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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

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| INDIGENOUS ENVIRONMENTAL NETWORK, *et al*.,<br><br>Plaintiffs,<br>v.<br><br>UNITED STATES DEPARTMENT OF STATE, *et al.*,<br><br>Federal Defendants,<br>and | CV 4:17-CV-00029-BMM<br><br>**REPLY IN SUPPORT OF SUPPLEMENTAL MOTION TO DISMISS** |

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| TRANSCANADA CORPORATION, *et al.*,<br><br>Intervenor-Defendants. | |

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## INTRODUCTION

This Court should dismiss Plaintiffs' Third Claim. Although Plaintiffs seek a different conclusion, the weight of authority indicates the issuance of the permit for the transborder crossing of the Keystone XL pipeline is a Presidential action. Because Plaintiffs do not dispute our showing that the waiver of sovereign immunity in the Endangered Species Act ("ESA") citizen-suit provision does not extend to the President, this Court lacks jurisdiction. Alternatively, Plaintiffs lack standing because they fail to sufficiently allege injury in fact and the Presidential nature of the underlying action means there is no redressability for their claim.

## ARGUMENT

### I. The ESA Citizen-Suit Does Not Waive Sovereign Immunity for Challenges to Presidential Action

In response to our showing that the waiver of sovereign immunity in the ESA citizen-suit provision does not extend to the Presidential action at issue here, Plaintiffs primarily continue to argue that the issuance of the Presidential permit is an "agency action" taken by the State Department. Although they raise several points in support of this argument, largely recycled from their opposition to our original motion to dismiss, none of them are successful. Because Plaintiffs fail to even address the second part of our argument – that the President is not a "person" within the ESA citizen-suit provision's narrow waiver of sovereign immunity – they concede the issue in the government's favor. Thus, because the issuance of the

permit here is a Presidential action, as further demonstrated below, Plaintiffs' Third Claim should be dismissed for lack of jurisdiction.

**A. Issuance of the Permit Is a Presidential Action**

Plaintiffs first point to State Department regulations generally recognizing the applicability of ESA Section 7(a)(2) obligations to "any Departmental action." Memorandum of Points and Authorities in Opposition to Federal Defendants' and TransCanada's Supplemental Motions to Dismiss First Amended Complaint ("Pls.' Opp.") (ECF 74) at 12 (quoting 22 C.F.R. § 161.11(a)). The blanket statement in this regulation says nothing to support the argument that this particular Presidential permit is an agency action; indeed, it does not speak to the issue here because, in issuing the Presidential permit, Under Secretary Shannon was not exercising any authority of the Department of State, but rather acting pursuant to delegated Presidential authority.

Plaintiffs next argue that statements in the Record of Decision/National Interest Determination ("ROD/NID") and the January 24, 2017 Presidential Memorandum acknowledge a requirement for the State Department to comply with ESA Section 7(a)(2) before issuing the Presidential permit. Pls.' Opp. at 12-13. First, the legal question before the Court is whether the issuance of the permit was a Presidential action and, in turn, whether the ESA citizen-suit provision waives sovereign immunity to challenge that action. Second, the ROD/NID is definitive

that the issuance of the permit "is Presidential action, made through the exercise of Presidentially delegated authorities" and that the requirements of the ESA, National Environmental Policy Act ("NEPA,") and the Administrative Procedure Act ("APA") do not apply. ROD/NID (ECF 44-6) at 4. The consultation documents were prepared "as a matter of policy" in order to inform the Under Secretary's national interest determination, *id.*at 5, but the voluntary preparation of such materials cannot have the legal effect of transforming a Presidential action into an everyday "agency action."

Similarly, reference to ESA Section 7(a) in the President's January 24, 2017 Memorandum does not establish that the issuance of the permit is an "agency action" instead of a Presidential action. The memorandum states only that the existing Supplemental Environmental Impact Statement ("SEIS") and environmental analyses relied upon therein, including the ESA consultation documents, should be deemed by the Secretary "[t]o the maximum extent permitted by law . . . to satisfy" "any other provision of law that requires executive department consultation or review," including ESA Section 7(a). Jan. 24, 2017 Mem. (ECF 44-7) § 3(a)(ii)(B). In no way did the memorandum state that the permit was "agency action" to which the ESA applied; rather, it was a direction that the Secretary consider any existing environmental analysis and consultation to be sufficient for purposes of making a decision within 60 days. *Id.* § 3(a)(1).

