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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 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF INDIGENOUS ENVIRONMENTAL NETWORK AND NORTH COAST RIVERS ALLIANCE'S NOTICE OF MOTION AND 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.)
_____)

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INTRODUCTION

The 1,210-mile[1] long pipeline and related pumping, power transmission, and access facilities known as the Keystone XL Pipeline (the "Project") would transport up to 830,000 barrels per day ("bpd") of crude oil from Alberta, Canada and the Bakken shale formation in Montana to existing pipeline facilities near Steele City, Nebraska, but at an enormous cost to the Planet. State Department Administrative Record ("AR") 1203, 5952; Plaintiffs' RJN, Exhibit 1 ("Mainline Order"), p. 49. It would pose grave risks to the environment, including the climate, water resources and wildlife, and to human health and safety. It would cross more than 1,000 water bodies, critical habitat for numerous endangered species, and sacred lands of Indigenous Peoples, creating over 1,200 miles of impacts from construction and operation, and placing all of these resources at risk of contamination from spills.

The U.S. Department of State ("State") recognized that these grave risks of profound environmental harm precluded approval when in 2015 it *denied* the application to construct and operate the Keystone XL Pipeline submitted by TransCanada Keystone Pipeline, L.P. ("TransCanada"), a limited Delaware partnership owned by affiliates of TransCanada Corporation of Canada. AR 1-50,

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[1] The length of the pipeline increased from 1,204 to 1,210 miles when it was re-routed through Nebraska by order of the Nebraska Public Service Commission on November 20, 2017. See Plaintiffs' Request for Judicial Notice ("RJN") filed concurrently, Exhibit 1 ("Mainline Order"), p. 49.

1157-1188.

Despite State's well-documented finding in 2015 that the Project "would not serve the national interest" (AR 1188), the current Administration invited TransCanada to reapply for its Keystone XL Permit in 2017 (AR 1191-1193, 1194-1234), and without either a factual or a legal basis for its flip-flop, completely reversed its position, issuing a Presidential permit ("Permit") for the Project on March 23, 2017. AR 2485-2489, 2490-2520.

In order to enforce this nation's laws protecting the environment, plaintiffs Indigenous Environmental Network ("IEN") and North Coast Rivers Alliance ("NCRA") (collectively, "plaintiffs") brought this action for declaratory and injunctive relief against defendants United States Department of State ("State"), Under Secretary of State Thomas A. Shannon, United States Fish and Wildlife Service ("FWS"), Acting Director of the United States Fish and Wildlife Service James Kurth, and Secretary of the Interior Ryan Zinke (collectively, "Federal Defendants") to set aside their unlawful approval of the Project.

In approving the Project, the Federal Defendants violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. section 4321 *et seq*., the Endangered Species Act ("ESA"), 16 U.S.C. section 1531 *et seq*., the Administrative Procedure Act ("APA"), 5 U.S.C. section 701 *et seq*., and regulations promulgated thereunder.

State's NEPA review of the Project was inadequate. The Final Supplemental Environmental Impact Statement ("FSEIS") fails to (1) provide a

detailed and independent Project purpose and need, (2) analyze all reasonable alternatives to the Project, including the foreseeable alternative that was recently approved through Nebraska, (3) study the Project's transboundary effects, (4) disclose and fully analyze many of the Project's adverse environmental impacts to hydrology, cultural resources of Indigenous Peoples, and climate, (5) formulate adequate mitigation measures, (6) respond adequately to comments, and (7) consider and analyze the newly approved route through Nebraska. In addition, the FSEIS was irredeemably tainted because it was prepared by Environmental Resources Management ("ERM"), a company with a substantial conflict of interest.

State violated the ESA and FWS violated the APA because they failed to fully analyze the Project's potential effects on threatened and endangered species, failed to use the best scientific and commercial data available, and entirely failed to consider the Project's effects on the endangered northern swift fox, contrary to 16 U.S.C. section 1536(a)(2).

Because the Federal Defendants failed to adequately analyze the Project's impacts on the environment and imperiled species in violation of NEPA, the ESA and the APA, this Court must grant summary judgment to plaintiffs, and set aside Federal Defendants' unlawful and unsupported Project approval.

STANDARD OF REVIEW

The APA governs this Court's review of State's compliance with NEPA and FWS' compliance with the ESA. *Western Watersheds Project v. Kraayenbrink*,

632 F.3d 472, 481 (9th Cir. 2011). Under the APA, 5 U.S.C. section 706, this Court must set aside the Federal Defendants' Project approval if it is "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if [it] failed to meet statutory, procedural, or constitutional requirements." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971) (overruled in part on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977) (internal quotations omitted)). In applying the arbitrary and capricious standard, the court must "engage in a substantial inquiry" and conduct a "thorough, probing, in-depth review." *Oregon Natural Resources Council Fund v. Brong*, 492 F.3d 1120, 1125 (9th Cir. 2007). "[W]hen an agency has taken action without observance of the procedure required by law" this Court must set that action aside. *Sierra Club v. Bosworth*, 510 F.3d at 1023.

"The Supreme Court has identified NEPA's 'twin aims' as 'plac[ing] upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action[, and] ensur[ing] that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.'" *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Com'n*, 449 F.3d 1016, 1020 (9th Cir. 2006) (quoting *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983)). The "procedural requirements prescribed in NEPA and its implementing regulations are to be strictly interpreted to the fullest extent possible in accord with the policies embodied in the Act. Grudging, pro forma compliance will not do." *California v. Block* ("*Block*"), 690

F.2d 753, 769 (9th Cir. 1982); *Center for Biological Diversity v. U.S. Forest Service,* 349 F.3d 1157, 1166 (9th Cir. 2003).

An agency's "policy change violates the APA 'if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so.'" *Organized Village of Kake v. U.S. Dept. of Agriculture*, 795 F.3d 956, 966 (9th Cir. 2015) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009)).

Judicial review of the Federal Defendants' violations of the ESA raised pursuant to its citizen-suit provision is not limited by the APA. Order on Motion to Limit Judicial Review, ECF 113, filed December 12, 2017 ("Judicial Review Order"), 2 (citing *Washington Toxics Coalition v. EPA*, 413 F.3d 1024, 1034 (9th Cir. 2005)). The Court may rely on expert reports and other evidence. Judicial Review Order 3 (citing *Western Watersheds Project*, 632 F.3d at 497). While the "APA provides the standards of review for the ESA, [it] does not dictate the scope of judicial review," which is not limited to the facts contained in the agencies' administrative record. Judicial Review Order 3.

STANDING

Plaintiffs have standing to bring this action because (1) they will suffer an injury-in-fact that (2) is fairly traceable to the Federal Defendants' challenged actions and (3) is likely to be redressed by a favorable court decision. *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009).

To demonstrate injury-in-fact, a plaintiff must show "an invasion of a

legally protected interest" that is both "concrete and particularized." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). As this Court ruled in denying the defendants' motions to dismiss, "[t]he relevant showing 'is not injury to the environment, but injury to the plaintiff.'" Order filed November 22, 2017 (ECF 99) ("Order") 24 (quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 181 (2000)).

Plaintiffs have demonstrated that the Keystone XL Pipeline would harm their legally-protected interests in "concrete and particularized" respects. First, it would disturb 1,200 miles of lands and waters during construction, and its operation would pose a risk of contamination of water courses such as the Missouri River, the Yellowstone River, and the Cheyenne River that plaintiffs' members use for drinking water, fishing and other cultural and recreational pursuits, and that wildlife use for habitat. Declaration of Tom B.K. Goldtooth in Support of IEN Plaintiffs' Motion for Summary Judgment ("Goldtooth Dec.") ¶¶ 10-18; Declaration of Kandi Mossett in Support of IEN Plaintiffs' Motion for Summary Judgment ("Mossett Dec.") ¶¶ 5-13; Declaration of Joye Braun in Support of IEN Plaintiffs' Motion for Summary Judgment ("Braun Dec.") ¶¶ 2-8; Declaration of LaVae High Elk Red Horse in Support of IEN Plaintiffs' Motion for Summary Judgment ("Red Horse Dec.") ¶¶ 2-5; Declaration of Bill Whitehead in Support of IEN Plaintiffs' Motion for Summary Judgment ("Whitehead Dec.") ¶¶ 4-13; Declaration of Frank Egger in Support of IEN Plaintiffs' Motion for Summary Judgment ("Egger Dec.") ¶¶ 3-19; Declaration of Kathleen Meyer in

Support of IEN Plaintiffs' Motion for Summary Judgment ("Meyer Dec.") ¶¶ 4-9.

Second, plaintiffs have shown that construction and operation of the Keystone XL Pipeline would, as the FSEIS, Biological Assessment and Biological Opinion prepared by the Federal Defendants concede, affect nine threatened and endangered 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. Plaintiffs have demonstrated that their members highly value each of these species, have studied and observed them in the wild and will continue to do so in the future, and that the Keystone XL Pipeline could harm them and their habitat. Goldtooth Dec. ¶ 15; Meyer Dec. ¶ 6; Egger Dec. ¶ 19. As the Supreme Court held in *Lujan*, the "desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for the purpose of standing." *Lujan*, 504 U.S. at 562-563. Accordingly, this Court held, in rejecting the defendants' motions to dismiss, that these "harms constitute injuries-in-fact." Order 25.

Plaintiffs have demonstrated that the foregoing injuries-in-fact they would suffer would be "fairly traceable" to the Federal Defendants' approval of the Keystone XL Pipeline. *Summers*, 555 U.S. at 493. They have shown that construction and operation of the Project would harm fish and wildlife habitat, water quality, fertile farm land and ranch land, scenic and recreational enjoyment, and spiritual and cultural practices and fulfillment. Goldtooth Dec. ¶¶ 12-18;

Mossett Dec. ¶¶ 6-13; Braun Dec. ¶¶ 5-8; Red Horse Dec. ¶¶ 2-5; Whitehead Dec. ¶¶ 4-13; Meyer Dec. ¶¶ 4-10; Egger Dec. ¶¶ 5-19.

