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

INDIGENOUS ENVIRONMENTAL NETWORK, *et al.*, and NORTHERN PLAINS RESOURCE COUNCIL, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF STATE, *et al.*, Federal Defendants, and TRANSCANADA CORPORATION, *et al.*, Defendant-Intervenors.	CV 17-29-GF-BMM CV 17-31-GF-BMM **MEMORANDUM IN SUPPORT OF DEFENDANT-INTERVENORS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT**

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INTRODUCTION

Oil pipelines play a pivotal role in the United States' economy and energy security. Not only do pipelines provide jobs, tax revenue, and other economic benefits, but they also are an important piece of the Nation's critical energy infrastructure. In 2015, for example, construction and operation of crude oil pipelines created 207,800 jobs and contributed $21.8 billion to GDP.[1] Experts project that these benefits will continue to increase in the future.

Pipelines also provide a safe and efficient mechanism to transport crude oil used to power our transportation system, manufacture important chemicals and materials, and, in some cases, power our homes. With pipeline infrastructure in place, the United States is able to take advantage of and develop its domestic natural resources, as well as take advantage of the resources available from friendly neighboring countries, such as Canada.

The United States recognizes pipelines as high priority infrastructure. As detailed in Executive Order 13766, the President directed federal agencies to identify high priority infrastructure projects that would strengthen America's economic platform, make America more competitive, create jobs, and reduce the costs of goods and services for American families and consumers. E.O. 13766.

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[1] *See* http://www.nam.org/Issues/Energy-and-Environment/Crude-Oil-Pipeline-One-Pager.pdf.

Since that time, the President has encouraged federal agencies to engage in an efficient review of such projects to help stimulate the economy and reduce unemployment.

TransCanada is an energy company with one of North America's largest energy infrastructure portfolios. For over 65 years, TransCanada has delivered the energy that millions of North Americans rely on to power their lives and fuel industry. The company is invested in 11 power generation facilities with a combined capacity of 6,100 megawatts (enough to power more than six million homes). More than half of that generation capacity comes from emission-less sources, which includes nuclear and wind energy. Additionally, TransCanada is a leader in the development and operation of high-efficiency, natural gas-fired power facilities.

In addition to power generation, TransCanada operates in the midstream oil and gas industry, meaning that the company receives oil and gas from upstream companies and then transports those products to the downstream companies that process or refine it. The company owns and operates a 57,100-mile network of natural gas pipelines and 3,000 miles of liquid hydrocarbon pipelines. TransCanada does not own upstream interests – i.e. oil extraction operations, and it does not own downstream interests – i.e. refineries. Accordingly, the company is not in the business of extracting oil from the Western Canadian Sedimentary Basin

(WCSB) or in the business of deciding where or how the products it transports will be used.

In order to enhance its pipeline network, TransCanada sought authorization from a number of United States agencies to construct and operate the Keystone XL Pipeline. In March 2017, TransCanada received a Presidential Permit from the U.S. Department of State (State) authorizing it to construct, connect, operate, and maintain pipeline facilities at the international border of the United States and Canada at Morgan, Montana. (DOSKXLDMT02485). The Keystone XL Pipeline will provide domestic refineries with a secure and reliable source of crude oil from Canada and, depending on commercial demand, our own domestic Bakken formation. This pipeline will help improve energy security by reducing U.S. reliance on crude supplies that must be transported via oil tankers from Mexico, Venezuela, the Middle East, and Africa. Additionally, the pipeline will supply jobs, energy security and other economic benefits in the United States, as well as improve our domestic energy infrastructure. The pipeline will achieve these benefits safely and with minimal impacts to the environment.

The Keystone XL Pipeline will be state-of-the-art, equipped with safety features that exceed federal standards. As specified in its permit application, TransCanada indicated that operation and maintenance activities would be governed by over 1,000 specific procedures that promote safety, environmental

protection and efficiency in the operation of the pipeline. (DOSKXLDMT054). The record of decision (ROD) and Presidential Permit also tout the safety mechanisms in place, noting that TransCanada agreed to incorporate mitigation measures for the design, construction, and operation of the proposed project that exceed what is normally required for such structures, including 59 special conditions recommended by agencies such as the Pipeline and Hazardous Materials Safety Administration (PHMSA). (DOSKXLDMT02506, 07157-62). These procedures include the operation of a control center that provides continuous, 24 hours per day, monitoring and control of the company's natural gas and liquids pipeline networks network. TransCanada has developed a cutting-edge suite of control and information management tools, which direct and monitor the safe and efficient flow of gas and oil across the continent. (DOSKXLDMT054).

State, in consultation with PHMSA, has determined that these standards and practices, combined with regulatory requirements and the set of proposed Project-specific Special Conditions developed by PHMSA, would result in a degree of safety over any other typically constructed domestic oil pipeline system under current code and a degree of safety along the entire length of the proposed pipeline system, similar to that required in HCAs as defined in 49 C.F.R. § 195.450. (DOSKXLDMT06607). Given the potential benefits of this project, the Keystone XL Pipeline has received wide-ranging support from Senators and members of the

House of Representatives (DOSKXLDMT0184-200, 204-223, 237-239), the Premier of Saskatchewan, governors from 10 states (DOSKXLDMT0201-203, 224-233, 242, 249-252, 275, 279-292, 299-301, 311-313, 318-322), the Government of Alberta (DOSKXLDMT015099-101), and the Canadian Government (DOSKXLDMT0276-278).

FACTUAL HISTORY

Nearly 10 years ago, TransCanada submitted an application for a Presidential Permit to the Department of State requesting authorization to construct a pipeline and appurtenant facilities across a small stretch of the international border between Saskatchewan, Canada and Morgan, Montana.[2] As part of the review of the application, State analyzed the potential impact of all 875 miles of the proposed project that would be located in the United States. State also directly contacted 84 Indian tribes, engaged in government-to-government consultation with 67 Indian tribes, coordinated review of the project with 10 federal and state entities, and provided numerous opportunities for the public to comment on the proposed project.

[2] A full recitation of the factual history is contained in TransCanada's memorandum in support of its motion to dismiss. *See* Mem. In Supp. Of Mot. To Dismiss at 3-8 (Doc. 49).

State completed a Final Environmental Impact Statement (FEIS) in August 2011. 76 Fed. Reg. 55,155 (Sept. 6, 2011). Prior to making its decision, State identified a need to supplement the FEIS to address alternative pipeline routes through Nebraska. During this time, Congress passed legislation, signed into law by the President on December 23, 2011, that required the President to make a national interest determination for the project within 60 days. The President indicated that the 60-day time period was insufficient to assess issues concerning the alternative route in Nebraska and denied the application.

TransCanada reconfigured the project after the denial of its Presidential Permit application. As part of this process, TransCanada moved forward with two segments of the pipeline that had independent utility, and thus could operate apart from the Keystone XL Pipeline project. TransCanada informed State of this decision and then resubmitted a revised Presidential Permit application in May 2012. During this time, the Nebraska Department of Environmental Quality (NDEQ) evaluated alternative routes through Nebraska, and the Nebraska Governor approved a route in January 2013 that would avoid the Nebraska Sandhills area.

Following approval of a Nebraska route, State released a draft supplemental EIS in March 2013 and then the Final Supplemental EIS (FSEIS) in January 2014. As State released its draft supplemental EIS, it also issued a Biological Assessment

in 2013 and then engaged in consultation with FWS under Section 7(b) of the ESA. In May 2013, the consultation process concluded with FWS' adoption of a Biological Opinion that the agency later supplemented in March 2017.

The President denied TransCanada a Presidential Permit on November 6, 2015, based on the premise that approval would be perceived to undermine U.S. climate leadership in the international arena. On January 24, 2017, however, the President invited TransCanada to resubmit its Presidential Permit application. The President directed State to "take all actions necessary and appropriate to facilitate its expeditious review," including reaching a final permitting determination within 60 days. Memorandum of January 24, 2017: Construction of the Keystone XL Pipeline, 82 Fed. Reg. 8,663, § 3(i) (Jan. 30, 2017). TransCanada promptly reapplied and on March 23, 2017, more than eight years after TransCanada filed its original application, Thomas A Shannon, Jr., Under Secretary of State for Political Affairs, signed TransCanada's Presidential Permit and a combined ROD and national interest determination (NID) that expressly determined issuance of this permit to TransCanada for the Keystone XL Pipeline would serve the national interest.

On November 20, 2017, the Nebraska Public Service Commission (PSC) issued an order approving the Mainline Alternative route through Nebraska – a route different from the preferred route TransCanada requested. TransCanada has

decided to proceed with the Mainline Alternative route and defend this route in the litigation currently proceeding before the state court in Nebraska. TransCanada expects that this litigation will conclude by the end of this year.

REGULATORY FRAMEWORK

I. NEPA

NEPA is procedural statute that directs federal agencies to take a "hard look" at the environmental consequences before taking a major action. *See* 42 U.S.C. §§ 4321, 4331; *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1051 (9th Cir. 2012) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350–51 (1989)). To guide the decision-making process, an agency must prepare an Environmental Impact Statement (EIS) when proposing "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); *Cascadia Wildlands v. Bureau of Indian Affairs*, 801 F.3d 1105, 1111 (9th Cir. 2015). An agency must review the potential environmental impacts of a proposed decision and a reasonable range of alternative options in an EIS, but NEPA does not require that an agency reach a particular result. *Native Ecosystems Council*, 697 F.3d at 1051. Rather, NEPA merely "prohibits uninformed—rather than unwise—agency action." *All. for the Wild Rockies v. Savage*, 209 F. Supp. 3d 1181, 1189 (D. Mont. 2016) (quoting *Robertson*, 490 U.S. at 351). Thus, when courts review the adequacy of a NEPA analysis, they "ask whether the agency

adequately studied the issue and [took] a hard look at the environmental consequences of its decision, not whether the agency correctly assessed the proposal's environmental impacts." *Klein v. U.S. Dep't of Energy*, 753 F.3d 576, 581 (6th Cir. 2014) (citation omitted).

II. ESA

ESA Section 7(a)(2) requires a federal agency to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2); *see also Defs. of Wildlife v. Zinke*, 856 F.3d 1248, 1252 (9th Cir. 2017). The agency proposing an action must first determine whether the proposed action "may affect" an endangered or threatened species or its critical habitat by preparing a biological assessment. *Defs. of Wildlife*, 856 F.3d at 1252.

Under the ESA, the action agency may informally consult with the U.S. Fish and Wildlife Service (Service or FWS) or National Marine Fisheries Service (NMFS). *Id.* (citing 50 C.F.R. § 402.13(a)). If the consulted agency, here the FWS, concurs with the action agency's determination that the action is not likely to affect listed species or critical habitat, then the informal consultation is concluded, the consultation process is terminated, and no further action is necessary. *Id.*

The ESA requires formal consultation if the FWS concludes that the proposed action is "likely to adversely affect" a listed species or critical habitat. *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 807 F.3d 1031, 1036 (9th Cir. 2015). At the completion of the consultation process, the FWS issues a Biological Opinion reflecting its expert judgment regarding the effect of the proposed action on the species or its habitat. 16 U.S.C. § 1536(b)(3)(A). Specifically, the Service will set forth "a summary of the information on which the opinion is based, a detailed discussion of the effects of the agency action on the listed species, and an opinion as to whether the proposed agency action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." *Ctr. for Biological Diversity*, 807 F.3d at 1037 (citation omitted). The Service will outline any reasonable or prudent alternatives that it believes will avoid jeopardizing the relevant species or critical habitats. *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 988 (9th Cir. 2014) (quoting *Bennett v. Spear*, 520 U.S. 154, 158 (1997)).

When the Service concludes an action will not jeopardize a listed species, as is the case here, it will issue an incidental take statement (ITS) identifying the expected impact on the listed species. The ITS sanctions the incidental taking of protected species, thereby "exempt[ing] the action agency from the prohibition on

takings found in Section 9 of the ESA." *Ctr. for Biological Diversity*, 807 F.3d at 1037 (citation omitted).

During formal consultation, the agencies must use the "best scientific and commercial data available." *Id.* at 1036. The purpose of this standard is to "prevent an agency from basing its action on speculation and surmise." *San Luis & Delta-Medota Water Auth.*, 776 F.3d at 995. Under this standard, an agency is not required to conduct new tests or make decisions on data that do not yet exist. *Id.* An agency action is not rendered arbitrary and capricious solely because the only available data is "weak" or not dispositive, even where the agency disagrees with or discredits the only available data. *Id.* Additionally, "what constitutes the best scientific and commercial data available is itself a scientific determination deserving of deference. *Id.* Thus, a court must be especially wary of overturning such a determination on review. *Id.*

STANDARD OF REVIEW

Where federal court jurisdiction has been established, the court's review of the issues in this case is governed by the APA. 5 U.S.C. § 706(2). Though the parties in this matter are moving for summary judgment, the standard set forth in Federal Rule of Civil Procedure 56(c) "does not apply because of the limited role of a court in reviewing the administrative record." *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 89 (D.D.C. 2006); *see also Alameda Health Sys. v. Ctrs. for Medicare*

& Medicaid Servs., No. 16-CV-5903-PJH, 2017 WL 6450506, at *11 (N.D. Cal. Dec. 18, 2017) (finding that because the APA governs judicial review, "the usual standard for summary judgment does not apply"). Instead, the APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). It instructs that courts are to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Nev. Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993); *see Westlands Water Dist. v. U.S. Dep't of the Interior*, 376 F.3d 853, 865 (9th Cir. 2004). A court will find an action to be arbitrary and capricious if the "agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The APA's arbitrary and capricious standard of review is highly deferential and narrow. *Norfolk Energy, Inc. v. Hodel*, 898 F.2d 1435, 1439 (9th Cir. 1990). A court "will defer to the [agency's] interpretation of what [a statute] requires so long as it is rational and supported by the record." *Oceana, Inc. v. Locke*, 670 F.3d

1238, 1240 (D.C. Cir. 2011) (citation omitted). A court must be "at its most deferential" when reviewing matters where the agency relies on areas of scientific expertise under NEPA. *Native Ecosystems Council*, 697 F.3d at 1051 (citing *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1075 (9th Cir. 2011) (quoting *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103, (1983))). In reviewing the agency's scientific judgments under NEPA, a court must not substitute its own scientific judgements or require that the agency explain "every possible scientific uncertainty." *Lands Council v. McNair*, 537 F.3d 981, 988 (9th Cir. 2008) (en banc), *rev'd on other grounds by Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008). Even if a court finds an alternative opinion to the one adopted by the agency persuasive, it must not substitute its judgment for that of the agency. *Lands Council*, 537 F.3d at 1000. Additionally, "[w]hen specialists express conflicting views, *an agency must have discretion to rely on the reasonable opinions of its own qualified experts* even if, as an original matter, a court might find contrary views more persuasive." *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1124 (9th Cir. 2012) (emphasis in original) (citations omitted).

Further, under this highly deferential standard, an agency decision is presumed valid where a reasonable basis exists for its decision. *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 833 F.3d 1136, 1145-46 (9th Cir. 2016) (citing

Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric., 499 F.3d 1108, 1115 (9th Cir. 2007)).

SUMMARY OF ARGUMENT

In March 2017, State found that the Keystone XL Pipeline would serve the national interest and issued TransCanada a Presidential Permit. This conclusion followed from State's review of "a range of factors, including but not limited to foreign policy; energy security; environmental, cultural, and economic impacts; and compliance with applicable law and policy." (DOSKXLDMT02493). Because the issuance of a Presidential Permit is presidential action, State was not obligated to comply with "NEPA, the ESA, the NHPA, the APA, and other similar laws and regulations that do not apply to Presidential actions." (*Id.*). Nonetheless, State reviewed the potential impacts of the action on the environment and cultural resources consistent with these statutes to inform its national interest determination. (*Id.*). Because State clearly satisfied the requirements of NEPA and the ESA, TransCanada respectfully requests the court to grant its motion for summary judgment as well as Federal Defendants' summary judgment motion.