### B. Issuance of the Permit is Based on the President's Constitutional Authority, Which is Unconstrained by Congress

Citing the original Keystone pipeline case, Plaintiffs focus on whether "'the President's authority to direct the [agency] in making policy judgments' is curtailed in any way or whether the President is 'required to adhere to the policy decisions' of the agency." *Nat. Res. Def. Council v. U.S. Dep't of State*, 658 F. Supp. 2d 105, 111 (D.D.C. 2009) ("*NRDC*") (citing *Franklin v. Massachusetts*, 505 U.S. 788, 799 (1992)). Plaintiffs then, oddly, ignore the *NRDC* court's on-point answer to this question with respect to the same source of delegated permit authority at issue here:

> ...the President has complete, unfettered discretion over the permitting process. No statute curtails the President's authority to direct whether the State Department, or any other department for that matter, issues a presidential permit. Nor does any statute bind the President to any State Department decision granting or denying a permit.

*Id.* Plaintiff similarly ignores the same conclusions reached in *Sisseton-Wahpeton Oyate v. U.S. Department of State*, 659 F. Supp. 2d 1071, 1082 (D.S.D. 2009), and *White Earth Nation v. Kerry*, Civ. No. 14-4726 (MJD/LIB), 2015 WL 8483278, at *6-*8 (D. Minn. Dec. 9, 2015). Because Plaintiffs fail to address these conclusive determinations, the rest of their argument on this point fails.

Plaintiffs fare no better when they revive this argument in subsection D of their brief, asserting that the President's authority here is concurrently shared with Congress. Pls.' Opp. at 19 (*citing Ýoungstown Sheet & Tube Co. v. Sawyer*, 343

U.S. 579, 636 (1952) (J. Jackson concurring)). As the District of Columbia district court recognized again, just last year, permitting international oil pipelines is "an area in which Congress had never chosen to intervene," thus making it "clear" that issuance of the permits derives from "the President's inherent constitutional authority over foreign affairs." *Detroit Int'l Bridge Co. v. Gov't of Canada*, 189 F. Supp. 3d 85, 101 (D.D.C. 2016).

Nor does Congressional exercise of power in passing the ESA or NEPA, both of which apply only to agency actions, constrain the President's inherent constitutional authority at issue here. The *NRDC* court squarely rejected this argument in the NEPA context, finding that no statute "curtails or otherwise governs the President's discretion to issue presidential permits." *NRDC*, 658 F. Supp. 2d at 112. The flaw in Plaintiffs' argument is that the constraint on the authority to act must come from the same source of authority to take the action in the first place. For this reason, the analysis in *Detroit Bridge* focuses on the relationship between the relevant Executive Order and the International Bridge Act. *Detroit Int'l Bridge Co.*, 189 F. Supp. 3d at 96-98.

But here, as numerous courts recognize, there is no relevant statutory authority, and thus no similar Congressional constraint on the President's authority. And any such constraint cannot be found outside the relevant source of delegated Congressional authority or borrowed from generally applicable statutes

like the ESA. As the D.C. Circuit has found, ESA Section 7 applies only to how an agency utilizes its existing statutory authorities - it "does not *expand* the powers conferred on an agency by its enabling act." *Platte River Whooping Crane Critical Habitat Maint. Tr. v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992); *see also Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 299 (5th Cir. 1998) ("the ESA serves not as a font of new authority"). Here, there is not even an enabling statute at play – rather, the sole source of authority for the permit is the President's constitutional authority. Thus, there is no indication of any Congressional constraint, regardless of whether Congress requires agencies to comply with the ESA and NEPA when otherwise exercising their statutory authorities.

### C. Waiver of Certain Review Procedures Did Not Transform the Permit Into an Agency Action

Finally, Plaintiffs insist that the issuance of the Presidential permit was transformed into an agency action taken by the State Department because the President's January 24, 2017 memorandum waived certain interagency review and resolution procedures established in E.O. 13,337. Pls.' Opp. at 17-18. The waiver of those procedures, however, in no way curtailed the "complete, unfettered discretion," *NRDC*, 658 F. Supp. 2d at 111, the President possessed over the permit process here. As discussed in the reply to our original motion to dismiss, the January 24, 2017 memorandum did not limit the President's authority to further modify the process or subsequently overturn the Under Secretary's decision. ECF

66 at 9-10. Thus, the waiver of the interagency review procedures did not require the President to "'adhere to the policy decisions' of the agency" *NRDC*, 658 F. Supp. 2d at 111 (quoting *Franklin*, 505 U.S. at 799).

## II. Plaintiffs' Third Claim Should Be Dismissed for Lack of Standing

Our supplemental motion to dismiss demonstrated that Plaintiffs' vague allegations about harm to their interests in wildlife, generally, are insufficient to support a claim of injury in fact to any interest in protected species that may be impacted by the Project. ECF 71 at 9. In response, Plaintiffs argue that their case may go forward on such insufficient allegations of injury in fact, especially because they need only provide "succinct" and "general" allegations at the motion to dismiss stage. Pls.' Opp. at 21.

