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

INDIGENOUS ENVIRONMENTAL NETWORK and NORTH COAST RIVERS ALLIANCE, Plaintiffs, vs. UNITED STATES DEPARTMENT OF STATE, et al., Federal Defendants,	CV 17-29-GF-BMM CV 17-31-GF-BMM **IEN PLAINTIFFS' OPPOSITION TO TRANSCANADA'S MOTION TO AMEND THE COURT'S ORDER ON SUMMARY JUDGMENT** Judge: Hon. Brian M. Morris

and)
)
TRANSCANADA KEYSTONE PIPELINE)
and TRANSCANADA CORPORATION,)
)
Defendant-Intervenors.)
_____)

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I. INTRODUCTION

Plaintiffs Indigenous Environmental Network and North Coast Rivers Alliance (collectively, "Plaintiffs") respectfully submit this Memorandum in opposition to TransCanada's motion and supporting memorandum (ECF 222) ("TC"). TransCanada seeks to continue activities in furtherance of the Keystone XL Pipeline on the premise that "none of these activities has the potential to cause injury[,] . . . affect ongoing federal decision-making or to taint pending permitting [, or] . . . implicate the purported deficiencies that the Court identified in the State Department's environmental review." TC 1. But TransCanada contemplates actions that would do just that. For this reason as discussed below, Plaintiffs urge this Court to deny the motion.

This Court has twice ruled that the State Department ("State") violated the National Environmental Policy Act ("NEPA") when it approved the cross-border permit for the Keystone XL Pipeline and subsequent rerouting of the project through Nebraska. Partial Order on Summary Judgment Regarding NEPA Compliance filed August 8, 2018 (ECF 210) and Order Granting and Denying Motions and Cross-Motions for Summary Judgment In Part and Denying Them In Part filed November 8, 2018 (ECF 218). In its latter Order, this Court also ruled that State violated the Endangered Species Act (ESA) and the Administrative Procedure Act (APA) when it approved Keystone XL. Based on these rulings, the Court "ordered that [State's] ROD issued on March 23, 2017 is VACATED" and that "Plaintiffs' request for injunctive relief is GRANTED." ECF 218 at 54. This

Court "enjoin[ed] Federal Defendants and TransCanada from engaging in any activity in furtherance of the construction or operation of Keystone and associated facilities until [State] has completed a supplement to the 2014 SEIS that complies with the requirements of NEPA and the APA." *Id.*

Despite this Court's repeated, and thoroughly documented, rulings declaring State's approval of Keystone XL unlawful and ordering detailed further environmental reviews before it may even be considered for approval, TransCanada has moved this Court to amend its Judgment to allow TransCanada to continue with its "preconstruction" activities as if this Court's rulings have no effect on TransCanada's construction schedule and claimed entitlement to ultimately build and operate its project.

By Minute Entry for the Telephonic Status Conference held November 28, 2018, this Court clarified that the permanent Injunction ordered on November 8, 2018 was not intended to prevent TransCanada from engaging in the "activities stated in paragraphs 16 and 17" of the Declaration of Norrie Ramsay submitted in support of TransCanada's Motion to Amend Judgment ("Ramsay") – i.e., "project engineering and . . . planning and related office work . . . . includ[ing] submitting reports and other administrative actions required . . . [by] valid state and local permits" and "pursuing remaining outstanding permits; interfacing with land owners and acquiring necessary land rights; acquiring pipe, materials and equipment . . .; inspecting and refurbishing work force camp modules, pipe and associated materials and equipment previously purchased; engaging with

communities . . . [and] federal, state and local governmental entities . . . ; hiring additional project staff; soliciting, engaging, and contracting with potential construction contractors, speciality service providers and suppliers; and other *non-construction*, *non-destructive* planning activities . . . ." Ramsay ¶ 17 (emphasis added).

In clarifying the scope of the injunction to allow "non-construction, non-destructive planning activities" as described by TransCanada, this Court took TransCanada at its word. And, this Court was guided by settled law that in undertaking the activities described in paragraphs 16 and 17, "TransCanada would be taking [those actions] at its peril" in that if "the State Department made a different determination" after further environmental review as ordered by the Court, "that's [TransCanada's] tough luck . . . ." Transcript of Telephonic Status Conference November 28, 2018 at 7:17-21. *See, e.g., Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 979 (holding financial injury was "self-inflicted" because parties who "jump the gun" or "anticipate[] a pro forma result" on their permit applications become "largely responsible for their own harm" (quoting *Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002), abrogated on other gds.)).