Plaintiffs seek to remand State's thorough analysis by offering tenuous legal arguments which they support with a strained reading of the record. The Northern Plains Resource Council, et al. (Northern Plains Plaintiffs) seek review of State's determination that the Keystone XL Pipeline serves the national interest, arguing

that State's change in position on TransCanada's application is unlawful absent a detailed discussion for the underlying change. But State's conclusion is legally sound, adequately supported, and committed to the agency's discretion. Accordingly, it is not subject to judicial review.

Northern Plains Plaintiffs and Indigenous Environmental Network, et al. (IEN Plaintiffs) both challenge the adequacy of State's NEPA analysis. IEN Plaintiffs argue that State improperly constrained the purpose and need to meet TransCanada's objectives, failed to analyze a reasonable range of alternatives, and overlooked the environmental impacts of the project. The record shows that State reasonably defined the purpose and need for the project by considering factors that would inform a national interest determination. State also identified TransCanada's purpose and need for the project, which is completely consistent with NEPA's expectations. State's alternatives analysis captures the full range of reasonable alternatives to the project, and the FSEIS fully accounts for the potential environmental impacts of the project.

Northern Plains Plaintiffs also challenge State's NEPA analysis, arguing that State failed to disclose the project's potential to affect the rate of WCSB oil production. They contend State has a duty to supplement its NEPA analysis in light of "new information" regarding oil prices, the development of rail infrastructure, oil spill data, and greenhouse gas (GHG) emissions. None of these

claims has merit. State reasonably concluded that oil prices and oil demand, not the Keystone XL Pipeline project, drive the decision on whether upstream companies would increase or decrease WCSB oil production. Additionally, the FSEIS fully accounts for a wide range of potential impacts and how those impacts could be altered by changing market forces (e.g., oil price fluctuations, competing transportation infrastructure, etc.). Thus, the "new information" Northern Plains Plaintiffs identifies does not produce potential environmental impacts that State failed to discuss in the FSEIS.

Plaintiffs jointly challenge State's NEPA process as incomplete because the Nebraska PSC changed the pipeline route through Nebraska after State's 2017 ROD/NID. State is under no continuing obligation to update its NEPA analysis as a result of this change, however, because the issuance of the ROD/NID completed the agency's decision-making process and there were no remaining federal actions. Thus, State has no duty to update its NEPA analysis.

Plaintiffs also challenge the adequacy of State's Biological Assessment (BA) and FWS' Biological Opinion (BiOp). First, Plaintiffs jointly challenge the data that State and FWS used in their Section 7 consultation with regard to the whooping crane. These claims are meritless. The agencies used the best scientific and commercial data available to analyze impacts to the whooping crane and reasonably concluded that the Keystone XL Pipeline project "may affect, but is not

likely to adversely affect" whooping cranes. In reaching this conclusion, State and FWS evaluated the robust conservation measures that will be implemented for the project.

Second, Northern Plains Plaintiffs claim that State and FWS did not rely on proper guidelines in their analysis of the interior least tern and piping plover, particularly in relation to measures to prevent predation. As explained below, the agencies properly relied on the best available data in their analysis of the interior least tern and piping plover. Third, IEN Plaintiffs claim that State and FWS failed to consider (1) prairie dogs and their effect on the black-footed ferret, and (2) the northern swift fox. These claims are inapposite because (1) prairie dog habitat is not determinative of the impact to the black-footed ferret, and (2) the northern swift fox is not a protected species under the ESA. IEN Plaintiffs also claim that the agencies failed to comply with the ESA in determining that the project "may affect, but is not likely to adversely affect" the pallid sturgeon, rufa red knot, western fringed prairie orchid, and northern long-eared bat. For each of these species, State and FWS acted lawfully and reasonably in reaching these conclusions. Lastly, contrary to Plaintiffs' assertions, impacts to listed species from *all* stages of the Keystone XL Pipeline project were properly analyzed.

ARGUMENT

I. There Is No Basis To Set Aside State's National Interest Determination

A. State's National Interest Determination Is Not Subject To Judicial Review

Northern Plains Plaintiffs challenge State's finding that the Keystone XL Pipeline project serves the national interest and is worthy of a Presidential Permit. Northern Plains Pls.' Mot. For Summ. J. ("NPP Br.") at 37-43 (Doc. 140). They point to former Secretary of State Kerry's 2015 decision denying TransCanada a Presidential Permit to argue that it was arbitrary and capricious for this administration to reverse course and grant a permit in 2017. TransCanada gives this contention primacy in this memorandum because it underscores Northern Plains Plaintiffs' fundamental misunderstanding of this dispute.[3]

Assuming, as this Court previously ruled, the issuance of the Presidential Permit was not a Presidential decision, but constituted "final agency action" of the State Department, the court still lacks jurisdiction to review Plaintiffs' challenge to the NID. State's finding that the Keystone XL Pipeline project serves the national interest is the quintessential type of matter committed to the agency's discretion. As such, there is no standard by which the court could undertake meaningful

[3] TransCanada respectfully adheres to its view that the issuance of this Presidential Permit is Presidential action, and therefore is not subject to review under the Administrative Procedure Act (APA). TransCanada is expressly preserving that argument for further consideration as this litigation continues.

review. In essence, regardless *who* made the decision to issue this Presidential Permit, *the nature of the action* makes judicial review unavailable. Thus, Plaintiffs' challenges to the NID should be dismissed.

The APA excludes from judicial review "agency action [that] is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The Supreme Court declared that "if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'" *Heckler v. Chaney*, 470 U.S. 821, 830 (1985); *see also, City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F. 3d 1142, 1166 (9th Cir. 1997) (judicial review of an executive order may be appropriate if "there is 'law to apply' [or] … objective standards" by which to judge an agency's action.) Without substantive legal criteria, "meaningful judicial review is impossible, and agency action is shielded from the scrutiny of the courts." *Drake v. FAA*, 291 F.3d 59, 70 (D.C. Cir. 2002).

State's national interest determination is an action that is committed to agency discretion because there are no standards the agency must meet in finding that a project serves the national interest. As stated in the 2017 ROD/NID, "[n]o statute establishes criteria for this National Interest determination. The President or his delegate may take into account factors he or she deems germane to the national interest." (DOSKXLDMT01160).

When courts have interpreted similar discretionary language in statutes, they have found that determinations of what is or is not in the national interest rest within the discretion of the agency and are not judicially reviewable. *See Webster v. Doe*, 486 U.S. 592, 600 (1988) (language permitting the Director of the Central Intelligence Agency to terminate an employee when such action is "necessary or advisable in the interests of the United States … fairly exudes deference to the Director and appears to us to foreclose any application of any meaningful standard of review"); *Claybrook v. Slater*, 111 F.3d 904, 908-99 (D.C. Cir. 1977) (a determination regarding what action would be in the "public interest" left the court with no law to apply).

In considering whether a decision is committed to agency discretion by law under the APA, courts also have examined whether the decision involves considerations of foreign policy or national security. *See Dep't of Navy v. Egan*, 484 U.S. 518, 528-29 (1988) (whether granting a security clearance would be "clearly consistent with the interests of national security" was unreviewable). In *Legal Assistance for Vietnamese Asylum Seekers v. Department of State*, for example, the court recognized the long-standing tradition of not second-guessing executive branch decisions involving complicated foreign policy matters and therefore declined to review immigration decisions involving those foreign policy concerns. 104 F.3d 1349, 1353 (D.C. Cir. 1997). Similarly, in *U.S. Ordnance Inc.*

v. U.S. Department of State, the court declined to review State's revocation of a license to export arms because the agency had determined exporting these arms was not "in furtherance of world peace and the security and foreign policy of the United States" 432 F. Supp. 2d 94, 99 (D.D.C. 2006), *vacated as moot by* 231 F. App'x 2 (D.C. Cir. 2007).

In the absence of any apparent "judicially manageable standard" for the Court to use in reviewing the Under Secretary's national interest decision, Northern Plains Plaintiffs attempt to import the "arbitrary and capricious criteria" from the APA. Using that standard, they contend the 2017 ROD/NID provided insufficient reasoning for rejecting Secretary Kerry's 2015 determination that approving this permit would have an adverse impact on global efforts to address climate change. (NPP Br. at 38-39). Also, Northern Plains Plaintiffs take issue with the assessment of "energy security" in the 2017 ROD/NID. (*Id.* at 40). They declare: "The Department's failure to provide a reasoned explanation for inconsistent findings on climate change and energy security violates the APA." (*Id*. at 42).

In support of their claim, Northern Plains Plaintiffs cite to *Organized Village of Kake v. U.S. Department of Agriculture*, 795 F.3d 956 (9th Cir. 2015) as "dispositive" authority on the issue. (NPP Br. at 42). This case and offers no legal support for Northern Plains Plaintiffs' theory and it is readily distinguishable. In

Kake, the Ninth Circuit faulted the Secretary of Agriculture for not explaining sufficiently a reversal of course regarding logging in the Tongass National Forest. 795 F. 3d at 965. In order to authorize a logging project, the Secretary needed to apply the Roadless Rule and determine that the social and economic hardships to the area out-weighed the potential long-term ecological benefits to the area. *Id*. at 967. The Secretary of State's "national interest" determination for approving a transboundary pipeline, however, has no statutory basis but rests on constitutional authorities including the discretion to identify and implement the strategic interests of the United States at the nation's international borders. E.O. 13337. This decision is not similar to decisions by the Forest Service administering the National Forest Management Act. Thus, we find no guidance in the *Kake* decision with its standard administrative law issues.

Instead, the Court should follow *No Oilport v. Carter*, where the question of whether an oil pipeline was "in the national interest" was a question "beyond the competence of the judiciary to review"… and that "no standards exist by which to review such a decision." 520 F.Supp. 334, 350, 352 (W.D. Wash. 1981). As in *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, the challenge to the ROD/NID embodies Executive Branch discretion as to matters beyond the competency of the courts to adjudicate. 333 U.S. 103, 114 (1948). "[T]he very nature of executive decisions as to foreign policy is political, not judicial…. They

are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Waterman,* 333 U.S. at 111.

B. State Did Not Need to Explain the President's Change in Policy on GHG Issues

Even if it is assumed that the APA allows review of State's national interest determination, this Court should uphold State's decision to issue a Presidential Permit for the Keystone XL Pipeline project because State reached the reasonable conclusion that the project would serve the national interest. In making this determination, State considered appropriate factors such as the project's benefit to the economy, the relationship between the United States and Canada, and the project's effect on energy security. State prioritized these considerations over other factors, such as the United States' perceived leadership role in addressing climate change, which the former administration relied on to support a finding that the Keystone XL Pipeline was not in the national interest. In doing so, State helped effectuate the shift in policy and national priorities implemented by the President following the election.

Northern Plains Plaintiffs contend that State's reconsideration of its national interest determination requires a detailed explanation, and that absent such an explanation, State's 2017 ROD/NID is arbitrary and capricious. (NPP Br. at 37-43). State's adherence to new national priorities, however, does not render its

change of course on the Keystone XL Pipeline project arbitrary or capricious, nor does it require the agency to provide a detailed explanation for its change in decision. Elections have consequences – interests, priorities, and policies change.

The 2017 ROD/NID highlights three policy considerations that influenced State's national interest determination: maintaining strong bilateral relations with Canada, providing economic benefits to the United States, and enhancing energy security. (DOSKXLDMT02516-2520). The State Department recognized the importance of the Keystone XL Pipeline to maintaining strong bilateral relations with Canada due to strong trade and financial ties with the country. As noted in the ROD, the United States and Canada conduct over $2 billion in trade, and U.S. and Canadian companies are heavily invested in each other's markets. (DOSKXLDMT02518). The countries "coordinate closely on most foreign policy issues and have a robust partnership in critical areas around the world." (*Id*.). Given Canada's interest in the completion of the Keystone XL Pipeline, the State Department found that "it is in the United States' interest to strengthen the role Canada plays as a secure conduit for crude oil to reach the U.S. market, and more broadly, to ensure our shared interests in energy, environmental, and economic issues continue to prosper." (*Id.*).

State also determined that the Keystone XL Pipeline will benefit the United States economy. During the project's two to three-year construction period, it is

likely to support approximately 42,100 jobs in the United States, 3,900 of which would be direct construction jobs. (DOSKXLDMT02518-19). On a long-term basis, the project's operations would support 50 employees in the United States. In addition to bringing jobs, the project would provide an estimated $3.4 billion to the United States' gross domestic product. In the first year of operation, the Keystone XL Pipeline would generate $55.6 million in property taxes spread across 27 counties in three states. (DOSKXLDMT02508). As noted by the State Department, the "impact to local property tax revenue receipts would be substantial for many counties, constituting a property tax revenue benefit of 10 percent or more in 17 of these 27 counties." (*Id.*). The State Department found that the "economic benefits are likely to be meaningful and reflect the importance policymakers place on positive near- and long-term economic growth." (DOSKXLDMT02519).

The Keystone XL Pipeline also "will meaningfully support U.S. energy security by providing additional infrastructure for the dependable supply of crude oil." (DOSKXLDMT02516). Crude oil is "is vital to the U.S. economy and is used to produce transportation fuels, fuel oils for heating and electricity generation, asphalt for our roads, and petrochemical feedstocks used for the manufacturing of chemicals, synthetic rubber, and a variety of plastics." (*Id.*). It is also vital to support military operations. (*Id.*). Because it is a net importer of crude oil, the

United States has an interest in "ensuring access to stable, reliable, and affordable energy supplies" and establishing domestic infrastructure that will reduce the impact of international oil supply disruptions and reliance on supplies from politically unstable countries. (*Id*.). This interest is satisfied through supplies from Canada, which not only is a reliable source of crude but also is the epitome of a politically stable country.

The State Department's consideration of these primary factors in making a NID was reasonable. Northern Plains Plaintiffs do not challenge the fact that energy security, a strong relationship with Canada, and economic benefits are policies relevant to the United States national interest. Instead, they claim that a shift in priority from the previous administration, which denied TransCanada a Presidential Permit, to the current administration cannot form the basis for granting a Presidential Permit absent a "more detailed justification" for the decision. (NPP Br. at 37-38). Plaintiffs contend that the 2017 ROD rests on factual findings that contradict the 2015 ROD. In doing so, Plaintiffs misconstrue the basis for the State Department's determination and the legal standard for granting a Presidential Permit. In reaching its NID, State relied on policy considerations and factual findings. Such changes do not merit the more detailed explanation Plaintiffs seek. Instead, assuming some degree of review is permissible, State provides a reasonable explanation for its 2017 decision.

When it applies, the APA requires agencies to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. But "[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances." *Id*. at 57. In particular, an agency is "not required to refute the factual underpinnings of its prior policy with new factual data. The Agency only need[s] to provide a reasonable explanation for discounting the importance of the facts that it had previously relied upon." *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 626 (D.C. Cir. 2016). An agency also "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Fox Television Stations*, 556 U.S. at 515 (emphasis in original).

In 2017, the nation's priorities included strengthening domestic infrastructure and providing jobs to the American workforce. The President issued Executive Order 13766 and directed federal agencies to expedite the review and authorization of high priority infrastructure projects, like the Keystone XL Pipeline project. 82 Fed. Reg. 8,657 (Jan. 30, 2017). Shortly thereafter, the President specifically invited TransCanada to resubmit its application for the Keystone XL

Pipeline project.[4] State reevaluated TransCanada's application with those changed priorities and policy considerations in mind. Accordingly, the State concluded its approval of Keystone XL Pipeline would not undermine U.S. objectives, and instead found that "a decision to approve this proposed Project would support U.S. priorities relating to energy security, economic development, and infrastructure." (DOSKXLDMT02518).

It is also entirely permissible for an agency to reverse course based on the priorities of new leadership. As the D.C. Circuit has held, "[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration." *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1043 (D.C. Cir. 2012) (quoting *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part)).