Finally, plaintiffs have demonstrated that their injuries are procedural, and would be redressed by a favorable court decision. *Summers*, 555 U.S. at 493. Plaintiffs have alleged procedural injuries under NEPA and the ESA. As this Court ruled in rejecting defendants' motions to dismiss, "[t]he Ninth Circuit has determined that a remedy 'procedural in nature' would redress a procedural NEPA injury." Order 23 (quoting *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 860 (9th Cir. 2005)). Accordingly, this Court held that "[p]laintiffs' alleged procedural injuries could be redressed through the procedural remedy of an adequate environmental review under NEPA." *Id.*

Similarly, this Court held that plaintiffs "have met the redressability requirement for the ESA and APA claims." *Id.* 25. As this Court explained, a "[p]laintiff asserting a procedural violation under Section 7 of the ESA needs to show only that the relief requested could protect the plaintiffs' concrete interest in the species." *Id.* (citing *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1226 (9th Cir. 2008)).

Consequently, this Court agreed with plaintiffs that their "request that the [U.S. Fish and Wildlife Service] engage in a formal consultation that includes a complete and non-arbitrary analysis of the Keystone XL Pipeline's alleged threat to the potentially effected species . . . could protect the Plaintiffs' concrete interests and thereby redress Plaintiffs' claim." *Id.*

Since plaintiffs have satisfied all three prongs of the test for standing under *Summers*, they have demonstrated their standing to bring their claims under NEPA, the ESA and the APA.

PROCEDURAL BACKGROUND

On May 4, 2012, State received an application from TransCanada for a Presidential permit for a crude oil pipeline that would run from the Canadian border to an existing pipeline in Steele City, Nebraska. AR 1-50. On March 1, 2013, State released a Draft Supplemental Environmental Impact Statement ("DSEIS") for that Project, and the 45-day public comment period commenced on March 8, 2013. AR 243-244, 27812-31582. State received more than 1.5 million comments on the DSEIS. AR 2494.

On May 15, 2013, FWS issued its Biological Opinion ("BiOp") for the Project. FWS Administrative Record ("FWS AR") 2036-2122.

State then provided an additional 30-day opportunity for the public to comment during the National Interest Determination ("NID") period that began with its February 5, 2014 notice in the Federal Register announcing release of the FSEIS. AR 503. State received more than 3 million comments during that time. AR 2494.

On November 6, 2015, Secretary of State John Kerry determined in a 32-page ruling under Executive Order 13337 that issuing a Presidential permit for the Project would *not* serve the national interest, and *denied* the permit application. AR 1157-1188. Despite Secretary Kerry's thoroughly documented finding that the

Project would not serve the national interest, on January 24, 2017, President Donald Trump issued a Presidential Memorandum Regarding Construction of the Keystone XL Pipeline which, *inter alia*, invited TransCanada "to resubmit its application to the Department of State for a Presidential permit for the construction and operation of the Keystone XL Pipeline." AR 1191-1192.

TransCanada resubmitted an application for the Project on January 26, 2017, which included purportedly minor route alterations due to agreements with local property owners for specific rights-of-way and easement access, ostensibly within the areas previously included by State in its FSEIS. AR 1194-1234.

On March 23, 2017, State granted TransCanada's Presidential Permit authorizing Project construction, and simultaneously issued a Record of Decision ("ROD") and NID. AR 2485-2489, 2490-2520, 2521-2523. Plaintiffs filed their Complaint four days later, on March 27, 2017. ECF 1.

Defendants moved to dismiss this action on June 9, 2017 and filed a supplemental motion to dismiss on August 18, 2017. ECF 44, 48, 68, 70. After extensive briefing by all of the parties (ECF 44, 48, 49, 60, 65, 66, 67, 68, 69, 70, 71, 74, 79, 80), the filing of an unopposed First Amended Complaint by plaintiffs (ECF 61, 72), and oral argument on October 11, 2017 (ECF 87), the Court correctly decided on November 22, 2017 to deny defendants' motions. Order (ECF 99).

However, since that time the Project's route has changed. After TransCanada filed an application with the Nebraska Public Service Commission

("NPSC") seeking approval of its route through Nebraska pursuant to Nebraska's Major Oil Pipeline Siting Act, the NPSC issued an Order on November 20, 2017 rejecting TransCanada's proposed route and instead approving the Mainline Alternative that shifted the pipeline to the east. RJN, Mainline Order. Notably however, the Mainline Alternative had not been considered, let alone analyzed, in State's FSEIS. AR 5946-5950, 6050-6123, 7456-7647. Despite the Federal Defendants' complete lack of analysis of this approved route and its significant impacts, defendants erroneously contend that their Project approvals are lawful.

I. THE PROJECT APPROVAL VIOLATES NEPA

By granting the Presidential Permit to TransCanada based on an inadequate FSEIS, State violated NEPA, 42 U.S.C. section 4321 *et seq.,* and its implementing regulations, 40 C.F.R. section 1500 *et seq*. By approving the Project without complying with NEPA, State failed to proceed in accordance with law in violation of the APA, 5 U.S.C. section 706(2)(A) and (D).

A. STATEMENT OF PURPOSE AND NEED

An EIS must "specify the underlying purpose and need to which the agency is responding in proposing the alternatives included in the proposed action." 40 C.F.R. § 1502.13. In preparing this statement of the underlying purpose and need, "'an agency cannot define its objectives in unreasonably narrow terms.'" *National Parks & Conservation Association v. Bureau of Land Management*, 606 F.3d 1058, 1070 (9th Cir. 2010) ("*NPCA*") (quoting *City of Carmel–By–The–Sea v. United States Department of Transportation*, 123 F.3d 1142, 1155 (9th Cir.1997)).

"One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing 'reasonable alternatives' out of consideration (and even out of existence)." *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 666 (7th Cir. 1997). While an agency may consider the private goals of an applicant, it must also examine its own goals, as determined by its "'statutory authorization to act [and] other congressional directives,'" to determine the "scope of the proposed project." *NPCA*, 606 F.3d at 1070 (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991)).

State "may not circumvent" NEPA's "proscription [that State not define its objectives in unreasonably narrow terms] by adopting private interests to draft a narrow purpose and need statement that excludes alternatives that fail to meet specific private objectives." *NPCA*, 606 F.3d at 1072. Yet it did just that. The FSEIS states that "the primary purpose of the proposed Project is to provide the infrastructure to transport Western Canadian Sedimentary Basin (WCSB) crude oil from the border with Canada to existing pipeline facilities" in Nebraska – at contract amounts of approximately 555,000 barrels per day ("bpd")– for eventual delivery to refineries on the Gulf Coast. AR 5756, 5651. It also states that TransCanada would allow up to 100,000 bpd of the Project's capacity to transport crude oil from the Bakken shale formation, for which it has already signed long-term contracts for 65,000 bpd. AR 5756. The FSEIS relies upon TransCanada's existing crude-delivery contracts and "existing demand by Gulf Coast area refineries for stable sources of crude oil" to establish the primary purpose of the

Project. *Id.*

Similarly, per the FSEIS, the Bureau of Land Management's "purpose and need for the proposed Project is to respond to the Keystone application under Section 28 of the Mineral Leasing Act, as amended, for a right-of-way (ROW) grant to construct, operate, maintain, and decommission a crude oil pipeline and related facilities on federal lands in compliance with the Mineral Leasing Act, BLM ROW regulations, and other applicable federal laws." AR 5758. Thus the FSEIS fails to articulate an underlying *federal* purpose for the Project, separate from TransCanada's narrow purpose as stated in its application.

While State may attempt to rely upon *City of Angoon v. Hodel*, 803 F.2d 1016 (9th Cir. 1986), it is distinguishable. There, the agency's then-applicable NEPA regulations limited the study of alternatives to those that satisfy "the purpose and need . . . for which the applicant has submitted his proposal." *Id.* 1021. State's regulations implementing NEPA have no similar limit. 22 C.F.R. part 161. Instead, they incorporate the Council on Environmental Quality ("CEQ") regulations, including 40 C.F.R. part 1502. *See*, *e.g.*, 22 C.F.R. §§ 161.9 (NEPA procedures), 161.10 (NEPA regulations addressing pipelines that cross an international border). Further, Executive Order 13337 requires State to consider the national interest.

By needlessly narrowing the Project's scope, the FSEIS unduly constrains the purpose of the Project to implementing TransCanada's contractual obligations – allowing State to reject from detailed consideration any alternative that did not

allow for sufficient oil deliveries to meet those obligations. AR 5674; *see also* AR 6051-6052. Thus the FSEIS only examines alternatives that address moving oil from the WCSB and the Bakken shale formation to market (*e.g.*, AR 6050-6052), and not alternatives that would address the nation's energy goals *through other means*. Its narrow purpose and need statement led State to unreasonably restrict the range of alternatives considered, omitting feasible and much more environmentally beneficial renewable energy and energy efficiency alternatives. This violates NEPA. *NPCA*, 606 F.3d at 1070-1072.

B. REASONABLE RANGE OF ALTERNATIVES

The alternatives analysis "is the heart of the environmental impact statement." 40 C.F.R. § 1502.14. An EIS must "[r]igorously explore and objectively evaluate all reasonable alternatives" so that "reviewers may evaluate their comparative merits." 40 C.F.R. § 1502.14(c); 42 U.S.C. § 4332. An "agency must consider appropriate alternatives which may be outside its jurisdiction or control, and not limit is attention to just those it can provide." *Sierra Club v. Lynn*, 502 F.2d 43, 62 (5th Cir. 1974). "The existence of a viable but unexamined alternative renders an environmental impact statement inadequate." *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008); *Southeast Alaska Conservation Council v. Federal Highway Administration*, 649 F.3d 1050, 1056-1059 (9th Cir. 2011).