Critically, however, this Court declined to grant TransCanada's additional request that it be permitted to conduct "field activities" including "preparation of off-right-of-way pipe storage and contractor yards; transportation, receipt and off-loading of pipe at off-right-of-way storage yards; preparation of sites for off-right-

of-way worker camps; and mowing and patrolling areas of the right-of-way to discourage migratory bird nesting." Ramsay ¶ 18. Instead, this Court decided to "defer final decision in regards to paragraph 18" until Plaintiffs have filed their responses. As shown below, with the sole exception of "cultural, biological, civil and other surveys" and "maintaining security at project sites to ensure public safety and maintaining environmental protections as required by permits," none of the activities described in paragraph 18 should be allowed. Those activities would cause irreparable environmental harm, and prejudice ongoing federal decision-making. Accordingly, this Court should deny TransCanada's motion to amend the injunction to allow these activities.

II. BACKGROUND

Plaintiffs detailed the numerous severe and irreparable environmental and cultural impacts of Keystone XL in their summary judgment briefing. ECF 146 at 28-42; ECF 182 at 23-52. This Court addressed many of these impacts in its Orders granting partial, and subsequently full, summary judgment to Plaintiffs, finding that State had failed to address the cumulative effects of greenhouse gas emissions from Keystone XL and other projects (ECF 218 at 19-22), failed to conduct an adequate survey of potentially impacted cultural resources (*id.* at 26-27), failed to conduct updated modeling of potential oil spills and based thereon, recommend appropriate mitigation measures to prevent them (*id.* at 28-31) and failed to examine the effects of current oil prices on the viability of Keystone XL (*id.* at 17-18).

Because State's 2012 Biological Assessment, and the U.S. Fish and Wildlife Service's (FWS's) 2013 Biological Opinion, had not examined the potential hazardous impacts to endangered species from oil spills associated with Keystone XL in light of the need for updated modeling and data on oil spills and leaks, this Court set aside State's Biological Assessment and FWS's Biological Opinion, and directed FWS to conduct an updated analysis of the oil spill data. *Id.* at 53. Most importantly of all, the Court held that "[t]he Department failed to comply with NEPA and the APA when it disregarded prior factual findings related to climate change and reversed course." *Id.* at 52, and prior discussion at 31-35. Rather than conducting the public interest analysis required by the APA, "[t]he Department instead simply discarded prior factual findings related to climate change to support its course reversal" in approving Keystone XL, despite former Secretary of State John Kerry's detailed analysis compelling rejection of this project. *Id.* at 35.

And, in its August 2018 Order finding the Department's approval of a different route through Nebraska violated NEPA, this Court ruled that "Federal Defendants have yet to analyze the Mainline Alternative route" through Nebraska despite the fact that this significant route change was a "connected action" to the proposed action and known to the Department of State "before it issued the Presidential Permit on March 23, 2017." ECF 210 at 8-12. For each of these reasons, this Court properly set aside State's approval of Keystone XL and enjoined both the Federal Defendants and TransCanada from "engaging in any activity in furtherance of the construction or operation of Keystone and associated

facilities until the Department has completed a supplement to the 2014 SEIS that complies with the requirements of NEPA and the APA." ECF 218 at 54.

Citing uncertainty regarding the specific scope of the injunctive relief provided in the Court's Judgment, on November 15, 2018 TransCanada filed its Motion to Amend the Court's Order on Summary Judgment. ECF 222. Its witness, Mr. Ramsay, described three somewhat overlapping categories of self-described "pre-construction activities" that TransCanada sought to implement provided the Court first confirmed it would be permissible to do so. ECF 222-1 at ¶¶ 16-18. As noted, following the Court's Telephonic Status Conference on November 28, 2018, the Court clarified the scope of its injunctive relief by expressly allowing TransCanada to proceed with the activities described in paragraphs 16 and 17. The Court deferred ruling with regard to the activities described in paragraph 18 until after considering Plaintiffs' responses to TransCanada's motion.

As explained below, with the sole exception of "cultural, biological, civil and other surveys" and "maintaining security at project sites," none of the "pre-construction" activities described in paragraph 18 should be allowed, as all of them will cause irreparable environmental and cultural harm, and prejudice the Federal Defendants' future decision-making pursuant to this Court's orders.

III. STANDARD OF REVIEW

Two standards of review govern this Court's decision on TransCanada's motion – the procedural standard applicable to requested amendments to judgments, and the substantive standard applicable to orders determining the scope of permanent injunctive relief. As to the first, procedural standard, amendments to judgments made pursuant to Rule 59(e) of the Federal Rules of Civil Procedure "are appropriate if the district court '(1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law.'" *Dixon v. Wallowa County*, 336 F.3d 1013, 1022 (9th Cir. 2003) (*quoting School Dist No. 1J, Multnomah County v. AcandS, Inc*., 5 F.3d 1255, 1263 (9th Cir. 1993)). It appears that TransCanada bases its motion on grounds that this Court either "committed clear error" or that its "initial decision was manifestly unjust." TC 5.