Plaintiffs' related contention that State failed to explain inconsistent factual positions regarding the benefits of the Keystone XL Pipeline project on energy security is misplaced. (NPP Br. at 40). According to Plaintiffs, State contradicted

[4] 82 Fed. Reg. at 8,663.

its statement that the Keystone XL Pipeline project would have a limited significance for energy security in the 2015 ROD with a revised finding that it would improve domestic energy security in the 2017 ROD. (*Id.* at 40). In making this argument, Plaintiffs selectively omit State's discussion in the 2017 ROD/NID of factors that influenced its revised finding two years later.

State acknowledged that since 2016, "crude oil supply disruptions internationally have trended noticeably higher when controlling for Iran's return to the international oil market." (DOSKXLDMT02516). Additionally, due to "political instability and manipulative market tactics on the part of OPEC," unplanned disruptions to the crude oil supply "are over 500,000 bpd higher" and peaked at "nearly one million bpd in September 2016" compared to 2015. (*Id.*). On this basis, State updated its analysis of the Keystone XL Pipeline project's effect on energy security and reasonably determined that the project would help improve our energy security.

Plaintiffs try to manufacture an inconsistency by claiming the 2015 ROD discounts the project's effect on energy security on the basis that Canadian crude will reach the U.S. market regardless of whether Keystone XL Pipeline is constructed. (NPP Br. at 41 citing DOSKXLDMT01180-81). The 2015 ROD, however, does not make that conclusion. Instead, State acknowledges in the 2015 ROD that Canada is the "fastest-growing source of U.S. crude imports" and that

"U.S. imports of Canadian crude oil are increasing." (DOSKXLDMT01180). While State concludes that domestic refineries "will likely maintain access to Canadian crude oil" absent the construction of the Keystone XL Pipeline, this does not contradict a finding that the Keystone XL Pipeline will improve U.S refineries' access to Canadian crude or ability to displace other foreign crude imports with a more reliable source of Canadian crude. Absent the project, Canadian crude likely would be directed to Asian markets instead of the United States, thus lowering the volume available to domestic refiners. (DOSKXLDMT02517). This would impair U.S. refiners' ability to access Canadian crude in the event of a supply disruption instituted by OPEC. With Keystone XL Pipeline in place, a supply disruption would pose less of a threat to U.S. energy security.

State reasonably explained the basis for its national interest determination in the 2017 ROD/NID. Plaintiffs have failed to show that State made factual findings that are directly contradictory to those in the 2015 ROD. Instead, State "rebalanced old facts" in light of the new policies advanced by the new Presidential administration and updated some stale facts regarding disruptions to foreign oil supply to reach a different determination. Accordingly, the 2017 ROD/NID does not contain any unexplained contradictions that would merit remand.

II. State Complied with NEPA when It Approved Keystone XL

A. State Appropriately Framed the Purpose and Need for the Action

State reasonably framed the purpose and need of the proposed action based on both TransCanada's application for a Presidential Permit to construct an oil pipeline as well as State's own purpose of determining whether the project was in the national interest. As a result, the purpose and need statement for the project satisfies NEPA.

NEPA directs agencies preparing an EIS to "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. In doing so, an agency "must look hard at the factors relevant to the definition of purpose," and where, as here, "an agency is asked to sanction a specific plan . . . the agency should take into account the needs and goals of the parties involved in the application." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991*); see also Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 72 (D.C. Cir. 2011) ("An agency determining its objectives for an action should consider the needs and goals of the parties involved in the application or permit as well as the public interest.") (citation omitted). In fact, "it is appropriate for the agency to give substantial weight to the goals and objectives of that private actor." *Fuel Safe Wash. v. FERC*, 389 F.3d 1313, 1324 (10th Cir. 2004) (citation omitted); *see also*

48 Fed. Reg. 34,263 (July 28, 1983) (CEQ guidance states that there is "no need to disregard the applicant's purposes and needs in the common sense realities of a given situation in the development of alternatives."). In reviewing the adequacy of a purpose and need statement, a court employs a reasonableness standard. *HonoluluTraffic.com v. Fed. Transit Admin.*, 742 F.3d 1222, 1230 (9th Cir. 2014). "The Ninth Circuit provides agencies 'considerable discretion' when defining the purpose and need of a project. *Protecting Arizona's Res. & Children v. Fed. Highway Admin.*, No. 16-16586, 2017 WL 6146939, at *1 (9th Cir. Dec. 8, 2017) (citation omitted).

The purpose and need of the proposed action is to provide infrastructure to transport WCSB crude oil from the border with Canada and Bakken crude from Montana to existing pipeline facilities near Steele City, Nebraska, for onward delivery to Cushing, Oklahoma, and the Texas Gulf Coast area. (DOSKXLDMT05756). In addition to TransCanada's infrastructure needs, State's purpose and need for the proposed action also included its need to serve the national interest, BLM's need to respond to an application for a right-of-way grant to construct a pipeline, and the Department of Energy's need to consider interconnection requests to supply the project with electricity. (DOSKXLDMT05756-58). The stated purpose and need was broad enough that it allowed State to consider a reasonable range of project options.

(DOSKXLDMT05946). Ultimately, State determined to carry three alternatives forward for full analysis in the EIS: the no action alternative, the I-90 corridor alternative, and the 2011 Steele City Alternative. (DOSKXLDMT05758)

IEN Plaintiffs claim that the stated purpose and need in the FSEIS is improperly narrow because it lacks a federal purpose, and instead consists only of a recitation of TransCanada's need for the project—to satisfy contractual obligations to transport crude to Gulf Coast refineries. IEN Pls.' Mot. For Summ. J. ("IEN Br.") at 20-23 (Doc. 146). This argument neglects State's and other federal agencies' well-reasoned bases for their federal action in the FSEIS. Accordingly, IEN Plaintiffs' claim is not supported by the record.

The FSEIS clearly details federal purposes for State, BLM, and DOE. (DOSKXLDMT05756-58). State, for example, clarified that its purpose was "to consider Keystone's application in terms of how the proposed Project would serve the national interest, taking into account the proposed Project's potential environmental, cultural, economic, and other impacts." (DOSKXLDMT05757). Thus, while State needed to consider TransCanada's application, it did not discount its duty to make a national interest determination. The same is true for BLM, which contrary to IEN Plaintiffs' argument (IEN Br. at 22), set forth a federal purpose and need to ensure that any right-of-way grant it might issue would be compliant with the Mineral Leasing Act (MLA). (DOSKXLDMT05758).

State's purpose of making a national interest determination and BLM's focus on the project's compliance with the MLA are what set this matter apart from that in *National Parks & Conservation Association v. Bureau of Land Management*, 606 F.3d 1058 (9th Cir. 2010). In *National Parks*, the court found the purpose and need statement for the development of a landfill to be unreasonably narrow because BLM primarily articulated private interest factors as a basis for developing alternatives. *Id.* at 1071. One particular issue the court found with BLM's stated purpose of the project was that it included the goal of providing a long-term income source from the landfill. *Id.* The court held this was problematic because the project proponent, not BLM, would be the recipient of the income from the landfill. *Id.*

Here, however, State's purpose was to consider the Presidential Permit application in terms of how the proposed project would serve the national interest – not TransCanada's. (DOSKXLDMT05757). This distinguishing feature places this matter outside *National Parks* and squarely within *City of Angoon*.

In *City of Angoon v. Hodel*, the issue was whether the Army Corps of Engineers should issue a permit to a private party to allow construction of a log-transfer facility. 803 F.2d 1016 (9th Cir. 1986). Thus, the purpose and need was to provide a "safe, cost effective means of transferring timber harvested on [the applicant's] land to market." *Id.* at 1021. The district court found this purpose to

be too narrow and required the Army Corps to broaden it to "commercial timber harvesting." *Id.* The Ninth Circuit reversed the district court's decision, concluding that the lower court's formulation of the purpose and need failed to account for the Army Corp's need to balance a broad social interest with the factors relevant to granting a permit. *Id*. Like the Army Corps, State was responding to a private party's application and thus needed to balance the agency's purpose of making a national interest determination with TransCanada's purpose of constructing an oil pipeline. *Cf. Vermonters for a Clean Env't, Inc. v. Madrid*, 73 F. Supp. 3d 417, 426 (D. Vt. 2014) ("Given that the Forest Service was presented with a specific proposal, the Court finds it reasonable that the purpose and need statement took into account the proposal of the applicant, which included a specific site."). In doing so, State followed the requirements of Executive Order 13337 and set forth a federal purpose rather than adopt TransCanada's purpose as its own.

Plaintiff also criticizes State's purpose and need statement because it relied on TransCanada's application for a Presidential Permit for an oil pipeline as a basis to reject renewable energy and energy efficiency alternatives. (IEN Br. at 22-23). This criticism is misplaced. While State could have developed in more detail renewable energy and energy efficiency alternatives, this would have been a fruitless exercise because there was no proposal, structure, or authority in place for

State to implement the alternatives. NEPA does not impose an obligation to "consider alternatives that are unlikely to be implemented." *Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401, 1404 (9th Cir. 1996); *see also City of Angoon*, 803 F.2d at 1021 ("When the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved.").

B. State Considered a Reasonable Range of Alternatives

State's alternatives analysis complies with NEPA. As noted above, the FSEIS considered three fully developed alternatives. Plaintiffs argue that the alternatives analysis is insufficient because State considered alternatives designed to meet TransCanada's requirements, did not include adopting renewable energy or energy efficiency measures, and did not include the current configuration of the pipeline. (IEN Br. at 23-27). None of these arguments has merit. NEPA regulations and CEQ guidance clearly allow an agency to define the range of alternatives considered to account for the needs of a non-federal applicant. Additionally, State reasonably excluded renewable energy alternatives as outside the scope of the proposed action.

One of NEPA's primary purposes is to foster informed decision-making. *See* 40 C.F.R. § 1500.1(b). The statute accomplishes this goal in part by requiring federal agencies to consider a range of actions before making a final decision. Thus, NEPA requires an agency to consider as part of an EIS "alternatives to the

proposed action." 42 U.S.C. § 4332(2)(C)(iii). NEPA's regulations clarify that an agency should objectively evaluate reasonable alternatives. 40 C.F.R. § 1502.14(a). "Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense." 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981) (emphasis omitted); *see also Busey*, 938 F.2d at 195 (stating that the discussion of alternatives "must be moored to 'some notion of feasibility'") (citation omitted).

The range of alternatives an agency must consider and discuss under NEPA "is a matter within [the] agency's discretion." *Ctr. for Food Safety v. Salazar*, 898 F. Supp. 2d 130, 147 (D.D.C. 2012).[5] Though an agency "must look at every reasonable alternative . . . [it] need not ... discuss alternatives similar to alternatives actually considered, or alternatives which are infeasible, ineffective, or inconsistent with the basic policy objectives" of the agency. *Japanese Vill., LLC v. Fed. Transit Admin.*, 843 F.3d 445, 463 (9th Cir. 2016) (citations omitted). If an agency

[5] An agency satisfies its requirements under NEPA once it reviews a range of reasonable alternatives. *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1246 (9th Cir. 2005). NEPA does not require an agency to review a set number of alternatives. In *Native Ecosystems*, the Ninth Circuit rejected plaintiffs' arguments that the U.S. Forest Service should have considered alternatives in addition to the two alternatives the agency did consider in its NEPA analysis—no-action and a preferred alternative. The court held that so long as all reasonable alternatives were considered, the agency satisfied its requirements under NEPA. *Id.*

eliminates alternatives from a detailed study in the EIS, it must "briefly discuss the reasons for their having been eliminated." *Id.* (citing 40 C.F.R. § 1502.14(a)). "Those challenging the failure to consider an alternative have a duty to show that the alternative is viable." *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1087 (9th Cir. 2013).

IEN Plaintiffs contend that State violated NEPA by considering only variations of the proposed action and not exploring alternative or renewable energy alternatives. (IEN Br. at 25-26). When considering whether to grant a Presidential Permit for a transboundary oil pipeline, State is not obligated to consider alternatives that are beyond the scope of such a decision. Courts have routinely held that the range of alternatives an agency must consider can be narrowed when the project proponent is a non-federal entity. *See, e.g., See Fuel Safe Wash.*, 389 F.3d at 1324; *Theodore Roosevelt Conservation P'ship*, 661 F.3d at 74; *Busey*, 938 F.2d at 197; *City of Grapevine, Tex. v. Dep't of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir. 1994). In fact, the case Plaintiffs cite in their brief actually upheld an agency's alternatives analysis despite the plaintiffs arguing the agency impermissibly narrowed the range of alternatives it considered by "thoughtlessly adopt[ing] [the applicant's] narrow goals." *Alaska Survival*, 705 F.3d at 1085 (citation omitted). The Sixth Circuit has also rejected a similar argument to Plaintiffs, concluding that "[a]n agency need not consider a policy alternative generally—say, energy

conservation in the context of a surface mining application." *Klein*, 753 F.3d at 582–83 (citation omitted).

Additionally, the fact that a private applicant proposed the action at issue and not a federal agency is what distinguishes this matter from that recently decided by this Court in *Western Organization of Resource Councils v. BLM*. In that case, the plaintiffs argued that BLM's approval of Resource Management Plans (RMPs) violated NEPA because the agency failed to consider alternatives that would have decreased the amount of extractable coal available for leasing. *W. Org. of Res. Councils v. United States BLM*, No. CV 16-21-GF-BMM, 2018 U.S. Dist. LEXIS 49635, at *20 (D. Mont. Mar. 26, 2018). In addressing this claim, this Court acknowledged that the range of alternatives to be considered by the agency "should be dictated by the nature and scope of the proposed action." *Id.* at *27 (citation omitted). Because the scope of the action was broad – BLM had to manage the lands under a multiple use mandate – this Court determined that BLM was obligated to consider management actions that reduced climate change impacts. *Id*.

Here, however, the "nature and scope of the proposed action" is significantly different because a private applicant proposed a specific project for State's consideration. Thus, State's charge of reviewing the permit application is very different from BLM's obligation to manage federal lands for multiple uses.

Accordingly, Plaintiffs' claim that it was unreasonable for State to limit the range of alternatives considered based on the purpose of TransCanada's Presidential Permit application is legally incorrect.

But regardless of the private versus public applicant distinction, Plaintiffs' claim that State failed to consider renewable energy development or energy efficiency standards alternatives also fails because the record demonstrates that State considered and rejected those alternatives. In the FSEIS, State considered various proposals for developing alternatives that would replace oil demand with renewable energy sources or greater efficiency standards in order to reduce demand for crude so that the project would not be needed. (DOSKXLDMT06089-95). State relied on a number of studies and demand predictions from the International Energy Agency and concluded that "[o]utlooks for world and U.S. demand for crude oil indicate that even if there were a substantial reduction in U.S. consumption of crude oil (and/or relatively flat worldwide consumption), the market demand in PADD 3 that is driving the development of the proposed Project would likely remain." (DOSKXLDMT06091). Additionally, State indicated that a denial of the Keystone XL Pipeline project was not likely to drive up transportation fuel costs to a point where consumers would reduce the amount of transportation consumed. (DOSKXLDMT06092-93). For these and other reasons, these alternatives ultimately were eliminated from further development during

preparation of the EIS because State concluded they would have little, if any, impact on the demand for transportation fuels in the United States. (DOSKXLDMT06095). Moreover, this decision was reasonable because these proposed alternatives were not feasible and they were not substantially different from the no action alternative. *See Seattle Audubon Soc'y*, 80 F.3d at 1404 (an agency need not "consider alternatives that are unlikely to be implemented"); *Headwaters, Inc. v. Bureau of Land Mgmt., Medford Dist.*, 914 F.2d 1174, 1181 (9th Cir. 1990) ("NEPA does not require a separate analysis of alternatives which are not significantly distinguishable from alternatives actually considered, or which have substantially similar consequences.").