Here, State's range of alternatives is deficient for three reasons. First, State unreasonably dismissed alternatives that failed to satisfy TransCanada's private

purposes. Second, and relatedly, State failed to consider any feasible – and more environmentally-beneficial – alternative for aggressive renewable energy and energy efficiency measures that obviate the claimed need for the Project's crude oil production and transportation. Third, State's FSEIS does not include as an alternative the pipeline route through Nebraska that TransCanada *actually intends to implement* – let alone analyze that alternate. *E.g.*, AR 6096 (Major Route Alternatives). Each of these reasons provides independent grounds to set aside State's approval.

1. Alternatives Only Satisfied TransCanada's Private Purposes

State "developed [alternatives] based on the purpose and need for the proposed Project." AR 5946. As shown in Section A, above, State determined that "[a]lternatives that failed to meet the screening criteria were not brought forward for detailed analysis" – and screening criteria included "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." AR 5674; *see also* AR 6051-6052. Thus, every "action" Alternative that State analyzed in detail was designed to meet TransCanada's contractual obligations, not the public interest. AR 7396.

Because State constrained its objectives to fit only the Project as proposed, it effectively limited the acceptable range of alternatives rather than considering the reasonable range of alternatives that NEPA requires. By "unreasonably

narrow[ing its] consideration of alternatives so that the outcome is preordained," State violated NEPA. *Alaska Survival v. Surface Transportation Board*, 705 F.3d 1073, 1084 (9th Cir. 2013); *NPCA*, 606 F.3d at 1070.

2. State Failed to Analyze An Action Alternative that Markedly Reduces Demand for Crude

State declined to consider the feasible and environmentally beneficial action alternative of adopting aggressive renewable energy and energy efficiency measures to obviate the claimed need for more crude oil. Instead, after a cursory discussion, the FSEIS states that "use of alternative energy sources and energy conservation in meeting needs for transportation fuel have not been carried forward for further analysis as an alternative to the proposed Project." AR 6093; *see also* AR 7890 ("alternative energy sources would not meet the demand for transportation fuels").

State's 2011 FEIS acknowledges that "*if* policies and legislation were adopted to more aggressively respond to climate change in the United States by promoting fuel efficiency, electrification of motor vehicles, and/or alternative fuels, there could be a *substantial* reduction in demand for crude oil in the coming decades." AR 18699 (emphasis added). It also recognizes that if global policies were set "consistent with the goal to limit climate change to 2°C over pre-industrial levels, which equates to stabilizing [greenhouse gas ("GHG")] CO_2-equivalent emissions at 450 [parts per million ("ppm")]," existing transboundary pipelines could accommodate the level of crude required to meet resulting

demand. AR 18700-18701.[2]

But State then asked the wrong question by considering only whether *demand* for crude would be met under a policy scenario that attains existing climate change goals. Instead, State should have asked and analyzed whether it is in the national interest to promote such a climate-friendly alternative, which would force a *reduction* in crude production, and thereby curtail rather than exacerbate fossil fuel-induced climate change.

The Environmental Protection Agency ("EPA") criticized State's conclusion that, even without the Project, "oil sands crude will find a way to market." ECF 125-2, p. 4 of 8 (April 22, 2013 EPA Letter, 3). Indeed, EPA informed State that the DSEIS lacked sufficient analysis of how cost pressures could impact the demand for oil sands crude. *Id.* In part because this information was missing, EPA indicated that the DSEIS was "insufficient." *Id.*, 7 of 8; AR 7726-7733. State's FSEIS did not remedy this omission, and State failed to respond to EPA's comments on this point. AR 7726-7733. Yet State's ROD relies upon this inadequate analysis. AR 2517-2518. By failing to examine a viable alternative that reduces demand for crude oil through energy efficiency and the use of alternative energy sources, State failed to consider a reasonable range of alternatives. This violates NEPA. 40 C.F.R. § 1502.14; *NPCA*, 606 F.3d at 1070; *Friends of Yosemite Valley*, 520 F.3d at 1038.

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[2] The FSEIS incorporates this analysis by reference. AR 6089.

3. State's Environmental Analysis Fails to Consider the Alternative that TransCanada Intends to Implement

State failed to analyze the feasible alternative that TransCanada now plans to implement. As discussed above, the NPSC rejected TransCanada's proposed route through Nebraska, and instead approved the Mainline Alternative – which was never discussed in the FSEIS. RJN, Mainline Order; AR 6096. The Mainline Alternative changes the Project, as approved by State, by rerouting it east through Madison County, Nebraska, and after approximately 50 miles, turning south and co-locating with the existing Keystone pipeline for the remaining approximately 95 miles to Steele City, Nebraska. RJN, Mainline Order, pp. 47, 49. TransCanada's new route goes far beyond the "minor adjustments to the proposed pipeline alignment" that the FSEIS declined to analyze in detail, but acknowledged might occur. AR 5953. The new route instead extends miles outside of the boundaries that were studied in the FSEIS. RJN, Mainline Order, pp. 47, 49; AR 6096. State's failure to analyze this viable alternative and its impacts – particularly now that it has *become* TransCanada's intended Project – violates NEPA. *Friends of Yosemite Valley*, 520 F.3d at 1038; *Southeast Alaska Conservation Council*, 649 F.3d at 1056-1059.

C. ENVIRONMENTAL IMPACTS

An EIS must take a "hard look" at the environmental impacts of proposed major federal actions and provide a "full and fair discussion" of those impacts. 40 C.F.R. § 1502.1; *National Parks & Conservation Association v. Babbitt*

("*Babbitt*"), 241 F.3d 722, 733 (9th Cir. 2001). Here, however, the FSEIS' discussion of many environmental and cultural impacts is absent or inadequate.

1. Extraterritorial Impacts

Federal agencies must consider the international impacts of their proposed actions. "[U]nder NEPA, agencies must analyze extraterritorial effects of actions before they can issue a permit." *Backcountry Against Dumps v. Chu*, 215 F.Supp.3d 966, 980 (S.D. Cal. 2015); *Backcountry Against Dumps v. United States Department of Energy*, Case No. 3:12-cv-03062-L-JLB (S.D. Cal. Jan. 30, 2017) ("Defendants had a duty to consider the environmental impacts upon Mexico stemming from all portions (the U.S. Line, the Mexico Line, and the ESJ Wind Farm) of the Project. . . . By not considering such impacts in the FEIS, Defendants violated NEPA."); *Government of the Province of Manitoba v. Salazar*, 691 F.Supp.2d 37, 51 (D.D.C. 2010) (federal agencies must consider the effects of their actions taken within the United States that are felt across sovereign borders, such as in Canada); *Border Power Plant Working Group v. Department of Energy*, 260 F.Supp.2d 997 (S.D. Cal. 2003) (same); *Hirt v. Richardson*, 127 F.Supp.2d 833, 844 (W.D. Mich. 1999) (holding that "the facts in this case warrant extraterritorial application of NEPA"); *National Organization for Reform of Marijuana Laws v. United States Department of State*, 452 F.Supp. 1226, 1232-33 (D.D.C. 1978) (court "assume[d] without deciding, that NEPA is fully applicable to the Mexican herbicide spraying program" in which the U.S. was participating, and required an analysis of the program's impacts in Mexico); *Sierra Club v.*

Adams, 578 F.2d 389, 392 (D.C. Cir. 1978) ("[i]n view of the conclusions we reach in this case, we need only assume, without deciding, that NEPA is fully applicable to construction in Panama"); *Wilderness Society v. Morton*, 463 F.2d 1261 (D.C.Cir. 1972) (holding that Canadian citizens had standing to intervene in a NEPA-based suit on the basis of their claims that possible oil spills from the Trans-Alaskan oil pipeline might cause damage to Canada).

Here, State claims that it is not legally required to "conduct an in depth assessment of the potential impacts of the Canadian portion of the proposed pipeline," but that, "as a matter of policy," State included information regarding potential impacts in Canada." AR 7358. However, as shown State is wrong as a matter of law in claiming that it need not analyze the Project's effects in Canada, and its proffered "information" falls far short of the "hard look" that NEPA requires. *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972).

Among the extraterritorial impacts that should have been – but were not – fully analyzed in the FSEIS are the impacts of an increase in bitumen tar sands mining in Canada that will result from the Project. The very premise of the FSEIS' limited discussion of the impacts of oil sands extraction – that the "Project would not contribute to cumulative impacts associated with bitumen extraction activities" – is fundamentally incorrect. AR 7369. It defies logic to claim, as does the FSEIS, that because the pipeline (which will carry bitumen) is located slightly southeast of the point of extraction of the bitumen it will carry, the pipeline bears

no relation to that extraction. *Id*. This type of fragmented analysis is exactly what NEPA is designed to avoid.

In addition, to the extent that the FSEIS does superficially analyze the impacts of oil sands extraction, it profoundly understates those impacts. AR 7369-7374. For example, the FEIS and DSEIS claim that 232 square miles "have been disturbed by oil sands mining activity," and the FSEIS slightly increases this number, admitting that 276 square miles "of land have been disturbed." AR 7372. According to the DSEIS, the number of square miles (232) that had been disturbed by oil sands mining activity and the number of square miles that were in the process of reclamation (26) did not change between the time of the release of the original FEIS in August, 2011 and the release of the DSEIS *19 months later* in March, 2013. AR 9156, 18665. This cannot be true, and is emblematic of State's failure to provide accurate information regarding the Project's severe impacts in Canada.

The FSEIS also implies that tar sands mining sites can be and are being reclaimed. AR 7373. However, it cites no evidence to support this claim. NEPA requires facts, not "speculation." *Foundation for North American Wild Sheep v. U.S. Department of Agriculture* ("*Foundation*") 681 F.2d 1172, 1179 (9th Cir. 1982) ("[T]he very purpose of NEPA's requirement that an EIS be prepared for all actions that may significantly affect the environment is to obviate the need for . . . speculation by insuring that available data is gathered and analyzed prior to the implementation of the proposed action"). If tar sands mining devastates the land

so severely that such sites cannot be reclaimed within a human lifetime, if ever, that impact must be disclosed and analyzed, rather than hidden under the FSEIS' claims that such sites can be returned to "self-sustaining ecosystems over time." AR 7373. "Over time" is meaningless because it is indefinite as to duration. It could easily mean a thousand years.

