harm. This gaping lack of specificity does not amount to concrete and particularized interests. Under *Lujan*, 504 U.S. at 560, these claims cannot survive a motion to dismiss.

Second, IEN cannot sufficiently demonstrate that the alleged deficiencies in Federal Defendant's Biological Assessment will cause an injury to even one of its members. Again, generalizations dominate the amended complaint. IEN's allegation, for example, that it is not clear if Bird Flight Diverters will mitigate risks to whooping cranes, (ECF No. 61 at ¶ 97), is not an allegation of injury to a protected species, but an assertion of a potential dispute among aviation biologists.

Third, this Court cannot redress an injury that does not exist. But even if this court finds that IEN's members indeed suffer an injury-in-fact, that injury

cannot be redressed by invalidating the Biological Assessment. *Lujan*, 504 U.S. at 560-61. This is because the President retains ultimate discretion over the decision to issue the Presidential Permit. As TransCanada explained in its Supplemental Motion to Dismiss (ECF No. 69 at 9 n.2), Plaintiffs must show that there is a "direct relationship between the alleged injury" they seek to remedy "and the claim sought to be adjudicated." *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973). There is no such direct relationship here.

Even if the court were to set aside the Biological Assessment and order Federal Defendants to prepare a new "adequate" Biological Assessment, this is not the ultimate injury that IEN seeks to remedy. IEN seeks to reverse the issuance of the Presidential Permit and its alleged impacts on listed species – a remedy unavailable from this Court. The decision to issue the Presidential Permit is one committed to the discretion of the President. *See, e.g.*, *Earth Island Inst. v. Christopher*, 6 F.3d 648, 652-53 (9th Cir. 1993) (deciding not to enforce a statute that required the Executive Branch to negotiate with foreign nations, as that branch alone has the exclusive power to conduct foreign relations); *see also NRDC*, 658 F. Supp. 2d at 111 ("[T]he President has complete, unfettered discretion over the permitting process. No statute curtails the President's authority to direct whether the State Department . . . issues a presidential permit.").

IEN claims that *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1225-27 (9th Cir. 2008), is inapposite, but that is not the case. There, the Ninth Circuit found that plaintiffs lacked standing to sue for two out of three claims because that court found it had no authority to set aside the international treaty that indirectly caused the alleged injuries. For the third claim, *the Salmon Spawning* court found standing because new information had come to light, such that reinitiation of ESA consultation might "ultimately benefit the groups." *Id.* at 1229. IEN concedes this distinguishing point, however, IEN alleges no new information warranting re-initiation of ESA consultation.

IEN also relies on *Center for Biological Diversity v. Mattis*, No. 15-15695, 2017 WL 3585638 (9th Cir. Aug. 21, 2017), in support of its redressability argument. This case, too, is distinguishable from the case at hand. In *Mattis*, the Ninth Circuit found redressability because the plaintiffs there had not challenged decisions committed to the Executive Branch, in contrast to *Salmon Spawning*. *Mattis*, at *10. Thus, *Mattis* provides no benefit to IEN; indeed, as the *Mattis* decision recognized, "*Salmon Spawning* suggests that to the extent CBD seeks declaratory relief aimed at challenging the 2006 Roadmap, or the decision to initiate the FRF Project, CBD lacks standing". *Mattis*, at *10. It follows that IEN cannot have standing to challenge its ultimate remedy – a Presidential Permit

issuance that is committed to the Executive Branch – because this link in the chain cannot be redressed by a court.

Because of these limits to federal judicial review, particularly in cases of foreign policy and national security concerns, IEN's third claim cannot be redressed by this court.

CONCLUSION

WHEREFORE, TransCanada respectfully requests that this Court dismiss IEN's First Amended Complaint with prejudice pursuant to Federal Rule of Civil Procedure 12(b).

Dated this 22nd day of September, 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 Reply Brief contains 2601 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 22nd day of September, 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 22nd day of September, 2017:

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