C. The Change in the Nebraska Route Does Not Impact State's NEPA Analysis

Plaintiffs also argue that the FSEIS is deficient because it did not review the actual current configuration of the Keystone XL Pipeline project. (IEN Br. at 27; NPP Br. at 9-12). Plaintiffs' arguments lack legal support, and they misapply NEPA's regulatory requirements. State reasonably reviewed the proposed project based on TransCanada's proposed configuration and made a final decision. For the reasons set forth below, there is no remaining federal action for State to take because it already issued the Presidential Permit, and absent a current federal action, there is no duty to perform additional NEPA analysis.

A federal agency must analyze the impacts of a proposed action and reasonable alternatives to that action as required by NEPA. 42 U.S.C. § 4332(2)(C)(iii); 40 C.F.R. § 1502.14(a). This requirement applies to the design of a project when it is proposed. If "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" arise during the course of the NEPA review, then an agency would be required to perform a supplemental analysis. 40 C.F.R. § 1502.9(c)(1)(ii).

Here, the Nebraska route change resulted from a decision by the Nebraska PSC that post-dated State's 2017 ROD and the issuance of the Presidential Permit. The resulting decision was beyond TransCanada's or State's control because it came from a state agency; it was not due to TransCanada or State completing an element of the project that was previously incomplete. Thus, the Nebraska PSC's decision to change the route constitutes new information and not a situation where information was incomplete at the time State issued the Presidential Permit. When State made its decision, the FSEIS was complete and provided the basis for an informed decision at the time the FSEIS was prepared. *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1439 (9th Cir. 1988), *amended by* 867 F.2d 1244 (9th Cir. 1989) ("The information in the EIS concerning the Avra Valley was complete and provided the basis for an informed comparison at the time the EIS was prepared."). Additionally, as discussed below, State had no obligation under NEPA to review

the impact of the Nebraska PSC decision because it occurred after the issuance of the Presidential Permit when there was no ongoing major federal action for the agency to take.

According to the Supreme Court, an agency's duty to supplement its NEPA analysis "is necessary only if there remains major Federal actio[n] to occur." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 73 (2004) (citation omitted). Once an agency an agency action is complete, "[t]here is no on going major Federal action that could require supplementation." *Id.* (citation omitted); *see also Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 374 (1989); *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1095 (9th Cir. 2013).

Here, State completed its federal action by making its national interest determination and issuing the Presidential Permit. Thus, once it issued the 2017 ROD, State had no ongoing duty or authority to supplement its NEPA analysis because its earlier decision had already authorized TransCanada to construct the transboundary portion of the Keystone XL Pipeline. As the Presidential Permit recites, TransCanada is authorized "to construct, connect, operate, and maintain pipeline facilities at the international border of the United States and Canada at Morgan, Montana, for the import of crude oil from Canada to the United States." (DOSKXLDMT02485). The agency's issuance of a permit authorizing construction and operation of the transboundary pipeline facilities, places this

matter on all fours with the Ninth Circuit's decision in *Center for Biological Diversity v. Salazar*, where the plaintiffs challenged BLM's failure to perform supplemental NEPA analysis after approval of a mining plan of operations. 706 F.3d at 1094.

In *Center for Biological Diversity*, a uranium mining company decided to resume mining operations after taking a seventeen-year hiatus. *Id.* at 1088. The mining company notified BLM in 2007 that it would restart operations and follow the plan of operations BLM approved in 1988. *Id.* at 1088-89. The plaintiffs filed suit to halt mining operations, arguing that BLM had to perform a supplemental NEPA analysis before mining operations could resume because 1988 environmental assessment had become stale and outdated. *Id.* at 1094. The court, however, found that the major federal action at question – the approval of the 1988 plan of operations – was completed when the plan was approved. *Id.* at 1095. Thus, there was "no ongoing major federal action that could require NEPA supplementation." *Id.* (citation omitted).

As in *Center for Biological Diversity*, there is no remaining major federal action regarding State's issuance of a Presidential Permit because the issuance of the permit authorized TransCanada to construct and operate the transboundary portion of the pipeline facilities. Plaintiffs will likely argue that this case is different because TransCanada still needs to obtain authorizations from other

federal agencies. In *Center for Biological Diversity*, however, the Ninth Circuit found that other prerequisites to mining activity, such as "th[e] BLM's issuance of a gravel permit to Mohave County, requirement that [the mining company] obtain a new air quality control permit, and approval of an updated reclamation bond," did not affect "the validity or completeness of the 1988 approval of the Arizona 1 Mine's plan of operations nor did they prevent [the company] from mining under that plan." *Id.* at 1095. Accordingly, even if TransCanada needs to obtain authorizations from other state or federal agencies, those prerequisites do not affect its ability to construct the transboundary pipeline facilities under the Presidential Permit. Thus, State has no ongoing major federal action that would require it to supplement its NEPA analysis.

D. State Reasonably Set Forth a No Action Alternative

State adequately developed a no action alternative using a status quo baseline and three scenarios of what likely would transpire absent authorization of the Keystone XL Pipeline. The no action alternative provides a baseline that allowed State to compare the effects of the Keystone XL Pipeline project alternatives, as well as to the existing conditions in the project area. Plaintiffs contend that the no action alternative is inadequate because it assumes that oil sands production will occur regardless of whether the project is approved. (NPP Br. at 12-19). This argument misses the mark because the Keystone XL Pipeline

project does not include authorization of upstream oil extraction activities – those activities are currently occurring and will continue to do so even without the Keystone XL Pipeline. Instead, the scope of the proposed action is that which State established for the review of an application for a Presidential Permit related to a midstream oil pipeline project. Thus, it was reasonable for State to rely on analysis showing that upstream entities would be able to deliver crude downstream to refiners absent the Keystone XL Pipeline.

As part of the environmental review of a proposed action, NEPA regulations obligate an agency to analyze "the alternative of no action." 40 C.F.R. § 1502.14(d). The no action alternative is the scenario where "the proposed activity would not take place, and the resulting environmental effects from taking no action would be compared with the effects of permitting the proposed activity or an alternative activity to go forward." 46 Fed. Reg. at 18,027. The no action alternative serves as the baseline by which an agency can measure the impacts of a proposed action.

In developing a no action alternative, an agency does not have to take the position that all direct, indirect, or cumulative effects would not occur absent approval of the proposed action. Instead, "[w]here a choice of 'no action' by the agency would result in predictable actions by others, this consequence of the 'no action' alternative should be included in the analysis. For example, if denial of

permission to build a railroad to a facility would lead to construction of a road and increased truck traffic, the EIS should analyze this consequence of the 'no action' alternative." *Id.*

The no action alternative analyzed in the FSEIS is the scenario where State denies the Presidential permit, the proposed project would not be built, and the direct impacts from the proposed project detailed in Chapter 4 of the FSEIS would not occur. (DOSKXLDMT06053). In formulating the no action alternative, State indicated that the indirect effects – upstream and downstream activities – would not be substantially different. (*Id.*). State determined that the indirect effects would remain the same because the agency reasonably concluded that the demand for WCSB crude would continue to be met by supply. State made this conclusion by relying on expert analyses (DOSKXLDMT014540-663) and data from the Energy Information Administration (DOSKXLDMT01136-44), which indicated that WCSB crude would reach refineries through a combination of rail, barge, and existing pipeline infrastructure absent the Keystone XL Pipeline. Thus, State envisioned the following alternative scenarios: (1) Rail/Pipeline scenario where WCSB crude would be transported by rail over existing rail lines to Oklahoma and then shipped via pipeline to the Gulf Coast area for refining; (2) Rail/Tanker scenario where WCSB crude would be transported by rail to port in British Columbia and then shipped via tanker to the Gulf Coast; and (3) Rail scenario

where WCSB crude would be delivered directly to the Gulf Cost by railcar.[6] (DOSKXLDMT07458-60).

These no action alternative scenarios are reasonable because U.S. refineries will continue to demand imported heavy crude, and Canadian production of heavy crude will continue to grow absent the Keystone XL Pipeline. (DOSKXLDMT05654). In the last few years, the increased demand for WCSB crude has led to growing volumes of crude shipped by rail. (*Id.*). In fact, "the transportation of Canadian crude by rail is already occurring in substantial volumes." (*Id.*). In 2011, "crude oil loading facilities had an estimated capacity to load approximately 60,000 bpd, with most of that capacity being in the Canadian Bakken area." (DOSKXLDMT06054). By the end of 2014, "the total crude-by-rail loading capacity [was] expected to be approximately 1.1 million bpd," representing an increase of rail capacity of over 1,800 percent. (*Id.*).

The 2017 ROD confirms that oil sands production has been increasing and that additional rail loading capacity has been added to Western Canada to satisfy transportation needs. (DOSKXLDMT02502) ("alternative transportation

[6] Contrary to Northern Plains Plaintiffs' argument (NPP Br. at 18), an agency can discuss more than one no-action alternative to meet the no-action alternative requirement under NEPA. *Mont. Wilderness Ass'n v. McAllister*, 460 F. App'x 667, 670–71 (9th Cir. 2011); *e.g.*, *Protect Our Communities Found. v. Jewell*, 825 F.3d 571 (9th Cir. 2016) (valid NEPA analysis with two no-action alternatives).

infrastructure would allow growing oil sands production to reach markets irrespective of the proposed Project. Most recently, this has been demonstrated by the growth in rail loading capacity in Western Canada, which as of February 25, 2017, the National Energy Board (NEB) of Canada now estimates at over 1,075,000 bpd.").

Northern Plains Plaintiffs contend that the no action alternative is meaningless because it assumes the existence of the proposed action. (NPP Br. at 13-14). This is not so, and the FSEIS does not support Plaintiffs' overly narrow view. The no action alternative correctly assumes that there will be no action along the route proposed by TransCanada. This allowed State to compare the potential impacts of the proposed action to the conditions that would exist if the project never materializes. (DOSKXLDMT07461) ("Under the Status Quo Baseline, the direct, indirect, and cumulative impacts associated with construction and operation of the proposed Project in the Project area would not occur.") The differences in environmental impacts are discussed over the span of nearly 200 pages. (DOSKXLDMT07456-647). The FSEIS discloses the differences in numerous categories of potential impacts and provides comparison tables that summarize the different effects of each scenario. (*See, e.g.*, DOSKXLDMT07637).

Northern Plains Plaintiffs' claim the no action alternative is inadequate because it assumes WCSB oil production will occur regardless of the project. (NPP Br. at 14). As noted above, however, State's analysis is reasonable and it does not defeat the purpose of establishing baseline environmental conditions because State has no power or duty to consider whether to approve the granting or development of an oil lease in Western Canada. NEPA does not restrict State from making reasonable predictions about what would transpire, absent approval of the proposed action.

In *Oceana v. Bureau of Ocean Energy Management*, for example, the district court found a no action alternative was reasonable where it assumed that the same level of oil and gas development would occur regardless of whether it approved or cancelled an oil and gas lease sale. 37 F. Supp. 3d 147, 172 (D.D.C. 2014). In the EIS, "BOEM simply recognized that even if it cancelled this lease sale, another lease sale in the same area would likely eventually go forward, and therefore cancelling the lease sale would not significantly change the impact to the environment." *Id.*

The court upheld the agency's analysis, finding that the agency "did consider a true no action alternative as mandated by NEPA, and that its analysis was reasonable." *Id.* Numerous other courts have upheld an agency's formulation of a no action alternative that predicts a similar level of development as the

proposed alternative. *See Young v. Gen. Servs. Admin.*, 99 F.Supp.2d 59, 74 (D.D.C. 2000) (agency's no action alternative was reasonable because where "a decision by the government not to consolidate its facilities on undeveloped land would result in significant private commercial and residential development on the vacant property, the consequences of that alternative development should be addressed"); *see also Communities, Inc., v. Busey*, 956 F.2d 619, 626 (6th Cir. 1992) (no action alternative assuming demolition of the area was reasonable where a local government would have demolished the site with or without the federal government taking its proposed action).

The cases Plaintiffs cite in support of their argument are clearly distinguishable from the facts before State. (NPP Br. at 14-17). In *Center for Biological Diversity v. U.S. Department of Interior*, the court found the no action alternative to a proposal for a land exchange to be arbitrary and capricious where it determined that mining would occur absent approval of the exchange. 623 F.3d 633, 642–43 (9th Cir. 2010). In that case, however, the project proponent faced obstacles to mining absent the land exchange. The court found that "if the proposed land exchange does not occur, the selected lands would remain in public hands" and the project proponent's "ability to conduct mining operations on its claims would be subject to the Mining Law of 1872." *Id.* at 643. Given the application of the Mining Law of 1872, the mining activity could be substantially

different if the land was public and not private because BLM could control development on public land. *Id.* Accordingly, the court concluded that it was arbitrary and capricious for the agency to assume that mining operations would be the same under the proposed and no action alternatives. *Id.* at 646.

Here, however, oil sands production in Canada can occur regardless of whether State approves the Keystone XL Pipeline project because State has no control over oil extraction activities in Canada. In fact, production has increased and is projected to increase notwithstanding the existence *vel non* of the Keystone XL Pipeline. Accordingly, the facts and court's conclusion in *Center for Biological Diversity* are not applicable to the facts of this case.[7]

[7] *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024 (9th Cir. 2008) is also inapplicable because the no action alternative in that matter included elements of a comprehensive management plan (CMP) that a court previously found to be invalid. Thus, it was not appropriate to assume such measures would exist absent additional action by the agency. *Id*. at 1038 ("because the Ninth Circuit held the 2000[CMP] to be illegal, NPS cannot properly include elements from that plan in the no action alternative as the status quo" (citation omitted)). The Fourth Circuit's decision in *North Carolina Wildlife Federation v. North Carolina Department of Transportation* also is easily distinguishable because the agency in that case accidentally relied on data that assumed the existence of the proposed highway project as part of the "no-build" baseline. 677 F.3d 596, 602 (4th Cir. 2012). On review, the agencies "admitted that they publicly (and erroneously) denied this fact throughout the administrative process" and had represented that the data had not assumed construction of the proposed project. *Id*. at 603. Here, State has not misrepresented data or made assumptions that have not been disclosed to the public.

Northern Plains Plaintiffs' argument that the FSEIS is inadequate because it "repeatedly states that denying Keystone XL would have no effect on greenhouse gas emissions" is equally meritless. (NPP Br. at 12-13). The GHG emissions from the construction and operation of the Keystone XL Pipeline along with the emissions estimated from other alternatives, including the no action alternatives are discussed in the FSEIS and presented in a chart so that the impacts can be compared. (DOSKXLDMT07640). The direct GHG emissions impacts from the project are different for each alternative. (*Id.*). Though the indirect GHG emissions of the project associated with WCSB oil extraction remain the same under each alternative, this prediction is reasonable because, as indicated in the study above, market forces will drive the development of WCSB oil production – not the Keystone XL Pipeline. Thus, there is no merit to Northern Plains Plaintiffs' argument that the no action alternative is deficient.

E. State's Cumulative Effects Analysis Complies with NEPA

Northern Plains Plaintiffs' argue that State approved the Keystone XL Pipeline without considering the cumulative effects of approving the project along with other pipelines, such as the Alberta Clipper. (NPP Br. at 23). In support of this argument, Northern Plains Plaintiffs' contend that State was aware of the

potential cumulative impacts of authorizing multiple pipelines capable of transporting WCSB oil from Canada to the United States because State disclosed in the Alberta Clipper EIS the potential cumulative GHG impacts from both the pipeline and the Keystone XL Pipeline. (*Id.*). By acknowledging that State was fully aware of the cumulative impacts of approving multiple pipelines, Northern Plains Plaintiffs' has undermined its own argument.

NEPA regulations instruct agencies to consider the direct, indirect, and cumulative impacts of a major federal action in order to inform the decision-making process. *Ctr. for Envtl. Law & Policy v. U.S. Bureau of Reclamation*, 655 F.3d 1000, 1006 (9th Cir. 2011). A cumulative impact is "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. As noted above, a review of a project's impacts helps inform an agency's decision-making process.