The FSEIS also fails to analyze the fact that tar sands mining releases massive amounts of sulfur dioxide and elemental sulfur into the surrounding environment, including both soil and water, harming birds and other wildlife. Sulfur emissions are only considered in the cumulative analysis with regard to refineries, and the extraterritorial impacts from sulfur emissions of tar sands mining are never discussed. AR 7345, 7358-7381.

Finally, the FSEIS fails to adequately analyze the severe environmental hazards posed by tailings ponds, which contain a witches' brew of toxic tar sands, tar, crude oil, sulfur, heavy metals and other contaminants that remain for decades after the oil extraction process. AR 7377-7378. Such ponds pose massive risks to wildlife, especially birds that are attracted to and land on the ponds. For example, Syncrude Canada, the largest tar sands oil extraction company in Canada, runs one lake-sized reservoir that killed over 1,600 birds in 2008 alone. AR 1680-1681, 7378. In light of their significant risks, tailings ponds should be fully addressed in the FSEIS' analysis of environmental impacts, not simply mentioned as posing an unstudied "exposure risk" for birds, and discussed only in three vague overview paragraphs – paragraphs that discuss efforts to *mitigate* risks of harm, rather than

disclosing and analyzing the full extent of the *harms* themselves. AR 7375, 7378.

By failing to analyze the Project's foreseeable and harmful extraterritorial impacts, the FSEIS violates NEPA.

2. Hydrologic Impacts

The FSEIS fails to accurately identify or evaluate the potential impacts of spills and leaks on the surface and subsurface water resources. State's failure to examine and disclose the Project's extreme water contamination risks violates NEPA.

The FSEIS does not appropriately examine the risks posed by the mixture of tar sands and trade-secret chemical diluents used in the transport of tar sands bitumen commonly referred to as diluted bitumen or "dilbit." Dilbit often sinks below the water's surface, can be suspended in water columns, and can intermix with sediment where it then can be a source of persistent contamination. AR 6026. Despite these characteristics, State used EPA's Hydrocarbon Spill Screening Model ("HSSM") to "assess the potential impact to groundwater" and "determine the extent of [any] plume" from a leak or spill. AR 7852. But State admits the HSSM "is intended to provide order of magnitude estimates of contamination levels only" and "not designed to address dynamic conditions." AR 7852-7853. Further, it was not specifically designed to address dilbit, but instead was intended to evaluate "light non-aqueous phase liquid" – liquid that normally *floats* on water, rather than sinking. *Id.*

The Project traverses northern Holt County, Nebraska, through an area that

has permeable soil and a high water table – precisely the characteristics that forced State away from the 2011 Steele City Alternative's route through the Nebraska Sandhills. AR 6096, 6262, 6268, 7790. The conditions in northern Holt County pose grave risks to groundwater supplies when coupled with the Project's predictable rate of future oil and chemical spills. *E.g.*, AR 7643 (Project projected to release an average of approximately 518 barrels of oil per year due to spills and leaks). The FSEIS admits that the sandy soils in this area "could be potential recharge areas for underlying aquifers." AR 7790. Yet State lacks accurate modeling of the effects of dilbit on, and its movement within, the Northern High Plains Aquifer System. AR 6746 ("[n]o information regarding conditions related to large-scale petroleum releases was readily accessible for the alluvial aquifers or [Northern High Plains Aquifer] along the proposed pipeline area;" FSEIS analyzes these impacts based on *non-dilbit* crude oil spill in Bemidji, Minnesota), 7852-7853 (HSSM inappropriate for dynamic conditions).

This informational gap renders the FSEIS inadequate. When "there is incomplete or unavailable information" that is "essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the [EIS]." 40 C.F.R. § 1502.22; *Foundation*, 681 F.2d at 1179; *Oregon Natural Desert Association v. Singleton* ("*ONDA*"), 47 F.Supp.2d 1182, 1194 (D.Or. 1998) ("NEPA requires that the agency develop the data first, and then make a decision, not make a decision and then develop the data") (internal quotations and citation omitted); *Oregon*

Environmental Council v. Kunzman, 614 F.Supp. 657, 663 (D.Or. 1985). Without the missing information, State failed to take the required hard look at the Project's impacts.

The Project's unstudied impacts on water resources extend past the Nebraska Sandhills. For example, the FSEIS ignores the thousands of unrecorded and unsealed wells in the rural areas through which the Project would pass. AR 1637, 1810-1811. The Project also threatens community water supplies. It would cross the Missouri River just below the spillway of the Fort Peck Dam. This crossing is upstream of the intake for the Assiniboine and Sioux Rural Water Supply System ("ASRWSS") water treatment plant, which supplies potable water to the Fort Peck Reservation and surrounding communities. AR 4609-4611, 6276. The FSEIS states that "[a] distance of 10 miles downstream has been selected for impact evaluation," despite acknowledging that "spill plumes would possibly migrate up to 10 miles *with residual crude oil materials traveling further*." AR 6749 (emphasis added). The FSEIS asserts that these materials will not harm the ASRWSS because those materials would not "have a widespread effect." AR 6276, 6749, 6750 (quote). State's assumption that tar balls and other suspended dilbit will not harm ASRWSS's water treatment systems is directly contradicted by State's acknowledgment that dilbit spills create difficult cleanup scenarios that create additional recovery challenges when dilbit is suspended within flowing

water. AR 6026, 6613.[3] The FSEIS's conclusion that no significant impacts would occur is unsupported.

The FSEIS also fails to examine how the Fort Peck Dam increases the risk of catastrophic contamination. While the FSEIS states that TransCanada "has increased burial depth so stream scour does not pose a threat to pipeline integrity," the increased depth does not account for the scour forces associated with high water releases from the dam's spillway. AR 6028. Further the FSEIS fails to examine whether catastrophic failure of that spillway would undermine and thereby damage the pipeline, causing a large spill into the Missouri River upstream of the ASRWSS intakes. AR 4607, 4609-4611. Plaintiffs have standing to raise this issue. Whitehead Dec. ¶¶ 4-13 and Exhibit 1; Egger Dec. ¶¶ 6-17.

The FSEIS dismisses the risk of contamination by claiming that preventive action and other laws would mitigate oil spill risks. But the FSEIS also admits that subsurface releases may go undetected and percolate into groundwater resources. AR 7104, 7790. State's purported mitigation can neither fully avoid the risks posed to these vulnerable and critically needed water supplies, nor fully remediate and restore them after contamination.

3. Cultural Resource Impacts and Environmental Justice

NEPA mandates that agencies analyze cultural resource impacts in environmental impact statements. 40 C.F.R. §§ 1502.16(f), 1508.8. In addition,

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[3] The FSEIS does not accurately detail the proximity of the pipeline to the three ASRWSS intakes. Whitehead Dec. ¶ 6 and Exhibit 1.

Executive Order 12898 (February 11, 1994) requires that federal agencies, including State, "make achieving environmental justice part of [their] mission[s] by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority populations," including Indigenous Peoples. Yet in violation of both NEPA and Executive Order 12898, State inadequately addressed the environmental justice and cultural resource impacts of the Keystone XL Pipeline. Plaintiffs have standing to raise this issue. Goldtooth Dec. ¶¶ 5-18; Mossett Dec. ¶¶ 5-13; Braun Dec. ¶¶ 2-8; Red Horse Dec. ¶¶ 2-5.

The Project would irreparably and disproportionately harm Indigenous Peoples and other under-represented minority populations, while restricting its claimed economic benefits primarily to the corporate proponents of the Project and Canadian tar sands mining. AR 6528 (the Project area contains lands and resources "important to Native American peoples for subsistence gathering, collection of plants for medicines, spiritual and ceremonial purposes, and everyday life"), 7842 (these populations "have the potential to be disproportionately adversely affected by the proposed Project, including exposure to construction dust and noise, disruption to traffic patterns, and increased competition for medical or health services in the event of a spill or other incident").

The Project's social, cultural, and health impacts would extend from the tar sands mining areas in Canada, along the length of the Keystone XL Pipeline, and down into Texas where the tar sands dilbit would be processed and exported. AR

6520 ("cultural resources would be encountered" along the entire Project route), 6521 (265 archaeological sites and 132 historical structures were identified along the Project route), 6528 (the "Project area contains cultural resources resulting from human settlement and other activities since the time when the region was glaciated"), 7000 ("397 cultural resources identified within the proposed Project area of potential effects"). As the FSEIS acknowledges, the Project could cause "direct damage to cultural resources within the construction footprint," indirect damage caused by equipment and vibrations, loss of community access to resources, visual impacts, and noise impacts. AR 7004-7005. Despite these potentially significant impacts, "1,038 acres remain unsurveyed" for potential cultural resources. AR 6522. Plaintiffs have standing to raise this specific issue. Goldtooth Dec. ¶ 16; Braun Dec. ¶¶ 6-7.

The FSEIS acknowledges that avoidance is the best course of action for all of these cultural resources, but goes on to claim that "mitigation measures" would limit the Project's cultural impacts despite the fact that over 1,000 acres "remain unsurveyed" for cultural resources, and post-impact "mitigation" measures would be ineffectual. AR 7001, 7003 (speculating that impacts to cultural resources could be mitigated by protecting "a similar resource nearby," "detailed documentation of the resource," or establishing "interpretive exhibits"), 7006, 7011, 7015. The cultural and spiritual value of these sites and artifacts is inextricably linked to their location. These vague mitigation plans are insufficient to protect these important resources, and thus violate NEPA. *Robertson v.*

Methow Valley Citizens Council, 490 U.S. 332, 351-52 (1989); *City of Carmel-By-The-Sea*, 123 F.3d at 1154; 40 C.F.R. § 1502.14(f).