As an initial matter, while "a court may presume that a general factual allegation embraces the different, specific facts that are necessary to render the major premise true," "a court cannot supply an entirely new, completely absent major premise that is necessary to establish standing." *Friends of the Earth v. U.S. Dep't of Interior*, 478 F. Supp. 2d 11, 21 (D.D.C. 2007). In *Friends of the Earth*, the Court granted a motion to dismiss for claims concerning off-road vehicle policies adopted in particular National Parks when the plaintiffs failed to sufficiently connect their members' use of national parks with harm from off-road vehicle usage. The Court strongly disagreed with the argument that it could assume

the more specific facts from the general, stating that "when the constitutional authority of this Court to hear a case is at issue," a plaintiff must "take the time to find and allege jurisdictional facts, or we go no further." *Id.* at 22. So it should be here. In our reply supporting our original motion to dismiss, we detailed why Plaintiffs' generalized allegations are insufficient to allege a concrete interest in species in the Project area. ECF 66 at 19-20. We incorporate those arguments by reference here, as they explain why Plaintiffs have failed to clearly allege sufficient facts showing a concrete and particularized interest in any of the listed species.

Finally, Plaintiffs insist that their injuries are redressable. Pls.' Opp at 25-28. Plaintiffs first assert that additional ESA consultation would redress their injury, citing *Natural Resources Defense Council v. Jewell*, 749 F.3d 776 (9th Cir. 2014), and *Defenders of Wildlife v. EPA*, 420 F.3d 946, 957 (9th Cir. 2005), *rev'd and remanded sub nom. National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007). But in these cases, as in many others, the redressability analysis turned on the fact that the underlying action was a run-of-the-mill agency action subject to the Court's jurisdiction, which is not the situation here. These cases simply do not speak to the issue of whether a claim that a Presidential action failed to comply with environmental statutes is redressable, where the Court cannot require the President or his delegee to adjust the action based on additional environmental analysis. Here, whether the Presidential Permit is issued and under

what terms is ultimately up to the President, regardless of what occurs in any consultation between the State Department and the Fish and Wildlife Service.

Indeed, despite the attempts to distinguish it, the situation here is nearly identical to the challenge to the biological opinion dismissed in *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220 (9th Cir. 2008). It is of no matter that the Court there also found that the plaintiffs' reinitiation claim could proceed – Plaintiffs here do not have a reinitation claim.[1] They have pled, just as the *Gutierrez* plaintiffs did, a challenge to the ESA consultation that was conducted. And, like here, the Ninth Circuit found the claim not to be redressable because the court could not order the State Department to reopen the underlying action. *Id.* at 1229.

For this reason, Plaintiffs' reliance on *Center for Biological Diversity v. Mattis*, 868 F.3d 803 (9th Cir. 2017), likewise fails. The *Mattis* court seemingly recognized that if the redressability of the plaintiffs' claims would require re-visitation of the two underlying decisions, then the plaintiffs would lack standing.

[1] Even if they did, the distinction drawn by the *Gutierrez* court on this point is, respectfully, internally inconsistent and unclear. Both the statutory duty to consult and the regulatory duty to reinitiate apply to the same underlying agency "action." 16 U.S.C. § 1536(a)(2), 50 C.F.R § 402.16. The *Gutierrez* court fails to explain why reinitiation of consultation, resulting in additional environmental analysis of the impacts of the Treaty, would redress the plaintiffs' harms when it previously recognized that the challenge to the original analysis was not redressable because it could not order the State Department to renegotiate the Treaty.

*Id.* at 819. However, the *Mattis* panel seemed to find that, because there was additional planning still to be done in connection with the project, the "forward-looking" aspect of the National Historic Preservation Act analysis could redress Plaintiffs' alleged injuries. *Id.* at 818 ("In a project with many moving pieces, as well as several stops and starts, the details of the base's *construction* and *operation* are susceptible to potential alteration and modification by the take-into-account process."). Here, in contrast, Plaintiffs challenge the past issuance of the Presidential permit for an allegedly insufficient ESA consultation. Just as in *Gutierrez*, this Court cannot issue an order requiring reopening of that permit, even if the Court found additional ESA consultation to be necessary, and Plaintiffs' alleged injury therefore is not redressable.

## CONCLUSION

For the foregoing reasons, Plaintiffs' Third Claim for Relief should be dismissed for lack of jurisdiction, as should all of the claims in the First Amended Complaint, as briefed in our original motion to dismiss.

Respectfully submitted this 22nd day of September, 2017.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the attached brief is proportionately spaced, has a typeface of 14 points, and contains 2,383 words, excluding the caption, signature, certificate of compliance, and certificate of service.

**CERTIFICATE OF SERVICE**

I hereby certify that on September 22, 2017, a copy of the foregoing Reply In Support of Supplemental Motion to Dismiss and Memorandum in Support was served on all counsel of record via the Court's CM/ECF system.

*/s/ Bridget K. McNeil*
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