State was well aware of the potential cumulative impact of authorizing additional pipeline infrastructure between the United States and Canada. In fact, the FSEIS acknowledges that Enbridge had made filings to "expand one of its heavy crude pipelines, Line 67 (also known as Alberta Clipper), from Hardisty, Alberta, to Superior, Wisconsin, by 120,000 bpd (to 570,000 bpd, with potential to

go to 800,000 bpd)." (DOSKXLDMT05805). In addition to understanding the additional capacity that the Alberta Clipper project would add, State also took a hard look at the potential cumulative impact of authorizing the Keystone XL Pipeline and the Alberta Clipper project. State detailed this review in the EIS for the Alberta Clipper project, however, instead of duplicating the analysis in the Keystone XL Pipeline FSEIS. State disclosed that the Alberta Clipper project, Keystone XL Pipeline project, and the upgrades to Line 3 would result in a cumulative increase in GHG emissions of approximately 2.1 to 49.9 million metric tons CO_2-eq per year. (Alberta Clipper EIA at 6-86).[8] State concluded that "construction and operation of these projects would emit greenhouse gases that would contribute to climate change." (Alberta Clipper EIA at 6-87).

State's review of the cumulative impacts of the Alberta Clipper and other proposed pipelines in the subsequent EIS for the Alberta Clipper project satisfies its obligation to consider cumulative impacts for the Keystone XL Pipeline. In similar cases, courts have found that it is not arbitrary and capricious for an agency to omit analysis of cumulative impacts in an EA or EIS as long as the cumulative impacts will be discussed in a later EA or EIS. *See Kleppe v. Sierra Club*, 427 U.S. 390, 415 (1976); *North Carolina v. FAA*, 957 F.2d 1125, 1131 (4th Cir.

[8] https://www.state.gov/documents/organization/273539.pdf

1992); *Ctr. for Envtl. Law & Policy*, 655 F.3d at 1011; *cf. N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 980 (9th Cir. 2006); *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1323 (W.D. Wash. 1994) ("Where a programmatic EIS is being considered, a court will not require consideration of nonfederal cumulative impacts in the EIS if the agency will analyze such impacts before specific projects are undertaken."), *aff'd sub nom. Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401 (9th Cir. 1996).

In *North Carolina*, for example, the plaintiff challenged the Federal Aviation Administration (FAA) for failing to "consider the cumulative impact of existing and proposed restrictions of airspace" when it issued a final rule "revoking, realigning, and establishing restricted airspace over eastern North Carolina." 957 F.2d at 1127–28. The plaintiff had identified "three other proposals that taken together [with the final rule] may have an adverse cumulative impact on the environment." *Id.* at 1131. The court agreed that NEPA "regulations require an analysis of the cumulative impact of the several existing and proposed special use airspace in eastern North Carolina." *Id*. at 1130. However, the court found that it was "not necessary . . . for an agency to always complete a comprehensive impact statement on all proposed actions in an appropriate region before approving any of the projects." *Id.* at 1131 (citation omitted). Thus, the court upheld the FAA's action despite the agency's failure to analyze cumulative impacts of other related

actions in the area because the EIS for one of the other actions impacting the airspace "will address the cumulative impact of the special use airspace at issue in this case as well as other restrictions." *Id.* The court held that a "cumulative impact analysis is therefore not necessary at this point, and it would be a waste of resources given the necessity for analysis of the cumulative impact of this and other proposals in connection with the [military operation areas]." *Id.*

Additionally, in *Center for Environmental Law and Policy*, the court held that the agency's failure to analyze the cumulative effects of a project that would drawdown water from Lake Roosevelt and another proposed project that would deliver water from the lake for use as a replacement for groundwater in an adjacent area did not violate NEPA. 655 F.3d at 1010. The court reasoned that because the agency would "consider all impacts, including cumulative impacts, as part of the future EIS, and because the courts could hold the agency to that implied promise, it was sufficient for the agency to address [the impacts of the future project] at a later stage." *Id*. (citation omitted). Thus, the court was satisfied that the agency would not "escape its downstream obligation to consider the impact of the project." *Id*.

The facts of this case are even more compelling than in *North Carolina* or *Center for Environmental Law and Policy*. In those cases, the *future* prospect of an agency addressing the cumulative effects of the proposed action and a future related action was sufficient to excuse the agency from not completing a

cumulative effects analysis for the earlier project. Here, however, as Plaintiffs' acknowledge, State already completed the cumulative effects analysis in the Alberta Clipper EIS. This satisfies State's obligation to consider cumulative effects of the Keystone XL Pipeline project with future pipeline projects. *See Kleppe*, 427 U.S. at 415 n.26 ("[A]n agency could approve one pending project that is fully covered by an impact statement, then take into consideration the environmental effects of that existing project when preparing the comprehensive statement on the cumulative impact of the remaining proposals.").

F. State Adequately Considered Extraterritorial Impacts of the Keystone XL Pipeline Project

IEN Plaintiffs claim that State's analysis of the impacts in Canada from the development of oil sands extraction is wholly inadequate because it fails to ascribe such development to the Keystone XL Pipeline project and fails to consider the severity of the impacts. (IEN Br. at 29-32). Not only are IEN Plaintiffs wrong on the facts, but they are wrong on the law as well.

The laws of the United States are "meant to apply only within the territorial jurisdiction of the United States" unless Congress expresses a contrary intent. *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 589 (9th Cir. 1983) (citation omitted). NEPA does not mandate consideration of extraterritorial impacts. *See Nat. Res. Def. Council, Inc. v. Nuclear Regulatory Comm'n*, 647 F.2d 1345, 1367 (D.C. Cir. 1981) ("NEPA's legislative history illuminates nothing in regard to

extraterritorial application."); *Greenpeace USA v. Stone*, 748 F. Supp. 749, 759 (D. Haw. 1990) ("Although the language of NEPA indicates that Congress was concerned with the global environment and the worldwide character of environmental problems, it does not explicitly provide that its requirements are to apply extraterritorially."). In fact, it states only that federal agencies shall "recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment." 42 U.S.C. § 4332(2)(F). CEQ's NEPA regulations also do not require consideration of extraterritorial impacts. State, however, has promulgated regulations that instruct the agency to "analyze actions under their cognizance with due regard for the environmental effects in the global commons and areas outside the jurisdiction of any nation and in foreign jurisdictions." 22 C.F.R. § 161.12. This regulation instructs State to analyze extraterritorial impacts in accordance with Executive Order 12114.

Executive Order 12114 directs federal agencies "to be informed of pertinent environmental considerations and to take such considerations into account" when making decisions regarding projects that may affect the environment beyond the United States border. According to the Order, "[i]f a major Federal action having

effects on the environment of the United States or the global commons requires preparation of an environmental impact statement, and if the action also has effects on the environment of a foreign nation, an environmental impact statement need not be prepared with respect to the effects on the environment of the foreign nation." E.O. 12114 § 3-5. Additionally, the Executive Order exempts "actions taken by or pursuant to the direction of the President or Cabinet officer when the national security or interest is involved or when the action occurs in the course of an armed conflict." *Id.* § 2-5(a)(iii).

Based on applicable legal authority, State has no duty to take a hard look at the effects of the Keystone XL Pipeline project in Canada. Executive Order 12114 not only indicates that an EIS need not be prepared to address the effects to Canada, but it also exempts actions taken by direction of the President when the national interest is involved. Here, there is no doubt that State's action was taken at the Direction of the President in accordance with its delegated authority under Executive Order 13337 and that it involves the national interest. The sole basis for State's issuance of the Presidential Permit was a finding that the project was in the national interest.

Even assuming that State had an obligation to review and disclose the effects of the project in Canada, such an obligation was minimal given that Canada prepared its own environmental review of the Keystone XL Pipeline project. As

indicated in Executive Order 12114, an agency should modify its approach to analyzing impacts of an action on a foreign nation to "avoid adverse impacts on foreign relations or infringement in fact or appearance of other nations' sovereign responsibilities." E.O. 12114 § 2-5(b)(ii). Here, Canada reviewed and approved of the Keystone XL Pipeline project after performing a full environmental review. (DOSKXLDMT07267-69). Canada's National Energy Board's (NEB) determined that "with the implementation of Keystone's environmental protection procedures and mitigation measures, and with the NEB's conditions and recommendations, the proposed Keystone XL pipeline in Canada was not likely to cause significant adverse environmental effects." (DOSKXLDMT07267).

State has afforded due respect to the analysis performed in Canada, and it should continue to do so in order to respect Canada's sovereignty. A decision by State to deny a Presidential Permit based on the project's potential impacts in Canada, despite Canada's review and approval of the project, would be the epitome of an action signifying a lack of respect for Canada's sovereignty. *See Greenpeace*, 748 F. Supp. at 760 (finding that the "extraterritorial application of NEPA to the Army's action in the [Federal Republic of Germany] with the approval and cooperation of the FRG would result in a lack of respect for the FRG's sovereignty, authority and control over actions taken within its borders").

Accordingly, IEN Plaintiffs' argument that State failed to properly review the extraterritorial impacts of the action should be dismissed.

G. State Took a Hard Look at the Potential Impact of the Project and Its Analysis Does Not Require Supplementation

The EIS State prepared in 2011 and updated in 2014 sufficiently addresses potential environmental impacts associated with fluctuating oil prices, transportation of oil by rail, oil spill probabilities, and GHG emissions. IEN Plaintiffs claim this analysis is insufficient because State did not take a hard look at water contamination risks, cultural resource impacts, or climate impacts. (IEN Br. at 32-42). Northern Plains Plaintiffs contend that numerous potential impacts have changed since the publication of the FSEIS, which requires State to supplement its NEPA analysis anew. (NPP Br. at 25-34).

State's review of the potential environmental impacts is sound and thorough. A supplemental analysis is not necessary because the changes Northern Plains Plaintiffs identify do not affect the environment in a manner different from that already analyzed and disclosed in the FSEIS. In fact, State acknowledged in the FSEIS that there were various uncertainties in the predictions it made because market forces can alter the price of oil, which has rippling effects on production volumes and methods of transportation. To account for a wide range of uncertainties, State took a hard look at a multitude of scenarios and provided its

best estimation of the impacts that could result. Thus, there is no basis to require State to revise its analysis.

NEPA does not obligate agencies to supplement their environmental reviews "every time new information comes to light after the EIS is finalized." *Marsh*, 490 U.S. at 373-74. Rather, an agency must supplement its NEPA analysis only when faced with "significant new circumstances or information" that are "relevant to environmental concerns" and affect "the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii). State Department regulations instruct the agency to supplement a final EIS only "when a substantial change is made in the proposed action or when significant new information on the environmental impacts comes to light." 22 C.F.R. § 161.9(k).

Federal courts interpret NEPA regulations as requiring a supplemental EIS "only where new information provides a *seriously* different picture of the environmental landscape." *Friends of Capital Crescent Trail v. Fed. Transit Admin.*, 877 F.3d 1051, 1060 (D.C. Cir. 2017) (citation omitted); *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1155 (9th Cir. 2008) (a supplemental EIS was not required because there were "no new impacts that were *significantly* different than those already considered" (emphasis added)). In reviewing whether new information requires supplemental analysis, courts grant significant deference to an agency's decision because it is a "classic example of a

factual dispute the resolution of which implicates substantial agency expertise." *Marsh*, 490 U.S. at 376.

Contrary to Plaintiffs representation, there is no low bar for triggering a supplemental EIS. (NPP Br. at 26 (claiming that "the bar for triggering a supplemental EIS is low")). In advocating for a lower legal standard, Plaintiffs misinterpret *Klamath Siskiyou Wildlands Center v. Boody*, wherein the Ninth Circuit indicated that plaintiffs faced a low bar for showing an agency needed to prepare an *initial* EIS. 468 F.3d 549, 562 (9th Cir. 2006). The court stated: "under 42 U.S.C. § 4332(2) an EIS 'must be prepared if substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor.' . . . This is a low standard." *Id.* (citation omitted). In the succeeding paragraph, the court clarifies that the "low standard" refers to the obligation to prepare an EIS by criticizing the Bureau of Land Management for failing to prepare any NEPA analysis. *Id.* ("not only did BLM fail to conduct an EIS prior to implementing either of the ASR Decisions, it did not even conduct an EA"). Moreover, the authority cited by the Ninth Circuit in support of its legal analysis, *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir.1998), pertained to the requirements for preparing an *initial* EIS – i.e. for "major Federal actions significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(C). That court did not address the standard for preparing a *supplemental*

EIS. The correct legal standard actually imposes a high bar – an agency needs to supplement an EIS "only if the new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered." *Idaho Wool Growers Ass'n v. Vilsack*, 816 F.3d 1095, 1106 (9th Cir. 2016) (citation omitted).

1. *Oil Prices*

Oil price fluctuations do not paint a seriously different picture of the potential environmental impacts of the Keystone XL Pipeline project than those disclosed in the FSEIS. Though Plaintiffs contend State dismissed the impact of oil prices on oil production, that is not supported by the record. (NPP Br. at 27-29).

In the FSEIS, State disclosed the impact oil prices could have on oil sands development and the role, if any, that the Keystone XL Pipeline project would play in that development. (DOSKXLDMT05882-97). State estimated the potential long term and short term impacts on oil sands development from low prices and other production constraints and determined that "pipeline constraints are unlikely to impact production given expected supply-demand scenarios, prices, and supply costs," but noted that "lower-than-expected oil prices *could* affect the outlook for oil sands production." (DOSKXLDMT05895) (emphasis added). Ultimately, however, State concluded that the "dominant drivers of oil sands development are

more global than any single infrastructure project. There are possible scenarios in which production and investment in the oil sands could abate due to extremely low oil prices, regulatory changes, or the development of new technologies or energy sources, but the effects of those factors should not be conflated with the effects of constraints on an individual pipeline or other cross-border pipeline capacity growth." (DOSKXLDMT05897).

State's analysis encompasses a broad swathe of possible outcomes based on the approval of the project in combination with a variety of oil price scenarios. Plaintiffs have failed to explain how lower than anticipated oil prices paint a significantly different picture of the potential environmental impacts of the project than is disclosed in the FSEIS. Nor can Plaintiffs claim to know for certain that the price of oil will remain low by the time the Keystone XL Pipeline would be operational.

In fact, no one can accurately predict oil prices years into the future. If Plaintiffs' logic holds and State has to revisit its analysis every time the market price of oil fluctuates, then pipeline projects would never be built. This is precisely why State employed a range of oil prices when it analyzed the potential impacts of the project. Because the FSEIS addresses the impact of oil prices on oil sands development, there is no basis for requiring State to supplement the FSEIS. *See All. for the Wild Rockies v. U.S. Dep't of Agric.*, 772 F.3d 592, 606 (9th Cir.

2014) ("Because the federal defendants considered these issues during the initial final EIS process, we affirm the district court's grant of summary judgment to the federal defendants.").[9]

2. *Rail Transportation*

The potential environmental impact from the reduced use or increased cost of rail transportation has not significantly changed from that discussed in the FSEIS. As State indicated in its environmental review of the project, oil sands production is likely to decline when oil prices are low, and could decline further if oil transportation costs remain high. (DOSKXLDMT05895) ("lower-than-expected oil prices could affect the outlook for oil sands production, and in certain scenarios higher transportation costs resulting from pipeline constraints could exacerbate the impacts of low prices"). State also acknowledged that the availability of pipeline infrastructure can reduce transportation costs and could make oil production economical at a lower price point than rail transportation

[9] The EPA's comment on the FSIES takes State's conclusion out of context. EPA interpreted the FSEIS as concluding that approval of the project in combination with lower oil prices would lead to increased oil sands production. (DOSKXLDMT0974). The FSEIS concluded, however, that sustained low oil prices could decrease oil sands production by a volume greater than the capacity of the project – meaning that there could be a net decrease in production because transportation by pipeline still would not be economical for some producers. (DOSKXLDMT05657) ("higher transportation costs could have a substantial impact on oil sands production levels— possibly in excess of the capacity of the proposed Project").

when oil prices fall in the $65 to $75 per barrel range. (DOSKXLDMT05896). However, when oil prices drop below $65 per barrel, overall oil sands production could decline, even assuming the availability of pipeline capacity from the Keystone XL Pipeline. (*Id.*).