4. Climate Impacts

State failed to take a "hard look" at the Project's climate change impacts. Rather than "'foster [] informed decision-making and . . . public participation,'" the FSEIS omits critical analyses and weaves a blanket of false security. *NPCA*, 606 F.3d at 1072 (quoting *Block*, 690 F.2d at 761). The FSEIS' climate change analysis fails to satisfy NEPA for at least two reasons.

First, the FSEIS fails to quantify or otherwise substantively analyze the "impact that [the Project's] emissions will have *on climate change* . . . in light of other past, present, and reasonably foreseeable actions." *Center for Biological Diversity v. National Highway Traffic Safety Administration* ("*NHTSA*"), 538 F.3d 1172, 1216 (9th Cir. 2008) (emphasis added). The FSEIS' Greenhouse Gases and Climate Change section includes some scientific and regulatory context, an estimate of the Project's GHG emissions, a brief synopsis of Canada's GHG emissions, and a discussion of *climate change's* expected effects on the *Project and Project area*. AR 7196-7264. But the FSEIS *entirely* fails to analyze the "*actual* environmental effects" on "*climate change* [and] on the environment more generally" *from the Project-specific and cumulative GHG emissions*. *NHTSA*, 538 F.3d at 1216 (first emphasis original). What portion and what types of climate change impacts might be attributable to the Project-specific and cumulative GHG emissions? Despite purporting to include a subsection on "Cumulative

Greenhouse Gas Emissions and Climate Change Impacts," the FSEIS is silent. AR 7240-7242.

Indeed, the FSEIS fails to even list, let alone analyze the cumulative climate change impacts from, "other past, present, and reasonably foreseeable future actions," like the "significant number of [proposed] projects" that the FSEIS touts as "directly support[ing] the export of WCSB crudes and/or move WCSB and Bakken crudes to destination markets." AR 5805. State thereby violated NEPA. *NHTSA*, 538 F.3d at 1216-1217.

Second, the FSEIS' GHG emissions assessment is fatally flawed. The FSEIS trivializes the Project's GHG emissions by erroneously treating crude oil production as a zero-sum game. The FSEIS concludes that the 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." AR 7241. It asserts the Project would simply "replace or displace" other crude in U.S. refineries, and accordingly focuses its GHG emissions analysis on the "range of *incremental* GHG emissions" the Project would cause above the estimated emissions from the currently imported crude. AR 2501, 7241 (emphasis added). As a result, the FSEIS truncates its GHG emissions estimates from *147 to 168 million metric tons of CO_2 equivalents* ("$MMCO_2e$") annually to a mere (incremental) 1.3 to 27.4 $MMCO_2e$, which State then relies on to claim that the Project is "not likely to lead to a significant net increase in GHG emissions." AR 2500, 7241. Not only are the assertions undergirding the FSEIS' truncated estimates factually flawed, the

estimates impermissibly ignore the GHG emissions from "past, present, and reasonably foreseeable actions." *NHTSA*, 538 F.3d at 1216.

The FSEIS premises its first assertion – that the Project would not likely increase oil sands extraction and transport – on the assumption that other proposed oil pipeline or rail transport projects "would directly support the export of WCSB crudes and/or move WCSB and Bakken crudes to destination markets." AR 5805. But NEPA prohibits agencies from avoiding environmental impact analysis based on the speculative possibility that other projects would be built and cause similar impacts if the proposed project were denied. *Montana Environmental Information Center v. U.S. Office of Surface Mining*, — F.Supp.3d —, 2017 WL 3480262 at *15 (agency violated NEPA and the APA by "fail[ing] to consider the cost of greenhouse gas emissions from coal combustion" based on the "illogical conclusion" that "there would in fact be *no* effects from these emissions, because other coal would be burned in its stead").

Here, the State's own evidence and conclusions show that the alternative oil transport projects are speculative and do not support its "illogical conclusion" that the Project is "not likely to lead to a significant net increase in GHG emissions." AR 2500. The FSEIS acknowledges that the three pipeline projects it mentions "face significant opposition from various groups, and . . . may continue[] to be delayed." AR 5804. And State admits in the Presidential Permit itself that the "extent to which rail transport will actually occur . . . or would prove to be a major form of transport for WCSB crude to the United States in the long term, *remains*

uncertain." AR 2504 (emphasis added). Rail is already "a more expensive form of transportation than pipelines," but State expects it to become even more expensive with the "implementation of new Department of Transportation [safety] rules." *Id*. The recent low crude oil prices – currently hovering under $60 – make rail transport even less feasible for the high-cost WCSB crude. Many WCSB crude projects are only "expected to break even when sustained oil prices are in the range of $65-$75 per barrel." AR 2503. Evidence submitted by commenters throughout the permitting process confirms these and other impediments to WCSB crude development and export. AR 1591-2101; ECF 125-2.

Moreover, even if the alternative oil transport projects touted by the FSEIS were "reasonably foreseeable," the FSEIS would still violate NEPA. NEPA requires analysis of project-specific *and* cumulative GHG emissions from "past, present, and reasonably foreseeable actions." *NHTSA*, 538 F.3d at 1216; 40 C.F.R. § 1508.7.

The FSEIS's second assertion underpinning its truncated GHG emissions analysis is likewise unfounded and skirts the required cumulative impact analysis. Both record evidence and common sense refute FSEIS' conclusion that the Project is unlikely to increase U.S. refineries' demand for heavy crude. AR 7241. The FSEIS itself acknowledges that "[a]ctual heavy crude processing capacity is higher than current levels of heavy crude imports" to the U.S. AR 5781. With that additional capacity, refineries might choose to increase their production rather than simply replace existing imports. And as Sierra Club and others have

explained, "[i]ncreasing transportation capacity, and thus fossil fuel supply, leads to more greenhouse gas emissions in a variety of ways." AR 1855; *cf. Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520, 549 (9th Circ. 2005) ("proposition that the demand for coal will be unaffected by an increase in availability and a decrease in price . . . is illogical at best"); *Sierra Club v. U.S. Department of Transportation*, 962 F.Supp. 1037, 1043 (N.D.Ill. 1997).

Furthermore, even if the Project did not increase U.S. refineries' crude oil demand, the displaced supply from current exporters (like Mexico and Venezuela) would likely just be exported and used elsewhere. The FSEIS violates NEPA by failing to analyze that possibility, let alone the cumulative GHG emission impacts associated with it. *NHTSA*, 538 F.3d at 1216; 40 C.F.R. § 1508.7.

Because the FSEIS' GHG emissions and climate change impact analysis is internally inconsistent, incomplete and based on incorrect assumptions, it violates NEPA.

D. MITIGATION MEASURES

NEPA requires that an EIS include a "detailed discussion of possible mitigation measures." *Robertson*, 490 U.S. at 351-352; 40 C.F.R. § 1502.14(f). "[O]mit[ting] a reasonably thorough discussion of mitigation measures . . . would undermine the action-forcing goals of [NEPA]." *City of Carmel-By-The-Sea*, 123 F.3d at 1154. The FSEIS fails to adequately mitigate the Project's substantial risks.

For example, the FSEIS acknowledges that the risk of releases, spills, or

leaks poses dangers to the environment, but it fails to consider multiple available and feasible mitigation measures, including, for example, the sensors used by the Longhorn pipeline in Texas, and more frequent foot and aerial inspections. *E.g.*, AR 7069, 7863, 7866, 9161.

The FSEIS also implies that the impacts to birds from the Alberta tar sands tailings ponds are sufficiently mitigated because "[t]ailings settling ponds are designed and located after environmental review and bird deterrents are used to prevent birds from landing on tailings ponds." AR 7373. But the facts show otherwise. For example, over 1,600 ducks died in a single tailings pond in 2008, with hundreds more dying in the same pond in 2010, despite highly vaunted "bird deterrents" that proved to be completely ineffectual. AR 1680-1681. The FSEIS' single sentence on measures to reduce these well documented and continuing impacts lacks "sufficient detail to ensure that environmental consequences have been fairly evaluated." *Robertson*, 490 U.S. at 353; *South Fork Band Council v. U.S. Department of Transportation*, 588 F.3d 718, 727 (9th Cir. 2009).

E. RESPONSE TO COMMENTS

NEPA requires that agencies solicit public comments on draft environmental impact statements and respond to those comments. 40 C.F.R. §§ 1502.9(b), 1503.1(a)(4), 1503.4(a) (agency "shall assess and consider comments both individually and collectively, and shall respond, . . . stating its response in the final statement"). If the agency decides that a comment "do[es] not warrant further agency response," it must provide an explanation for this decision. 40

C.F.R. § 1503.4(a)(5); *Block*, 690 F.2d at 773-774; *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1183 (9th Cir. 2011) (EIS must "address[] substance of public comments").

Contrary to this mandate, State failed to adequately respond to the public's comments on the DSEIS. First, the FSEIS repeatedly offered completely irrelevant answers to plaintiffs' comments. *E.g.*, AR 7772-7773 (responding to plaintiffs' comment (AR 9159) that the purpose and need statement was impermissibly narrow with a paragraph that does not address the narrowness of the purpose and need statement), 7878 (failing to respond to plaintiffs' concerns (AR 9155) regarding outdated information), 7881 (failing to respond to plaintiffs' comments (AR 9156) regarding the discrepancy between the claimed and actual footprint of oil sands development, and the release of sulfur dioxide), 7882-7883 (failing to explain why the ineffective mitigation measures identified by plaintiffs (AR 9155-9156) will be sufficient to mitigate the admittedly significant impacts from tailing ponds on birds), 7887-7888 (failing to respond to plaintiffs' comments (AR 9157) about infeasibility of reclaiming mining sites), 7894 (failing to address the limited and inadequate purpose of the Project identified in plaintiffs' comments (AR 9158)). And, where State's response was relevant to the topic addressed in plaintiffs' comment, it was often unresponsive to the specific comment made. *E.g.*, AR 7856 (failing to address plaintiffs' comment (AR 9161) regarding potential impacts on unsealed and unrecorded wells), 7863 (ignoring the leak detection system mentioned by plaintiffs (AR 9161)), 7865-7866 (failing to

consider the feasibility of increased inspections (AR 9161)).