Plaintiffs criticize State's predictions regarding the future development of rail-loading facilities in the WCSB as being inaccurate because that development has stalled. (NPP Br. at 29-31). According to Plaintiffs, information affecting tank car pricing and availability is significant new information because State relied on an assumption that rail infrastructure would continue to develop as a basis for assuming WCSB oil production would continue at the same level absent the Keystone XL Pipeline project. (*Id.*). This argument confounds the record and fails to elucidate a potential impact from the project that State has not already discussed.

As noted above, State set forth a number of operating scenarios where oil extraction could increase, decrease or remain the same in light of the Keystone XL Pipeline. Plaintiffs fail to recognize that the FSEIS discusses a broad range of potential scenarios and indicates that such scenarios are difficult to predict and can change over time. Plaintiffs also fail to recognize that oil prices change daily. While they claim today's oil prices indicate that the Keystone XL Pipeline project would increase oil sands production, the same conditions may not exist in two to three years if the pipeline becomes operational. State assessed these varying

conditions and disclosed the potential impacts of the Keystone XL Pipeline project on oil sands production. Accordingly, there is no basis for requiring State to supplement the FSEIS.

3. *Oil Spills*

Contrary to IEN Plaintiffs' assertion (IEN Br. at 32-35), State adequately assessed the potential impacts of the Keystone XL Pipeline on hydrological resources, including the potential consequences of a release. The potential impacts and probability of a release from the Keystone XL Pipeline project has not changed significantly since State issued the FSEIS. While Northern Plains Plaintiffs claim that releases from other pipelines present significant new information regarding the potential for a release from the Keystone XL Pipeline, (NPP Br. at 31-33), such information does not speak to the adequacy of the measures TransCanada has agreed to implement to reduce the likelihood of a release from the proposed project. Additionally, the new studies discussing the cleanup of diluted bitumen do not paint a significantly different picture of the impacts of a potential release.

State took a hard look at the potential impacts of potential releases to water resources in chapters 3.3, 3.4, 3.13, 4.3, 4.4, and 4.13 of the FSEIS. (DOSKXLDMT06240-6321, 6604-6638, 6732-95, 7066-186). State discloses the potential impact that a release could have and it supported its assessment with modeling performed using EPA's Hydrocarbon Spill Screening Model (HSSM).

(DOSKXLDMT07117). As noted in the FSEIS, the model "is a practical approximation tool to estimate contamination levels for uses related to emergency response, initial phases of site investigation, facilities siting, and underground storage tank programs." (*Id.*). IEN Plaintiffs' argue that the model is not sufficient to analyze diluted bitumen releases or address dynamic conditions. (IEN Br. at 32). NEPA "hard look" standard is not as demanding as Plaintiffs characterize it.

In reviewing whether an agency took a hard look at potential environmental consequences, courts ask "whether an EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1206–07 (9th Cir. 2004) (citation omitted). As noted above, courts afford agencies substantial deference in making judgments about an action's impacts and will find a review to be arbitrary and capricious if the "agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

For the Keystone XL Pipeline project, State utilized reasonable scientific models to study the potential impacts of a release. (DOSKXLDMT07066-186). Though the modeling performed by State cannot replicate in exact detail the

consequences of a release from a pipeline at every point along the pipeline path of any volume or chemical makeup of oil, it can reasonably predict a consequence area and inform the agency of what could be expected in the event of a release. State also thoroughly analyzed other potential consequences of a release, detailing the potential impacts over the span of more than 100 pages. (*Id.*). This was sufficient to provide State with necessary information to make a reasoned decision in this matter; and IEN's flyspecking of State's reasoned analysis should be rejected.

It is important to note that a significant release is unlikely, and it is even more unlikely that a release would occur into water. As noted in the FSEIS, the design standards and construction practices used for the Keystone XL Pipeline project "would result in a degree of safety over any other typically constructed domestic oil pipeline system under current code." (DOSKXLDMT06607). TransCanada "has agreed to incorporate additional mitigation measures in the design, construction, and operation of the proposed Project, in some instances exceeding what is normally required, including 59 Special Conditions, 57 of which were recommended by PHMSA." (DOSKXLDMT02506). Many of these measures are intended to reduce the likelihood of a release and others are designed to reduce the consequences and impact of a release should it occur. (*Id.*). Some of the elements TransCanada incorporated as part of the design criteria that "greatly

reduce the threat of crude oil releases" include the use of pipeline specifications that meet or exceed applicable regulations, the use of "the highest quality external pipe coatings (fusion bond epoxy or FBE) to prevent corrosion," a pipeline monitoring system that remotely measures changes in pressure and volume every 5 seconds, and surveillance and pipeline integrity inspections. (DOSKXLDMT012066). As a result, the "Keystone XL pipeline has a lower probability of experiencing a spill due to the combined application of the design standards and the addition of the Special Conditions, which add a greater degree of safety over the pipeline systems with reported spill events in the PHMSA incident database." (DOSKXLDMT07071).

To assess impacts and the likelihood of a spill, the FSEIS relies on PHMSA data from 2002 to 2012. (DOSKXLDMT011317-19). This data showed a range of incidences across a variety of pipelines. During this time period, PHMSA's data indicated there were 1,692 incidents, 321 of which involved the body of the pipeline or the welds connecting mainline pipe sections, and 1,027 incidents were associated with tanks, valves, and equipment at pump stations. (DOSKXLDMT011319).[10] PHMSA converted this data to determine the incident rate per mile-year of pipeline. (*Id.*). Because the average age of the pipelines in

[10] The remaining 344 incidents were reported in a way that it was not possible to distinguish the source of the incident. (DOSKXLDMT011319).

the database was approximately 47 years old, the data is likely overly conservative. (DOSKXLDMT07081). Nonetheless, the data enabled State to understand the likelihood of certain releases at a number of different points along a pipeline and the potential causes and sizes of such releases. (DOSKXLDMT07080-88). State updated its analysis to add data through August 2013. That data indicated that the probabilities and incidents were consistent with its prior calculations. (DOSKXLDMT011334).

Northern Plains Plaintiffs claim that State must revise its analysis because there have been recent releases at other pipelines in the United States, (NPP Br. at 31-32); however, they fail to demonstrate how this information has any bearing on the project or its impacts. The recent releases do not indicate that the overall frequency of releases has increased or that the PHMSA historical data used to calculate the incident per mile factor is no longer accurate. In fact, as noted in the risk assessment, "the number of spills on crude oil pipelines has substantially declined in recent years with the implementation of US Department of Transportation's (USDOT) Integrity Management Rule." (DOSKXLDMT012067). Nor do the releases suggest that any of the proposed mitigation measures are significantly less effective than contemplated. Instead, Plaintiffs simply identify releases postdating the FSEIS and label them significant.

"This is not enough." *Pub. Emps. for Envtl. Responsibility v. Beaudreau*, 25 F. Supp. 3d 67, 127 (D.D.C. 2014).

Northern Plains Plaintiffs also claim that new studies finding diluted bitumen is more challenging to clean up than other types of oil or that it requires first responders to receive more training also is significant new information. (NPP Br. at 32-33). It is not. The FSEIS fully discloses the potential impacts that could result from a release. (DOSKXLDMT07120-57). State reviewed the potential impacts of a release to land, water, ground water, and high consequence areas. (DOSKXLDMT07122-57). It detailed the type of response that would be required, noting that it would vary based on the significance of the release. The National Academies of Sciences study Plaintiffs reference as warranting supplemental NEPA analysis does not change the kind of impact a pipeline release could have on the environment. Instead, it suggests the degree of impact could be different. For example, diluted bitumen has a relatively lower toxicity than commonly transported crudes, so a release of diluted bitumen would pose the same or less of a concern for contaminated drinking water and respiratory problems or disease. (DOSKXLDMT01394). Conversely, diluted bitumen is denser than other crudes so a release may pose a greater level of concern for sinking in water and not biodegrading as quickly as other crude oils. (*Id.*).

Given diluted bitumen's higher density and propensity to sink in the event of a release to water, the National Academies of Sciences study recommends improving preparedness for a spill so that responses will be effective. Specific recommendations include providing first responders with safety data sheets for each of the named crude oils, require plans that address release risks to water bodies and other sensitive areas, require PHMSA to review spill response plans for pipelines carrying diluted bitumen. (DOSKXLDMT01396). These considerations have already been addressed as part of the development of the Keystone XL Pipeline project. The FSEIS states that "[i]n the event of a release, the specific MSDSs and exact composition of the product shipped (and released) would be provided to emergency responders (including any state, local, or federal agencies involved in spill response actions) within 1 hour of the release." (DOSKXLDMT07165). The FSEIS also indicates that PHMSA has been consulted to assist in the development of spill response plans and it has imposed a set of special conditions that increases safety in the event of a release "above current minimum requirements." (DOSKXLDMT07157).

Additionally, the FSEIS identifies sensitive areas, water body crossings, and high consequence areas that could be impacted by a release. (DOSKXLDMT07122-57). Given that State in coordination with PHMSA, TransCanada, and other federal agencies have already addressed the

recommendations identified in the National Academies of Sciences study, it was reasonable for State to conclude that the study did not require a supplemental EIS. (DOSKXLDMT02507 "the measures that Keystone has already committed to-including commitments relating to development of an ERP and other mitigation plans that account for new information adequately address the new challenges, training needs, and communication needs identified in the NAS 2016 study.").

H. State Took a Hard Look at Potential Impacts of the Keystone XL Pipeline Project

Plaintiffs criticize State's analysis of the potential impacts of the project, claiming that State failed to take a hard look at GHG impacts, impacts to Fort Peck dam, and cultural resource impacts as well as environmental justice concerns. None of these claims has merit, as State took a hard look at each one and disclosed the potential impacts in the FSEIS.

1. *GHG Impacts*

Contrary to IEN's argument, (IEN Br. at 38-42), State analyzed a broad range of potential GHG emissions from the construction, operation and annual lifecycle emissions of the Keystone XL Pipeline project. These were fully disclosed in the FSEIS. (DOSKXLDMT07199-228). Northern Plains Plaintiffs contend that the Greenhouse Gases, Regulated Emissions, and Energy use in Transportation (GREET) model that was created after the FSEIS constitutes significant new information because it estimates that GHG emissions from WCSB

crude may be 5 to 20 percent higher than previously estimated. (NPP Br. at 34). Because the Keystone XL Pipeline project is unlikely to increase oil sands production, any increase in lifecycle GHG calculations from WCSB would not significantly change the potential environmental impacts of the project.

As noted above, State concluded that numerous factors determine the rate of oil sands production. The price of oil is the primary factor driving production decisions, followed by regulations and technological developments; the availability of a single pipeline is not a significant factor given that there are other rail and pipeline transportation options available to upstream operators. (DOSKXLDMT02502). For this reason, State determined that it was not reasonable to conclude that the Keystone XL Pipeline project would increase GHG emissions by an amount equal to the lifecycle GHGs produced by the pipeline's capacity. (*Id.*). State concluded that the amount of oil sands production would not be affected substantially by the project. (*Id.*). Thus, it was not arbitrary or capricious for State to conclude that the GREET model should not significantly impact the estimated GHG impacts of the Keystone XL Pipeline project.

Even assuming that the full amount of lifecycle GHG emissions from an amount of crude equivalent to the Keystone XL Pipeline project's capacity is attributable to the project, the GREET model results would not significantly change the potential environmental impact of the project. In the FSEIS, State

calculated the total amount of GHG emissions attributable to the project based on the assumption that it would result in an increase in oil sands production equivalent to the pipeline's capacity. (DOSKXLDMT07199-200, 7231). The high range of estimated emissions is a small percentage of the overall amount of GHG emissions in the United States or Canada. Thus, a 5 to 20 percent increase in the potential emissions of the project would not significantly change the amount of GHG emissions in either country.

2. *Impacts to Fort Peck Dam*

IEN also claims that State failed to analyze "how the Fort Peck Dam increases the risk of catastrophic contamination" or examine whether a failure of the dam would threaten the integrity of the pipeline. (IEN Br. at 35). The FSEIS, however, addressed potential flood risks and notes that mitigation measures are in place to mitigate potential risks. For example, "at some water crossings the pipeline would be installed using the HDD method, at depths greater than 8 feet below the stream bed, where it would not be affected by scouring events." (DOSKXLDMT06713). Additionally, other mitigation measures will be required as a result of the Clean Water Act and Rivers and Harbors Act permitting process. (DOSKXLDMT06753-54). As noted in the FSEIS, the project plans for pipeline depth at major waterbody crossings "indicate a typical minimum depth of 30 feet from lowest channel elevation to the top of pipe or coating . . . [and] [t]he plan

supplied for the Niobrara river in Nebraska indicates a depth of over 60 feet from the lowest point in the channel to the top of pipe." (DOSKXLDMT06754). The potential impacts of a catastrophic dam failure will be addressed by the Army Corps as part of the Clean Water Act Section 408 permission review. This permitting process is not compete, accordingly IEN has failed to allow the proper agency an opportunity to review and evaluate their claim.

3. *Cultural Resources and Environmental Justice*

IEN challenges the adequacy of State's review of the potential impacts to cultural resources and its environmental justice evaluation. (IEN Br. at 35-37). Though they argue the review is inadequate, they fail to articulate a basis to support their claim. Instead, they merely conclude that mitigation measures are insufficient to protect the potentially impacted resources. (IEN Br. at 37). Regardless of what IEN is trying to argue, State adequately addressed cultural resources.

State thoroughly analyzed potential environmental justice concerns and discussed them in the FSEIS. (DOSKXLDMT06492-99). During this review, State set a very conservative analysis area that was a minimum of 4 miles wide and extended to as much as 10 miles from the project where the project would cross rivers and creeks. (DOSKXLDMT06493). State identified minority and low-income populations in this area, and provided data regarding the 71 census blocks

within the project area. (DOSKXLDMT06494-96). Based on its analysis, State concluded that 16 census block groups were identified with minority populations that were meaningfully greater than their respective reference areas, and five census tracts were identified with low-income populations that were meaningfully greater than their respective reference areas. (DOSKXLDMT06495-97).

In order to mitigate any potential impacts on environmental justice communities, in addition to avoiding certain areas, TransCanada agreed to specific mitigation that would "involve ensuring that adequate communication in the form of public awareness materials regarding the construction schedule and construction activities is provided." (DOSKXLDMT06971). TransCanada would provide materials in appropriate languages that would "contain information on how to seek needed services in the event of a health or other social service disruption related to construction activities." (*Id.*). TransCanada also has committed to "employee and supplier diversity; has in place continuing Affirmative Action plans for females, minorities, individuals with disabilities and covered veterans; and supports a policy of equal opportunity for Minority and Women-Owned Business Enterprises (M/WBEs) and Historically Underutilized Businesses (HUBs)." (DOSKXLDMT06975). As a result, State concluded that "it was not likely that proposed Project operation would disproportionately adversely impact [environmental justice] populations," and there "is no evidence that [potential

release] risks would be disproportionately borne by minority or low-income populations." (DOSKXLDMT06979). Accordingly, State fulfilled its obligation to analyze and discuss environmental justice concerns.

State's review and protection of cultural resources also satisfies its NEPA obligations. (DOSKXLDMT07000-20). As summarized in Appendix Z and noted in the FSEIS, there are mitigation measures in place that will minimize potential impacts to cultural resources. (DOSKXLDMT012797-98). The mitigation measures are memorialized in a Programmatic Agreement (PA) that requires "the avoidance, if possible, or mitigation of adverse effects on historic properties." (DOSKXLDMT012798). Where avoidance is not possible a, "Treatment Plan would be prepared consistent with the stipulations of the amended PA" that "would describe the measures to minimize and mitigate the adverse effect of proposed Project construction activities on historic properties, the manner in which these measures would be carried out, and a schedule for their implementation." (DOSKXLDMT012797-98). State indicated that this approach would be sufficient to minimize impacts to cultural properties, and IEN has failed to demonstrate otherwise.