The FSEIS also only acknowledged numerous comments, rather than responding substantively – or at least, referring those commentors to the "Theme Codes" for responses. *E.g.*, AR 7914, 7915, 7920, 7922, 7923, 7931, 7959, 7980, 7988, 8153, 8173, 8229, 8321, 8454, 8473, 8541, 8542, 8545, 8635, 8743, 8888, 8986, 9106, 9339. These comments raised significant issues, including the effects of facilitating tar sands mining (AR 7915, 7920, 7931, 7980, 7988, 8153, 8321, 8541, 8542), indirect effects on the boreal forest and the migratory songbirds that it supports (AR 7923, 8173, 8454, 8473, 8542, 8635, 8986, 9106), questionable safety of waste disposal procedures (AR 8545), impacts to species (AR 8229, 8888, 9339), and risks of water pollution and oil spills (AR 7914, 7922, 7959, 8454, 8545, 8743). Responding to such comments with only an acknowledgment and no substantive discussion violates NEPA. *Sierra Forest Legacy*, 646 F.3d at 1183 (EIS must "address[] the substance of public comments").

F. CONFLICT OF INTEREST

State selected Environmental Resources Management ("ERM") to prepare the SEIS, despite ERM's financial and other interests in the Project's approval. This violates NEPA. 40 C.F.R. § 1506.5(c) (a contractor "shall execute a disclosure statement . . . specifying that they have no financial or other interest in the outcome of the project"). While State denies that a conflict exists (AR 7779-7780), the evidence shows otherwise.

In contrast to other contractors who correctly determined that it would be

improper to respond to the request for proposals for the SEIS, due to prior work with TransCanada and oil sands producers (AR 2600, 2603), ERM proceeded to bid nonetheless. AR 2659. ERM narrowed its answer to State's conflicts questionnaire by stating it had "no existing contract or working relationship with TransCanada" without addressing whether it had relationships with any *other* "business entity that could be affected in any way by the Project," as State had actually asked. AR 13071. In so doing, ERM failed to disclose business and consulting relationships with Chevron, Shell, ExxonMobil, BP, and ConocoPhillips, among others. AR 1818-1819. Chevron's oil sands interests in Alberta, Canada, and domestic refineries are likely to benefit from the Project, for example. AR 1299. These companies are "business entit[ies] that could be affected . . . by the proposed work" (AR 13071), and thus create a conflict. 40 C.F.R. § 1506.5(c).

ERM also claimed it was not an "energy concern," which includes any person "significantly engaged in the business of conducting research, [or] development" related to "developing, extracting, producing, refining, [or] transporting by pipeline . . . minerals for use as an energy source, or in the generation or transmission of energy from such minerals." AR 13071. Yet ERM admits "[t]he oil and gas sector is one of our largest strategic client sectors." AR 13031.

While ERM's bid disclaimed any "business relationship with TransCanada" (AR 13067, 13071), two months later, ERM disclosed prior work with

TransCanada. AR 3519 (ERM affiliate, worked on TransCanada and ExxonMobil's joint-venture Alaska Pipeline Project, amongst other actions). ERM also disclosed that it was reviewing environmental assessments for other TransCanada pipelines, but State nonetheless allowed ERM to continue with the contract, asking only that ERM keep personnel separated – *but ERM failed to do so.* AR 1818-1819.[4] A company that depends on mining, oil, gas, and other energy companies for most of its contracts and revenues has an interest in preparing a report that allows those businesses to continue.

State determined it "lack[ed] the resources to fact-check all of the assertions made" regarding conflicts of interest, and thus did not do so. AR 3381. State's failure to guarantee that ERM would not benefit from Project approval, and reliance upon ERM's tainted review, violated NEPA. 40 C.F.R. § 1506.5(c). The FSEIS and Project approval must be set aside.

G. NEBRASKA ROUTE

State's approval is unlawful because the environmental analysis underlying that decision never considered the newly approved Nebraska route. AR 5958; RJN, Mainline Order. As this Court has already determined, "issuance of the Presidential permit would constitute a 'major Federal action'" requiring NEPA

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[4] Plaintiffs note that State's AR excludes relevant documents on this point. Further, State's redaction of ERM's project experience prevents plaintiffs from providing additional evidence of ERM's conflicts. *E.g.* AR 13051-13066. Should this Court grant plaintiffs' pending motion to complete the record, plaintiffs will seek leave to supplement this memorandum.

analysis "to address reasonably foreseeable impacts from the proposed action." Order 8. State cannot avoid its duties under NEPA by ignoring the newly approved Nebraska route. Rather, the EIS must analyze all of the "reasonably foreseeable impacts from the proposed action," including those from the changed Nebraska route. *Id.*

State had to address the Nebraska route because it is obviously a "connected action" to the Project. 40 C.F.R. § 1508.25(a)(1); 22 C.F.R. § 161.1 (State "regulations are designed to supplement the CEQ Regulations"). Connected actions must be considered together in a single EIS. *Id*. The NEPA regulations define connected actions as those that "[a]utomatically trigger other actions which may require environmental impact statements," "[c]annot or will not proceed unless other actions are taken," or "[a]re interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1). In determining whether two actions are "connected" for the purposes of NEPA, courts examine whether the two actions have "independent utility," *Daly v. Volpe*, 514 F.2d 1106, 1110 (9th Cir. 1975), or whether it would be "irrational, or at least unwise, to undertake the first phase [of the project] if subsequent phases were not also undertaken." *Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985) (overruled on other grounds by *Cottonwood Environmental Law Center v. U.S. Forest Service*, 789 F.3d 1075, 1088-1092 (9th Cir. 2015).

Because the Project comprises one single pipeline that would transport oil from Canada into the U.S. and "traverse Montana, South Dakota, and Nebraska,"

the Nebraska component is a connected action. AR 5953. The approved route through Nebraska "cannot [and] will not proceed unless" the remainder of the Keystone XL Pipeline is constructed. 40 C.F.R. § 1508.25(a)(1). It is an "interdependent part[] of a larger action" and entirely "depend[s] on the larger action for [its] justification." *Id.* The Nebraska portion of the pipeline is thus but "one link" in the Keystone XL Pipeline chain. *Border Power Plant Working Group*, 260 F.Supp.2d at 1013-1014 (holding that power plant in Mexico is part of the same chain as transmission line and must be considered in same EIS).

The Nebraska route has no "independent utility" from the remainder of the Pipeline. *Daly*, 514 F.2d at 1110. Without the remainder of the Project, the Nebraska portion would simply be a pipe running through the state, ending abruptly at the border. Unlike the roadway in *Daly*, the Nebraska portion of the Pipeline has no logical termini and cannot function independently. *Id.* The entirety of the Pipeline is "so interrelated that no one . . . part of [the pipeline] can function as an efficient carrier of [oil] except in conjunction with the others," necessitating a single EIS that "would have as its subject all of the [pipeline] . . . which could only function efficiently as a unit." *Id*. (quoting *Movement Against Destruction v. Volpe*, 361 F.Supp. 1360, 1384 (D.Md. 1973)). Consequently, all segments of the Pipeline must "be treated as a single [pipeline] for the purposes the EIS." *Id.*

Like in *Thomas*, where the court held that "it would be irrational to build the road and then not sell the timber to which the road was built to provide access," "it

would be irrational, or at least unwise, to undertake" the Nebraska portion of the pipeline if it were not connected to the remainder of the pipeline and therefore able to transport oil. *Thomas*, 753 F.2d at 759. Because there would be no reason to "consider constructing only the segment in question," the Nebraska portion has no independent utility and is a connected action that must be considered together with the remainder of the Project in a single EIS. *Id.*; 40 C.F.R. § 1508.25(a)(1). Indeed, the FSEIS discusses the *previous* Nebraska route in detail. AR 5963. But the FSEIS entirely fails to discuss the finally approved Nebraska route. *Compare* AR 5958, 5963, 5968 *with* RJN, Mainline Order, pp. 48-51.

State must evaluate the impacts of the actual Project, including its approved route through Nebraska, and make an informed decision based on such analysis. Because it failed to consider the newly approved Nebraska route in the FSEIS, State violated NEPA.

II. THE PROJECT APPROVAL VIOLATES THE ENDANGERED SPECIES ACT

A. BIOLOGICAL ASSESSMENT AND BIOLOGICAL OPINION

The ESA, 16 U.S.C. § 1531 *et seq*., requires federal agencies to ensure that their actions are not likely to jeopardize the continued existence of any endangered or threatened species. 16 U.S.C. § 1536(a)(2). First, agencies authorizing activities such as the Project must consult with and prepare a biological assessment ("BA") for FWS. 16 U.S.C. § 1536(a). This BA is used by FWS to prepare a BiOp assessing the project's impacts on endangered and threatened

species. 16 U.S.C. § 1536(c); 50 C.F.R. § 402.12. FWS has a duty to identify a BA's deficiencies so that FWS can perform a thorough consultation and prepare an adequate BiOp. *Id.*; 50 C.F.R. § 402.14.

Here, State's BA was deficient and FWS failed to identify the deficiencies in the BA. FWS AR 2045 (limiting BiOp analysis to only those species identified in the BA). FWS' BiOp on the Project failed to fully assess the Project's risks to endangered and threatened species. FWS AR 2044. The agencies ignored impacts to species in Canada (FWS AR 570, 2085; AR 20145), understated the Project's risks to endangered and threatened species from spills (FWS AR 566, 653-654, 660-664, 670, 675, 680), presumed the efficacy of unproven mitigation measures (FWS AR 670-671), inappropriately deferred analysis of connected actions such as power lines (FWS AR 652,660, 674, 717-718, 724), and completely failed to analyze risks to the endangered northern swift fox (FWS AR 2045, 2058-2071). FWS also failed to develop and use the "best scientific and commercial data available" to assess the Project's adverse impacts on endangered species. 16 U.S.C. § 1536(a)(2).

FWS' review of the Project and issuance of the BiOp in violation of ESA is arbitrary, capricious, an abuse of discretion and contrary to law in violation of APA, 5 U.S.C. sections 701-706. Therefore this Court should grant summary judgment for plaintiffs and direct FWS to withdraw its BiOp.

B. IMPACTS TO SPECIES

In the United States, the Keystone pipeline would cross more than 1,000

water bodies and the vast Ogallala Aquifer in South Dakota and Nebraska. AR 6242; FWS AR 617; Expert Report of Dr. Yan Linhart, filed December 29, 2017 (ECF 120) ("Linhart"), ¶ 5. Steel pipelines such as the Project are inherently prone to corrosion and leakage. Linhart ¶ 5; AR 5988, 5992, 6605. For example, TransCanada's first Keystone pipeline spilled 14 times in the United States in its first year of operation alone. AR 17627. Dilbit is exceedingly difficult to clean up because it is so dense it sinks in water and attaches to the beds and banks of water bodies. Linhart ¶ 5; AR 6609-6611. Several years after the Enbridge pipeline spilled over one million gallons of tar sands oil into the Kalamazoo River in 2010, nearly 40 miles was still contaminated with oil despite the expenditure of nearly one billion dollars on cleanup. AR 1726-1727, 6613.

The Project would pass through threatened and endangered species' occupied and identified recovery habitat, exposing them to risks such as contact with toxic spills or tailings ponds, injury or displacement by construction and maintenance equipment vehicles and workers, collisions with power lines and other infrastructure, excessive noise and night-time lighting, surface- and ground-water contamination, habitat destruction and fragmentation, predation by introduced and invasive species, poaching by Project personnel and visitors, and other harms. Linhart ¶ 6. The imperiled species affected include 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, among others. Linhart ¶ 7;

FWS 2045. Plaintiffs highly value all of these species, have sought to study and observe them in the wild and will continue to do so in the future, and would be directly harmed if the Project hastens their demise by degrading or destroying their habitat, displacing them from their habitat, or by killing or injuring them directly or indirectly. Goldtooth Dec. ¶ 8; Meyer Dec. ¶ 6; Egger Dec. ¶ 19.

Any action "authorize[d], fund[ed], or carr[ied] out" by a federal agency which may affect listed species or their critical habitat is subject to inter-agency consultation under section 7 of the ESA. 16 U.S.C. § 1536(a)(2). The consultation process under section 7 of the ESA requires State as the "action agency" to consult with the Secretary of Interior (here, FWS) to ensure that State's actions are "not likely to jeopardize the continued existence of any endangered species . . . ." 16 U.S.C. § 1536(a)(2). In order to fulfill this statutory mandate, State and FWS must use the "best scientific and commercial data available." *Id.*

In the event that the agencies determine that the actions may adversely affect listed species, they must initiate formal consultation. 50 C.F.R. § 402.14. Formal consultation requires a detailed inquiry into the scope and extent of adverse effects upon endangered species which may result from the proposed action. *Id.* The formal consultation process must result in a biological opinion reaching one of two conclusions: that the project will, or will not, jeopardize listed species. 50 C.F.R. § 402.14(e).

If the project will jeopardize the continued existence of a listed species, taking that species creates civil and criminal liability under section 9 of the ESA.

If, however, the biological opinion concludes that the project will not jeopardize the continued existence of the species, but will cause the "incidental take" of members of the listed species, FWS will provide an incidental take statement authorizing a certain number or extent of takings allowed, and specifying "reasonable and prudent measures" required to minimize the impact. 50 C.F.R. § 402.14(i).

In both State's 2012 BA and FWS' 2013 BiOp, State and FWS failed to properly consider the potential impacts of pipeline spills, tailings ponds, injury or displacement by the Project's long-term operation and growth-induction, collisions with power lines and other infrastructure, excessive noise and night-time lighting, surface- and ground-water contamination, habitat destruction and fragmentation, predation by introduced and invasive species, poaching by Project personnel and visitors, and other harms to listed species. Linhart ¶¶ 6, 8; FWS AR 653-654, 658-660, 664-665, 669-672, 676, 679-680, 706-710, 715-718, 722-723, 2084-2085, 2090-2091, 2100. In addition, the agencies improperly relied upon conservation measures that are speculative, ineffective or unenforceable under the ESA in concluding that the Project would not adversely affect endangered species. Linhart ¶ 8; FWS AR 654-655, 661-662, 673-674, 680-681, 710-712, 719-720, 723-724, 2057-2071, 2097; *Center for Biological Diversity v. U.S. Bureau of Land Management*, 698 F.3d 1101, 1109-1110 (9th Cir. 2012) (concluding that it was improper for the biological opinion to rely upon a Conservation Action Plan that was "unenforceable under the procedures established by the ESA").

Furthermore, the BA and BiOp focus on construction stage impacts and ignore the Project's operational impacts including pipeline rupture and oil spills. Linhart ¶ 9. For example, the BiOp suggests that construction should be halted if species such as the piping plover, interior least tern, and whooping crane are observed during monitoring surveys. FWS AR 2059, 2061, 2064. But the BiOp only discusses crude oil spills in relation to the American burying beetle. FWS AR 2100. And that discussion declines to detail the impacts of a spill beyond a brief mention of soil compaction and soil disturbance. *Id.* Instead, the BiOp determines that oil spills are not covered by any take permit, and that the EPA will consult with FWS about species impacts *once a spill takes place*. *Id.* But it is too late to prevent harm *after* the damage has occurred. Linhart ¶ 9.

The endangered whooping crane is one of the rarest birds in North America, and the transmission lines for the Project threaten the species' survival and recovery. Linhart ¶¶ 10-11. Both the BA and FSEIS admit that transmission lines will pose a collision hazard to birds, including whooping cranes. AR 6820, 6822, 6837-6839; FWS AR 670 (acknowledging that "[p]ower lines associated with the proposed Project are collision hazards to migrant whooping cranes"). However, the agencies then claim that they have no duty to analyze the hazards associated with power lines, and instead rely upon future analysis and consultation to claim that these impacts will be mitigated to a level that is not likely to adversely affect the species. FWS AR 652, 2045. This deferral of analysis is impermissible; instead, State and FWS must use the "best scientific and commercial data

available" now. 16 U.S.C. § 1536(a)(2).

Mitigating risks to the whooping crane with bird flight diverters ("BFDs") on power lines is ineffectual. Linhart ¶ 12. Neither State nor FWS made any attempts to understand whether and how whooping cranes would respond to BFDs. *Id*. Thus, the agencies failed to meet ESA's section 7 requirements. 16 U.S.C. § 1536(a)(2).

The Project's route through Nebraska coincides with the migration corridor used by 90 percent of whooping cranes, where they stop to rest and feed on the Niobrara, Platte, and North and Middle Loup rivers. Linhart ¶ 10. Yet the BiOp fails to appropriately account for the potentially lethal risk that a pipeline leak or spill would pose to whooping cranes at these locations. *Id*.

The whooping crane is also listed as endangered in Canada, and its survival there is threatened by tar sands development. Linhart ¶ 13. Tar sands mining results in the creation of tailings ponds containing a toxic stew of clay, sand, hydrocarbons, sulfur, and heavy metals that remains for decades and possibly centuries after the oil extraction process. *Id.* Syncrude Canada, the largest tar sands oil extraction company in Canada, runs one lake-sized tailing reservoir that killed over 1,600 birds in 2008 alone. AR 7378. These tailings ponds pose a significant risk to many species of birds, including the whooping crane. Linhart ¶ 13; AR 7378. State refused to consider impacts to whooping cranes in Canada, insisting that it has no duty to do so. *Id*. However, 50 C.F.R. § 402.02 requires agencies to consider both direct and indirect impacts to species in "all areas to be

affected" by the Project, "and not merely [in] the immediate area involved in the action." *Id.* Therefore, the agencies' refusal to consider the effects of the Project on whooping cranes in Canada violates the ESA.

The pallid sturgeon has been listed as endangered since 1990, and the Keystone XL pipeline would cross through its habitat in the Missouri and Yellowstone rivers, and upstream of its habitat in the Missouri and lower Platte rivers. Linhart ¶ 14. A spill in either area would do tragic and irreparable harm to the pallid sturgeon. *Id.*; FWS AR 680, 2044. The BA recognizes that a spill exposing the pallid sturgeon to crude oil "could result in adverse toxicological effects" to the fish, but dismisses this risk with the assertion that such effects are "unlikely due to the low probability of a spill." FWS AR 680. The agencies further claim that the Project is not likely to adversely affect the pallid sturgeon because "if a significant spill event were to occur, federal and state laws would require cleanup." FWS AR 680, 2044.

However, according to State's own analysis, the pipeline will spill an average of 1.9 times annually, for a total of 34,000 gallons of oil each year. Linhart ¶ 14; AR 11328-11332. Tar sands oil is thicker, more viscous and therefore more difficult to clean up than conventional crude oil. Linhart ¶ 14. Simply hoping that a spill will not occur in or near pallid sturgeon habitat – and assuming that it will be rapidly and completely cleaned up if it does – is not the comprehensive, objective and searching analysis that the ESA requires.

The black-footed ferret, once considered extinct, is still extremely rare.

FWS AR 651; Linhart ¶ 15. It has been protected as an endangered species for the last fifty years. 32 Fed.Reg. 4001 (March 11, 1967). Black-footed ferrets depend upon prairie dogs as their main food source, and upon prairie dog burrows for their only source of shelter. FWS AR 652. While the proposed Project does not cross through any known black-footed ferret habitats, it will cross through eight prairie dog towns, endangering important habitat that ferrets could use as their population recovers. FWS AR 653. The loss of these prairie dog towns will further limit the ability of the black-footed ferret to recover, and both the BA and the BiOp must consider this indirect impact. 50 C.F.R. § 402.02; Linhart ¶ 15.