I. State Considered Adequate Mitigation Measures to Reduce Potential Impacts

IEN argues that the FSEIS is silent regarding mitigation measures to prevent releases. (IEN Br. at 42-43).[11] The FSEIS directly contradicts IEN's argument, noting that the mitigation measures for this project are "above what is normally required." (DOSKXLDMT05664). There are mitigation measures in place to reduce impacts to soils (DOSKXLDMT06725-29), water resources (DOSKXLDMT06763-64), wetlands (DOSKXLDMT06787-89), vegetation (DOSKXLDMT06811-15), wildlife (DOSKXLDMT06834-37), fisheries (DOSKXLDMT06858), threatened and endangered species (DOSKXLDMT06895-907), cultural resources (DOSKXLDMT07003-19), and potential releases (DOSKXLDMT07157-86). Additionally, there are three appendices to the FSEIS containing mitigation measures for the project: Appendix B (DOSKXLDMT09422-65), Appendix G (DOSKXLDMT010006-119), and Appendix Z (DOSKXLDMT012728-839). Though Plaintiffs believe more frequent inspections are necessary, they fail to recognize that the Keystone XL

[11] IEN also argues that there is an insufficient discussion of mitigation measures to reduce the threat to birds from the Alberta tar sands tailing ponds. (IEN Br. at 43). Given that these impacts and operations occur in Canada, State lacks jurisdiction to impose mitigation measures abroad. Moreover, as noted above, State's review of impacts in Canada should be extremely limited so as not to impose upon Canada's sovereignty, especially when Canada has performed its own environmental assessment of the Canadian portion of this project.

Pipeline project must be equipped with a Supervisory Control and Data Acquisition (SCADA) system that will provide remote monitoring of the whole pipeline system and will include a leak detection system that analyzes the pipeline much more frequently than foot and aerial inspections. (DOSKXLDMT012812-17; *see also* DOSKXLDMT06028 ("Pipeline conditions along the proposed Project would be continuously monitored 24 hours a day, 7 days a week. The proposed Project would have over 16,000 sensors along its length and multiple, overlapping state-of-the-art leak detection systems.")). The SCADA system will be paired with actual surveys of the pipeline, too. (DOSKXLDMT012819-20). Accordingly, IEN's argument that there are insufficient mitigation measures in place is meritless.

III. The Federal Defendants Fully Complied with the Endangered Species Act

At the outset, Northern Plains and IEN have repeatedly and consistently misconstrued the record when describing the BA and BiOp by substituting the word "would" in place of the word "could" in almost every case.[12] The two words are different.

[12] *See, e.g.*, NPP Br. at 3 ("these data prove that the project's power lines would undoubtedly harm the species"); *id.* at 47-48 ("The Department and the Service completely ignored readily available data on whooping cranes . . . when determining the harm Keystone XL's power lines would pose to whooping cranes."); *id.* at 53 ("that would be devastating for the species)"). *See also, e.g.*, IEN Br. at 16 ("construction and operation of the Project would harm fish and

According to the Merriam-Webster Dictionary, "could" – a term used throughout the BA and BiOp in concluding that the project *may* affect certain listed species – is defined as "to be able to." *Merriam-Webster.com*. 20 March 2018. "Would," on the other hand, "express[es] probability or presumption." *Merriam-Webster.com*. 20 March 2018. Here, the BA and BiOp found no probability or presumption that the project would affect the species that Plaintiffs challenge. The only species that State and FWS found *would* likely be affected by the Keystone XL Pipeline project is the American Burying Beetle (ABB). Consultation for all other species resulted in a finding of "no effect" or "not likely to adversely affect." (FWS000000000564-65). A "would" finding ("likely to adversely affect") places species in an entirely different ESA regime than a "could" finding ("not likely to adversely affect") and has no place in this litigation. Accordingly, it is vital to correctly use this all-important ESA lexicon in assessing Plaintiffs' claims of ESA violations.

State and FWS complied with the ESA in preparing the BA and BiOp. They properly concluded that the Keystone XL Pipeline project is "not likely to

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wildlife habitat…"); *id.* at 61 ("[c]learing for construction would disturb existing fringed orchids"). To the contrary, after extensive analysis and study, the BA concludes that "it is not expected that [power] lines would have cumulative impacts on [species]," referring specifically to the whooping crane. (FWS000000000646).

adversely affect" the whooping crane, piping plover, interior least tern, black-footed ferret, pallid sturgeon, and Western prairie fringed orchid. The agencies used the best available scientific and commercial data to assess the impacts to all species that occur within the proposed Keystone XL Pipeline project area, including consultation with State wildlife agencies and species experts.

Thirteen federally listed threatened or endangered species occur in the Keystone XL Pipeline project area, including the endangered ABB, the endangered black-footed ferret, interior least tern, whooping crane, and pallid sturgeon, and the threatened piping plover, western prairie fringed orchid, northern long-eared bat, and rufa red knot. In 2012, State, as the lead federal agency for the proposed Keystone XL Pipeline project, initiated formal consultation under ESA Section 7. In December 2012, State issued a BA[13] that covered both the federally protected species[14] and candidate species that occur in the proposed project area. After

[13] The BA also built on the 2011 BA for the prior proposed Keystone XL project. After completion of the 2011 BA, FWS released a BiOp in September 2011 with an incidental take statement for the ABB in South Dakota, Nebraska, and Oklahoma. (FWS000000000559).

[14] Since the 2013 BiOp, two additional species were listed as threatened: the northern long-eared bat and the rufa red knot. New ESA consultations for these species were initiated and completed, resulting in a "may affect, but not likely to adversely affect" determination for both species. Kamber Report at 3 (Doc. 135-1).

review and consultation between State and the FWS, the Service issued a BiOp in May 2013 that was supplemented in March 2017.

In challenging the agencies' BA and BiOp, Plaintiffs rely extensively on extra-record materials produced by "expert witnesses." Although TransCanada has joined in referencing these materials throughout this memorandum, TransCanada concurs with the federal government's position (*see* ECF No. 92) that the scope of judicial review in APA cases, such as this case, should be limited to the administrative record. *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (limiting judicial review to "the administrative record already in existence, not some new record made initially in the reviewing court").

A. FWS and State Used the Best Data Available to Assess Impacts to the Whooping Crane, Supporting a Finding of No Jeopardy from the Keystone XL Pipeline Project

The ESA requires agencies to use "the best scientific and commercial data available" throughout Section 7 consultations. 16 U.S.C. § 1536(a)(2). The purpose of this standard is "to prevent an agency from basing its action on speculation and surmise." *San Luis & Delta-Mendota Water Auth.*, 776 F.3d at 995. The Ninth Circuit has made clear that courts "should be especially wary of overturning" a determination of what constitutes the best scientific and commercial data available, because this determination "is itself a scientific determination deserving of deference." *Id.* (citations omitted).

Both Northern Plains Plaintiffs and IEN Plaintiffs place their primary focus on ESA claims related to the whooping crane.

As explained in more detail below, both Northern Plains Plaintiffs' and IEN Plaintiffs' whooping crane allegations fall short because State and the FWS did not violate the best available science standard by not using certain data related to whooping crane conservation, telemetry, and habitat.

1. *Conservation Measures, Including Bird Flight Diverters, Are Proven to Reduce Harm to the Whooping Crane*

Both the BA and FSEIS contain robust discussions of the whooping crane and potential impacts to the species from the Project. (*See, e.g.*, FWS000000005663-75; DOSKXLDMT06866-94). It is well known and documented that power lines can pose a risk to whooping cranes, and that risk was extensively discussed and disclosed in both the BA and FSEIS. Kamber Report at 18, 21; (FWS000000000664-73; DOSKXLDMT06866-94). Yet, Northern Plains contends that State and FWS "never analyze[d] these impacts" to whooping cranes. (NPP Br. at 47).

Northern Plains also asserts that an expert report submitted by them (ECF No. 118) provides the best available science on whooping cranes and "completely undermine[s]" State's "may affect, not likely to adversely affect" determination and the FWS' concurrence. (NPP Br. at 51). However, Northern Plains' expert report did not, in fact, provide new information or data that significantly differs

from the information and data presented in the BA and BO for the Project. Kamber Report at 21.

In acknowledging that the new power lines can be a collision hazard to migrating whooping cranes, the BA analyzed the addition of these proposed power lines for XL Pipeline pumping stations and issued a "may affect, not likely to adversely affect" determination. This finding in the BA rested on a number of factors. First, the project would add only 126 miles of power lines in the 75 to 95 percent whooping crane migration corridor, where approximately 16,180 miles of power lines already exist. *Id*. Thus, the lines associated with this project represent an increase of less than one percent of the existing lines. Because the numbers of this species have been increasing over time while the total miles of power lines has also grown, (FWS000000000244-246), it is difficult to see how this one percent is likely to tip this species into any more danger than it currently faces.

Second, this incremental increase in power lines would be mitigated by the implementation of conservation measures that would minimize any potential impacts to whooping cranes. In consultation with FWS, Keystone developed robust conservation measures related to the whooping crane for both construction of the pipeline within the migration corridor and construction of power lines and pump stations within the migration corridor. For example, for construction activities occurring during the spring and fall whooping crane migration periods,

environmental monitors will survey any habitat areas that might be used by whooping cranes every day in the morning and afternoon before starting equipment. Kamber Report at 19. If any whooping cranes are sighted, the environmental monitor will immediately contact FWS and require a delay of all human activity and equipment startup. *Id.* Construction work would not be able to proceed until the whooping crane(s) leave the area. (DOSKXLDMT06882). These conservation measures follow the Whooping Crane Survey Protocol developed by FWS and the Nebraska Game and Parks Commission. Kamber Report at 19. Mr. Kamber explained the conservation measures in detail in his report. *Id.* at 19-21; (FWS000000000673-74; DOSKXLDMT06881-83).

Third, conservation measures will be implemented by electrical service providers that initially include avoidance measures, and are then followed by minimization measures to prevent collision risk. Kamber Report at 19. For instance, construction of power lines will be avoided within five miles of suitable whooping crane roosting habitat and/or documented high use areas. *Id.* at 20. Furthermore, within the 95-percent migration corridor, all new lines within one mile of potentially suitable habitat will be marked and an equal amount of existing line within one mile of potentially suitable habitat will be marked. *Id.*;

(FWS000000000667).[15] Power line "marking" is used to increase the visibility of the power lines to avian species. "Most studies have shown a reduction in collisions and/or an increase in behavioral avoidance at marked lines when compared to unmarked lines." (FWS000000000282).

Fourth, conservation measures will include the installation of bird flight diverters within the 95-percent migration corridor to minimize the risk of collision. Kamber Report at 20. Outside the 95-percent migration corridor, new lines will be marked if within one mile of potentially suitable habitat, based on the biological needs of the whooping crane. *Id.* Finally, a compliance monitoring plan will be developed that requires written confirmation that the power lines have been marked and that the markers are maintained in working condition. *Id.*

Northern Plains attacks the FWS and State's reliance on bird flight diverters, claiming that the agencies "rely almost exclusively on the use of bird flight diverters to support their conclusion," but "the best available science indicates that these devices are inadequate." (NPP Br. at 58-59). These assertions are meritless. No one contends that bird flight diverters would be 100 percent effective. Kamber Report at 23. Other than siting to minimize impact, bird flight diverters are "the

[15] There are various types of line markers but markers typically fall into one of three general categories: aerial marker spheres, spirals, and suspended devices. (FWS000000000268). Lighting has also been successfully used as a line marking method to reduce collisions. *Id.*

current state-of-the-art technique for minimizing avian collisions with power lines and [are] the current industry standard for reducing avian collisions with the thousands of miles of existing power lines." *Id.* at 23.

Also, FWS Expert Rabbe explained that "[w]hile there are no clear guidelines that guarantee complete elimination or reduction of risk in every location to an acceptable level (risk of adverse effect unlikely), the Service's "Region 6 Guidance for Minimizing Effects from Power Line Projects within the Whooping Crane Migration Corridor (Guidance)" (USFWS, 2010) is the best source for information on reducing risk to whooping cranes." Rabbe Report at 9 (ECF No. 136-4). This Guidance was developed based, in part, on the Avian Power Line Interaction Committee, which calls on every project to evaluate the risk of adverse effects on a case-by-case basis. *Id.* at 9. And the record shows that is exactly what was done with regard to the whooping crane and the Keystone XL Pipeline project. Any assertion by Plaintiffs that the agencies did not rely on this Guidance is false.

FWS expert Rabbe explained that a study on Sandhill cranes (a close cousin to the whooping crane) "constitutes the best and most recent scientific source of information to assess the ability of BFDs to ameliorate risks of power line collisions to whooping cranes" and "reasonably concluded that BFDs were effective at reducing…an estimated 33-50 percent of collisions that power lines

caused." Rabbe Report at 12. Moreover, Kamber found that the standard measures presented in the BA and FSEIS comply with *Mitigating Bird Collision with Power Lines*, which presents stakeholders with "state-of-the-art guidance for siting of power lines and reducing bird collisions with power lines based on the most current information." Kamber Report at 19. What is more, Plaintiffs point to no whooping crane studies that would be considered the "best available data" that the agencies did not consider. As such, Plaintiffs contention that the agencies did not meet the best available science standard with respect to the whooping crane fails.

Yet, because the agencies know bird flight diverters are not 100 percent effective, the BA discusses numerous other siting, engineering, and construction techniques, along with conservation measures, that will minimize the risk of whooping crane collisions with power lines. *Id.* at 23. Indeed, the BA clearly states in its determination that the Project "may affect, but is not likely to adversely affect whooping cranes:"

> This determination is based on the rarity of the species, its status as a migrant through the proposed Project area, Keystone's commitment to follow recommended conservation measures identified by [FWS], and power providers will consult with [FWS] regarding ways to minimize or mitigate impacts to the whooping crane and other threatened and endangered species for new distribution lines to the pump stations and follow recommended avoidance and conservation measures of the [service]. (FWS000000000674).

As discussed above, bird flight diverters are just one conservation measure that is part of a comprehensive conservation plan that will be followed as the Project is carried out. Plaintiffs' blatantly ignore all of the other conservation measures identified by FWS and erroneously zero in on just one of the many numerous considerations that went into State's "not likely to adversely affect" decision and the FWS' concurrence.

Significantly, Northern Plans and IEN completely ignore the reality that a whooping crane cannot be adversely affected by a buried transmission line. Thus, the likelihood of burying major portions of those lines reduces their present claims to speculation. Northern Plains and IEN only discuss buried transmission lines in assailing FWS for relying on "informal promises" from private power providers that Plaintiffs claim are unenforceable and will be analyzed in the future. (NPP Br. at 56; IEN Br. at 54-55).

The prospect of buried transmission lines is real, regardless of Plaintiffs' attempts to minimize this outcome. Electrical power line providers are responsible for obtaining the requisite permits and approvals from federal, state, and local governments to construct new power lines that will be necessary to power the project. (FWS000000000671). The power line providers will be liable for any unlawful take under Section 9 of the ESA in the event of death or injury to a whooping crane. 16 U.S.C. § 1538(a)(1)(B). On top of this, TransCanada has

made a commitment to advise power providers of their ESA consultation requirements with FWS for the electrical infrastructure components of Keystone XL in order to prevent impacts to whooping cranes. (FWS000000000671). But at this point, it is not known which power lines will be buried and which power lines will not be buried.[16] Nevertheless, it is clear that the electrical service providers will have Section 9 liability. Therefore, Plaintiffs' speculation about this threat to a whooping crane does not amount to a violation of the ESA and the claims must fail.

2. *Telemetry and Sighting Data Is Not the Best Available Science on Whooping Cranes*

Northern Plains contends that State and FWS ignored telemetry and sighting data on whooping cranes, which Plaintiffs mischaracterize as "indisputably" the best available science for the species. (NPP Br. at 48). Then, they falsely assert that the agencies' conclusion "is based on 'pure speculation'" – as if the large body

[16] In light of the Nebraska Public Service Commission's approval of a modified route in Nebraska (the "Mainline Alternative Route"), State has reinitiated consultation with FWS with regard to the 2013 BiOp, as supplemented. *Letter from United States Department of State to Ms. Eliza Hines, Nebraska Field Supervisor, U.S. Fish and Wildlife Service*, Re: Request for Reinitiation of Section 7(a)(2) Consultation for the TransCanada Keystone XL Pipeline Project (Jan. 31, 2018). As was the case for the existing BiOp, the specific location of the transmission lines associated with the project will remain uncertain and all electrical power providers have committed to consult with FWS regarding the construction of any new power lines.

of analysis prepared by both State and FWS did not exist. (*Id.* at 48-49). Indeed, the federal government's whooping crane expert who leads the FWS Nebraska Ecological Services Field Office for whooping crane conservation and recovery disagreed with Northern Plains and detailed what the best available science for the whooping crane is. *See generally* Rabbe Report. As discussed above, this agency determination "is itself a scientific determination deserving of deference." *San Luis & Delta-Mendota Water Auth.*, 776 F.3d at 995 (citations omitted).

Rabbe is an expert on whooping cranes who "review[s] all reports, data, and scientific information pertinent to the species." Rabbe Report at 5. Rabbe explained that "the best compilation of scientific and commercially available data" on whooping cranes is the International Recovery Plan and the 5-year review the Service prepared for the species in 2011. Rabbe Report at 3, 5. These documents, which are published and updated periodically, "are intended to be relied upon by the Service for decision making," (*Id.* at 5) – a decision that constitutes a scientific determination entitled to deference. *San Luis & Delta-Mendota Water Auth.*, 776 F.3d at 995.

Rabbe noted that the Telemetry Project was just beginning when the BiOp was released in 2013 so the data was unavailable during consultation. The FWS field offices that reviewed the Keystone XL project did not have access to the telemetry data until January 2018. Rabbe Report at 8, 16 ("While the telemetry

data was collected through a partnership involving the USFWS, the data was protected from distribution or use by our office or the public, until recently, without explicit permission.").

Even had the data been available during consultation, this data is subject to numerous limitations and was improperly applied by Northern Plains' experts. *Id.* at 16-17. As such, after Rabbe considered the telemetry data and Northern Plains' expert report (which relies heavily on the telemetry data, albeit a "flawed application" of the data), Rabbe concluded that the Northern Plains expert report "is inconclusive in demonstrating that the Service's determination and concurrence of 'may affect, not likely to adversely affect' is inadequate or incorrect." *Id.* at 19.

Northern Plains' assertion that the agencies' based their "no adverse effects" conclusion on "pure speculation" is blatantly false. (NPP Br. at 49). In support of this assertion, Northern Plains cites to *Rocky Mtn. Wild v. U.S. Fish & Wildlife Serv.*, No. CV-13-42-M-DWM, 2014 WL 7176384, at *4-5 (D. Mont. Sept. 29, 2014), a case where the agency was found to violate the best available science standard by not considering the historical range of the species. *Id.*

But here, as TransCanada expert witness Kamber explained, the FWS reviewed almost *50 years* of observational data compiled by the FWS regarding the boundaries of the whooping crane migration corridor, recurring migratory stop-over locations, or the veracity of the sighting data. *Id.* This is in contrast to the

telemetry data, which Kamber explained, is not the best available data. Likewise, it would not even significantly add to or change the analysis. The telemetry data referred to by Northern Plains and its experts provides data from a limited number of whooping crane individuals that were equipped with tracking equipment and recorded from a mere five year period, from 2010 through 2015. Kamber Report at 21-22. Kamber pointed out that this limited telemetry data is better suited to a subsequent site-specific analysis and consultation for individual power line segments, by identifying migratory stop-over habitats. *Id.* As such, the *Rocky Mountain Wild* decision does not support Northern Plains Plaintiffs because here, the federal government did in fact consider the historical range of the species by reviewing almost 50 years of observational data.

Northern Plains further alleges that the telemetry and sighting data show construction would harm cranes by disturbing their habitat. (NPP Br. at 54). However, the Keystone XL project would not cross any designated critical habitats for whooping cranes. Potential impacts to whooping crane habitats are, nonetheless, "thoroughly discussed in detail in the BA/[BiOp], as supplemented, and FSEIS." Kamber Report at 25.

Based on the foregoing, Northern Plains and IEN claims regarding the whooping crane have no merit. State and FWS clearly looked at the best available data regarding whooping cranes in terms of both the species and critical habitat.

Plaintiffs have failed to meet the high burden of showing that the agencies' made an error in determining what constitutes the best available data, given that the agencies' determination itself of what constitutes the best scientific and commercial data available is a scientific determination that deserves deference. Northern Plains' and IEN's whooping crane claims simply cannot be squared with principles of judicial deference and must be dismissed.

B. State and FWS Properly Relied on Guidelines to Prevent Predation to Terns and Plovers

Northern Plains asserts that State and FWS relied on outdated and invalid guidelines in evaluating potential harm to interior least terns and piping plovers from raptor predation. That information, according to them, would show that the Keystone XL project will negatively affect the tern and plover. (NPP Br. at 62-64). There is no record evidence to support this.

First, Northern Plains claims that the 2006 Avian Power Line Interaction Committee, Suggested Practices for Avian Protection on Power Lines (APLIC 2006) was "clearly ignored by the agencies." (NPP Br. at 63). This claim is wrong because the agencies did, in fact, consider APLIC 2006. (*See, e.g.*, DOSKXLDMT018001-003). But, this is of no ultimate consequence because the 2006 APLIC guidelines are not even relevant to the agencies' consideration of preventing raptor predation against interior least terns and piping plovers.

Northern Plains Plaintiffs mischaracterize the 2006 APLIC guidelines and take them out of context. The 2006 APLIC guidelines are the culmination of efforts by "the utility industry, wildlife resource agencies, conservation groups, and manufacturers of avian protection products to understand the causes of raptor electrocution and to develop and implement solutions to the problem." (APLIC 2006, at ix). It is in this context – raptor electrocution – that the guidelines briefly mention efforts to reduce predation upon certain species, including preventing raptors from perching on power lines where threatened or endangered species are present. *Id.* The APLIC guidelines note, however, that "the actual impact of raptors hunting from poles on populations of these species has not been adequately studied, quantified, or verified." *Id.* The 2006 guidelines go on to recommend that "[u]tilities and agencies should work together to identify predation risk to sensitive species," which is precisely what the power providers and FWS have committed to do. (FWS000000000674 ("power providers will consult with FWS regarding ways to minimize or mitigate impacts to . . . threatened and endangered species for new distribution lines to the pump stations.")). In any event, the agency's decision to rely on the 1996 APLIC guidelines more than the 2006 guidelines is itself a scientific determination entitled to deference. *San Luis & Delta-Mendota Water Auth.*, 776 F.3d at 995.

Second, Northern Plains claims that neither State nor FWS proposed conservation measures to address any potential harm to plovers and terns. (NPP Br. at 62). Yet, the record shows that electrical power line providers will be responsible for obtaining necessary approvals and authorizations to construct the new power lines needed for the project – a process through which conservation measures would address this very issue.

Furthermore, IEN claims (based on their expert witness Dr. Linhart's "conclusions") that Keystone XL will negatively affect the least tern and piping plover, without citing to studies to support this conclusion. Both the FWS and TransCanada's experts – who relied on studies in their analyses – discredited Dr. Linhart and concluded that the project is "not likely to adversely affect" the interior least tern and piping plover. Doc. 136-2 at 10; Kamber Report at 33-36. Mr. Runge from FWS concluded that Dr. Linhart's report simply described a general risk to the interior least term and piping plover, but a much higher level of evidence would be needed to conclude that the project has a negative species effect. Doc. 136-2 at 10.

C. Claims Regarding the Prairie Dog and Fox are Meritless

1. *Prairie dog habitat is not determinative of the impact to the ferret*

The black-footed ferret is a protected species under the ESA. IEN, while acknowledging that the proposed Keystone XL Pipeline project does not cross

through any known black-footed ferret habitats, attempts to shift the focus to prairie dogs (the ferret's main food source). (IEN Br. at 57-58). This attempt fails because prairie dog habitat is not determinative of the impact to the ferret. Black-footed ferrets are not known to occur outside of reintroduced populations in the project area. Moreover, reintroduced populations "are considered nonessential/experimental and are protected as proposed (rather than endangered) species under the ESA" and do not contribute to recovery. Kamber Report at 43-44; Doc. 136-3 at 20. Both the BA and FSEIS analyzed the existing prairie dog colonies through which the proposed project would cross and found the colonies to be "unsuitable as black-footed ferret reintroduction habitat." Kamber Report at 43-44. "Therefore, there would be no impacts on the recovery of the black-footed ferrets." *Id.*

Even given this conclusion, in order to prevent potential or indirect impacts to the black-footed ferret from construction in Montana, Keystone committed to conservation measures related to the prairie dog towns. For example, Keystone committed to provide FWS with results of the Montana prairie dog town surveys and continue to coordinate with the Montana Service Ecological Office to determine a need for surveys in accordance with the FWS Black-Footed Ferret Guidelines. Kamber Report at 43-44.

As such, IEN's claim that the agencies failed to properly consider the black-footed ferret lacks merit.

2. *The Northern Swift Fox is not listed under the ESA*

IEN also claims that neither State nor FWS performed any ESA analysis on the project's potential effects on the northern swift fox. Although the northern swift fox was addressed as a Bureau of Land Management-sensitive species, a Montana state-listed species, and discussed in the FSEIS (DOSKXLDMT06899-900, DOSKXLDMT06895-906), neither the swift fox nor the northern swift fox (a subspecies) are listed in the U.S. as threatened or endangered species under the ESA. The exclusion of the northern swift fox from State and FWS' analyses and Section 7 consultation is appropriate and lawful under the ESA given that it is not a listed species in the U.S. Kamber Report at 51.

D. The Agencies Correctly Determined the Project Is Not Likely to Adversely Affect the Pallid Sturgeon, Rufa Red Knot, Western Fringed Prairie Orchid, and Northern Long-Eared Bat

1. *Pallid Sturgeon*

IEN claims that the BA did not adequately account for the possibility of a release from the Keystone XL Pipeline and its negative effect on the pallid sturgeon. (IEN Br. at 57). This claim is baseless. As TransCanada's expert demonstrated, the BA and FSEIS identify numerous construction and operations measures that would minimize impacts to the pallid sturgeon. Kamber Report at 37-38. Moreover, IEN's assertion that "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," is a complete misstatement of the record. It characterizes only the worst-case scenario of a release, without taking into account any mitigation measures. (IEN Br. at 57). Not only is the potential for a release low, but if a release occurred, it is likely that the total release volume would be 50 barrels or less based on PHMSA historical spill volumes. (DOSKXLDMT011312-37). In any event, IEN's expert provided no new information that was not "clearly identified and disclosed in the BA and FSEIS" with respect to the pallid sturgeon. Kamber Report at 37-38.

2. *Rufa Red Knot*

IEN asserts that the FSEIS and BA do not address the rufa red knot at all. (IEN Br. at 59). This assertion is misleading. The rufa red knot was not addressed in the 2012 BA because it was not listed as a federally threatened species until December 2014. Thereafter, State and FWS engaged in a new Section 7 consultation for the rufa red knot in 2015. Kamber Report at 45. The consultation resulted in a "may affect, not likely to adversely affect determination." *Id.*

IEN further claims that the conflicts between the rufa red knot's migration patterns and potential harms caused by the project were not addressed. (IEN Br. at 59). As FWS witness Hines explained, State "determined that several general and species-specific conservation measures (e.g., installation of bird flight diverters,

protection of water bodies from potential spills originating from construction equipment, and refueling actions) outlined in the [BiOp], which were already in place for the interior least tern, piping plover, and whooping crane, would also satisfactorily avoid impacts to the rufa red knot. ECF No. 136-3 at 14-15. Hines also noted that the rufa red knot is considered a "rare migrant" and "confirmed observations are unusual," so the Service decided that "regular protocol-driven surveys for the species along the Project route would not likely yield much useful information that might ultimately lend support for additional levels of protection." *Id.* at 15. As such, there is no merit to IEN's claims regarding the rufa red knot.

3. *Western Fringed Prairie Orchid (WFPO)*

IEN also erroneously contends the agencies did not sufficiently survey for the WFPO and that the relevant conservation measures are uncertain and inadequate. (IEN Br. at 60-61). Surveys for the WFPO and its habitat were, in fact, completed in June 2009 and May through June 2011 and 2012 using approved survey methods and personnel. Kamber Report at 48; (FWS000000000721). Additionally, TransCanada committed to implement habitat and species surveys prior to construction to identify any WFPO plants. (FWS000000000723-24). These surveys will use FWS-approved surveyors and, if a survey cannot be conducted during WFPO blooming period and "suitable habitat is present," the species will be presumed present. (FWS000000000723). Moreover, the BA

described conservation measures for the WFPO, which do not rely solely on avoidance, as IEN contends. Kamber Report at 48. TransCanada committed to implement both avoidance and conservation measures, including providing compensation for impacts to the WFPO where it is confirmed present. (FWS000000000724). In sum, none of IEN's claims regarding the WFPO have merit.

4. *Northern Long-Eared Bat (NLEB)*

Lastly, IEN claims that State's analysis of the NLEB is inadequate. (IEN Br. at 60). The NLEB was not listed as a federally threatened species until April 2015, thus it was not addressed in the original 2012 BA. State and FWS, however, initiated a new Section 7 consultation for the NLEB in 2017, resulting in a "may affect, not likely to adversely affect" determination. Kamber Report at 47.

IEN contends that State failed to determine impacts on the NLEB from the project. But as FWS witness Hines explained, State not only assessed the impacts but also committed to implement two conservation measures provided in the federal register when the species was listed. Doc. 136-3 at 16. IEN also contends that State did not conduct surveys to determine whether there are roosts in the project area. IEN is wrong again. State "committed to identification of known bat maternity roosts and hibernacula through coordination with the State Heritage

Databases in Kansas and Nebraska." *Id.* As such, IEN's claims regarding the northern long-eared bat are meritless.

E. Impacts from All Stages of the Project Were Appropriately Analyzed

IEN also contends that State and FWS ignored Keystone XL's operational impacts, including "pipeline rupture and oil spills," instead focusing only on construction impacts. (IEN Br. at 55). This is patently false. Indeed, the BA, BiOp, FSEIS, and numerous other documents have (and continue to) evaluate operational impacts such as oil spills. As FWS expert Sattelberg explained, oil spills have been addressed and will continue to be addressed by both the Environmental Protection Agency and FWS through the development of Area Contingency Plans and Sub-Area Contingency Plans. Doc. 136-1 at 4-7.

Importantly, any releases that may affect ESA listed species and/or critical habitat are dealt with under the ESA's informal emergency consultations. 50 C.F.R. § 402.05. The FWS' involvement is "on the response actions taken when a spill occurs . . . [which] allows the [Federal On-Scene Coordinator] to incorporate listed species concerns into the response actions during an emergency." ECF No. 136-1 at 6. This is the legal structure of the ESA and its implementing regulations, and as such, State and FWS could not have acted arbitrarily and capriciously by following the law.

CONCLUSION

For the reasons stated above, TransCanada requests that the Court deny IEN and North Plains Plaintiffs' motions for summary judgment and grant TransCanada's and Federal Defendants' motions for summary judgment.

Respectfully submitted this 30th day of March, 2018,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), I certify that this memorandum contains 24,436 words, excluding caption and certificates of service and compliance, printed in at least 14 points and is double spaced, including for footnotes and indented quotations.

/s/ Jeffery J. Oven

CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2018, a copy of the foregoing motion was served on all counsel of record via the Court's CM/ECF system.

/s/ Jeffery J. Oven