The Project will cut through endangered interior least tern habitat in Montana, South Dakota, and Nebraska, including important breeding areas along the Yellowstone, Cheyenne, Platte, Loup, and Niobrara rivers. FWS AR 655-656. This will expose the rare least tern to the risk of oil spills, construction noise and activity, habitat loss, and power line collisions. FWS AR 658-661; Linhart ¶ 16. As with its analysis of the whooping crane above, FWS declined to fully analyze the impacts of power lines because power providers have committed to consult with federal agencies when they build power lines in the future. FWS AR 660. But by then the Project would be built and it will be too late to redesign it. Linhart ¶ 16. Deferring analysis of this significant risk violates the ESA. 16 U.S.C. § 1536(a)(2), (d).

The Project will cut through habitat of the threatened piping plover in Nebraska and Montana, skirting nesting areas near the Platte, Loup, and Niobrara

rivers and the Fort Peck Reservoir. FWS AR 716. Not only will power lines pose a collision risk, but their towers would create perches for raptors, increasing predation of the piping plover. FWS AR 717-718; Linhart ¶ 17. Again, FWS impermissibly deferred analysis of these critical risks until after Project approval, in violation of the ESA. FWS AR 718; 16 U.S.C. § 1536(a)(2), (d); Linhart ¶ 17.

The rufa red knot is a migratory bird species. In its listing decision, FWS stated

> in years when conditions favor it, a large proportion of midcontinental migrants may use Northern Plains stopovers in spring. In addition, birds using the Northern Plains as a spring stopover stayed an average of 16.2 days (Newstead et al. 2013, Table 3); this was not a short stop but actually similar to the stopover duration in Delaware Bay.

79 Fed.Reg. 73706, 73716 (December 11, 2014). The rufa red knot has been observed stopping over in Montana and South Dakota, and may possibly stop over in Nebraska. *Id.* The FSEIS and BA do not address the rufa red knot at all. Linhart ¶ 18. While State's 2017 ROD states that it consulted with FWS on the impacts to this species, the bare conclusion that the Project will not harm this species does not address the conflicts between the rufa red knot's migration patterns and the potential harms cause by project construction and operation. *Id.* None of the Project's mitigation measures contemplate protections for the rufa red knot during construction or operation, and no survey protocols were included in the BA, BiOp or FSEIS. *Id.* The agencies failed to use and present the best scientific and commercial data available to protect the rufa red knot. *Id.*; 16

U.S.C. § 1536(a)(2).

After the BA and BiOp were prepared, FWS listed the northern long-eared bat as a threatened species, due to human disturbance, habitat destruction and fragmentation, and fungal disease. AR 6870-6871. State's analysis of potential threats to this species is entirely inadequate. Linhart ¶ 19. State acknowledges that the northern long-eared bat "occur[s] within the proposed Project area," AR 6868, 6405, 6867, and that the bat "may be impacted by proposed Project construction or operations." AR 6871. However, State failed to determine what those impacts would be, precluding consideration of any measures to mitigate or avoid them. AR 6867 (admits no conservation measures were developed for the northern long-eared bat); Linhart ¶ 19. In addition, State failed to conduct surveys to determine whether there are roosts in the Project area. Linhart ¶ 19; AR 6405, 6867. In fact, after *admitting* that the Project could have impacts on the northern long-eared bat, State failed to assess those impacts, claiming it would *later* "coordinate with [FWS] on whether the proposed Project could have impacts on the species." AR 6871. While the 2017 ROD indicates that FWS concurred that the Project "may affect, but is not likely to adversely affect" the northern long-eared bat, this concurrence is meaningless if based upon the inadequate information included in the BA, BiOp and FSEIS. AR 2510; 16 U.S.C. § 1536(a)(2).

The threatened western fringed prairie orchid is present in the Project area in Nebraska, and may be present in South Dakota, though uncertainty remains due

to insufficient surveying. FWS AR 720; Linhart ¶ 20. Clearing for construction would disturb existing fringed orchids, and "introduce or expand invasive species" that would compete with the orchid, hastening its decline and impeding its recovery. FWS AR 722, 2066; Linhart ¶ 20.

The BiOp claims that conservation measures would prevent the Project from adversely affecting this species, but the conservation measures are completely unenforceable, rely on TransCanada's employees avoiding the plant, and fail to contemplate the fact that the plant may be difficult to detect at certain points in its growth cycle. FWS AR 2045; Linhart ¶ 21. The effectiveness of these measures is therefore far from certain. *Id.* The conservation measures also completely fail to address the risk posed by invasive species, and the fact that the orchid's pollination requires the hawk moth, which could be harmed by herbicides used to maintain the pipeline's right of way. *Id.*

Both agencies failed to perform *any* ESA analysis of the Project's potential effects on the northern swift fox *(vulpes velox hebes*), even though it is a federally listed endangered species in Canada, was previously listed in Montana and South Dakota, and may again be listed in those states due to its depressed population and loss of habitat. Linhart ¶ 22; 50 C.F.R. § 17.11(h). It is simply not mentioned in either the BA or the BiOp. The Project will cut through many areas where the swift fox is managing to reestablish populations, and additional suitable habitat areas in Montana and South Dakota. Linhart ¶ 22. State admitted that the Project would affect northern swift foxes in the United States because it could crush dens

along with the kits and adults within. AR 6899. In addition, the Project will also harm habitat by disturbing it with noise and dust. *Id.* While State claims that the impacted foxes in Montana and South Dakota will return to the Project area once construction is completed, and that the loss of animals killed when the Project caused their dens to collapse will have "no significant population effects," this statement *entirely* lacks factual support or explanation. AR 6899; Linhart ¶ 22.

FWS and State entirely failed to consider that the Project will also have impacts on the northern swift fox in the Canadian portion of the pipeline, and that the species will be subject to the additional risks posed by tar sands mining in Alberta. *Id.* The ESA requires that agencies consider both direct and indirect impacts of their actions, including impacts outside "the immediate area involved in the action." 50 C.F.R. § 402.02. The agencies' failure to consider the Project's impacts on the northern swift fox violates the ESA. Turning a blind eye to the plight of a species simply because some of its members happen to inhabit one side of a political border – in this case, the Canadian side of its border with the United States – defies common sense and violates the ESA.

The BA and BiOp also fail to address the pernicious effects of the Project's pesticide and herbicide use. Linhart ¶¶ 23-25; AR 6814-6815. The use of herbicides has dangerous environmental impacts and is known to interfere with amphibian, reptile, and fish development, and cause cancerous tumors, birth defects, and other developmental disorders. Linhart ¶ 25. The BiOp's cursory treatment of these potential effects fails to utilize the best available scientific and

commercial data, and therefore violates the ESA. 16 U.S.C. § 1536(a)(2).

As shown, State and FWS failed to adequately assess the risks that the Project poses to threatened and endangered species as required by the ESA. Despite plaintiffs' 60-day notice alerting State and FWS to their ESA errors and omissions, these defendants failed to remedy those ESA violations. Accordingly, their approvals of the Project violated the ESA and the APA.

III. THE PROJECT APPROVAL VIOLATES THE ADMINISTRATIVE PROCEDURE ACT

When an agency action changes or reverses a prior policy or decision, it must "display awareness that it *is* changing position;" it may not, instead, "depart from a prior policy *sub silentio*." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Moreover, the agency "must show that there are good reasons for the new policy" and "provide a more detailed justification than what would suffice for a new policy created on a blank slate," for "[i]t would be arbitrary and capricious to ignore such matters." *Id.* "An 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.* at 537 (Kennedy, J., concurring).

State's approval of the Project fails to meet the foregoing standard, and thus it violates the APA. Despite the fact that Secretary Kerry documented with careful analysis the many facts underlying State's 2015 decision to reject the Project because it would harm, rather than serve, the national interest, the Trump

Administration nonetheless reversed course and overrode Secretary Kerry's ruling. AR 1157-1188, 2490-2520. And, it did so without addressing each of the many cogent grounds cited by Secretary Kerry in the 2015 National Interest Determination to reject TransCanada's application. *Id.* As shown above, State misapplied and violated NEPA, the ESA and the APA. It ignored both applicable law and the overwhelming facts that compelled denial of TransCanada's application in 2015, and it failed to perform and secure from FWS the adequate, comprehensive environmental reviews required under NEPA and the ESA.

For these reasons, in addition to those reasons previously discussed with respect to the Federal Defendants' violations of NEPA and the ESA, their approval of the Project also violates the APA.

IV. CONCLUSION

Federal Defendants' issuance of a Presidential Permit to TransCanada for its Keystone XL Pipeline and other Project approvals violate NEPA, the ESA and the APA.

The Project would have significant adverse impacts to waterways, species, cultural resources, and the climate. These far reaching impacts will extend well beyond the U.S. portion of the pipeline, significantly exacerbating GHG emissions and habitat destruction caused by tar sands mining in Canada. Yet State largely ignored these extraterritorial impacts in its FSEIS, and failed to fully and fairly analyze others.

Furthermore, the Project's impacts on threatened and endangered species

were not adequately analyzed in FWS' BiOp, and State's BA and FSEIS, which failed to utilize the best available scientific and commercial data, placing already imperiled species at even greater risk.

Despite these clear and grave impacts, and State's admission in 2015 that the Project "would not serve the national interest," State reversed its position and approved the Project. AR 1157-1188, 2485-2489, 2490-2520. This reversal belies all logic. GHG emissions have only worsened, and climate concerns have only grown more urgent, since 2015, and this Project will only exacerbate those impacts.

Accordingly, this Court should grant summary judgment to plaintiffs, and set aside the Federal Defendants' unlawful Project approvals.

Dated: February 9, 2018

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Dated: February 9, 2018

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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 January 16, 2018 Order Regarding Word Limits, Separate Statement of Facts, and Joint Appendix (ECF 129), I certify that this Brief contains 13,831 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: February 9, 2018

s/ *Stephan C. Volker*
STEPHAN C. VOLKER

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2018, a copy of the foregoing **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF INDIGENOUS ENVIRONMENTAL NETWORK AND NORTH COAST RIVERS ALLIANCE'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT** was electronically served on all counsel of record via the Court's CM/ECF system.

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