Under Rule 60(b), "relief should be granted 'sparingly' to avoid 'manifest injustice' and '*only* where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment.'" *Navajo Nation v. Department of the Interior*, 876 F.3d 1144, 1173 (9th Cir. 2017) (*quoting United States v. Alpine Land & Reservoir Co.,* 984 F.2d 1047, 1049 (9th Cir. 1993)); *see also Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) ("a movant seeking relief under Rule 60(b)(6)" is required "to show 'extraordinary circumstances' justifying the reopening of a final judgment").

Applying the foregoing procedural standards, Plaintiffs agree with

TransCanada that clarification of the scope of the injunctive relief ordered by the Court is appropriate, and that analysis of the four-factor test that governs issuance of permanent injunctive relief should be provided as discussed below.

As for the second, substantive standard of review governing the scope of permanent injunctive relief, Plaintiffs agree with TransCanada that the Supreme Court has ruled that an "injunction should issue only if the traditional four-factor test is satisfied." *Monsanto Co. v. Geerston Seed Farms* ("*Monsanto*"), 561 U.S. 139, 156-157 (2010). For a permanent injunction to issue, a plaintiff must demonstrate: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Monsanto*, 561 U.S. at 156-157 (citation omitted).

As shown below, Plaintiffs satisfy each of the four factors of this test for issuance of permanent injunctive relief.

IV. ARGUMENT

The Court's November 8, 2018 Order (ECF 218) and subsequent Order filed November 15, 2018 directing the Court Clerk to enter Judgment (ECF 219) vacated the Record of Decision issued on March 23, 2017, and remanded the matter to the Department of State "for further consideration consistent with" the Court's Order. ECF 218 at 54. Thus, the Court set aside State's unlawful

approval of Keystone XL. *Id.* Pending compliance with the Court's Order, and the issuance of a new Record of Decision either approving or disapproving this project, under NEPA "no action concerning [the Project] shall be taken which would: (1) [h]ave an adverse environmental impact; or (2) [l]imit the choice of reasonable alternatives." 40 C.F.R. § 1506.1(a). Most of the activities listed in paragraph 18 of the Ramsay Declaration would offend both of these limitations.

TransCanada argues that the Court failed to evaluate the mandatory factors that must be addressed prior to granting a permanent injunction, and failed to tailor the relief to Plaintiffs' injuries. TC 5-6. But all four factors favor the Court's permanent injunction forbidding most of the activities sought to be conducted by TransCanada in furtherance of Keystone XL. And, as the Court has set aside the Department of State's approval of the project pending compliance with NEPA, allowing TransCanada to proceed with these injurious activities would directly undermine and prejudice the ongoing NEPA, APA and ESA reviews ordered by the Court, and irreparably harm Plaintiffs and the environment.

A. TRANSCANADA'S PROPOSED AMENDMENTS TO THE JUDGMENT WILL CAUSE IRREPARABLE INJURY

TransCanada contends that Plaintiffs "cannot suffer an irreparable injury as a result of the limited activity TransCanada has been conducting to prepare for the construction of Keystone XL." TC 9. But the Administrative Record and TransCanada's own evidence show the contrary to be true.

TransCanada argues that "[p]reconstruction activities, of the type described

in the Ramsay Declaration, will not cause harm or impact federal decision-making." TC 9. Yet the Ramsay Declaration (ECF 222-1, hereinafter "Ramsay") establishes that TransCanada intends to conduct activities that would do both.

Ramsay states that TransCanada intends to conduct the following activities, among others: (1) "mowing and patrolling areas of the right-of-way to discourage migratory bird nesting;" (2) preparation of off-right-of-way pipe storage yards; (3) preparation of sites for off-right-of-way worker camps; (4) preparation of off-right-of-way contractor yards; and (5) transportation, receipt and off-loading of pipe at storage yards. Ramsay ¶ 18. But Ramsay avoids quantifying the acres of land that this work will disturb. *Id.* His omission hides the vast scale of the impacts of these activities.

TransCanada plans to mow its intended right-of-way in order to discourage its use by migratory birds. Ramsay ¶ 18. Ramsay does not clarify how many miles or acres of right-of-way TransCanada intends to mow, but the 2014 Final Supplemental Environmental Impact Statement ("FSEIS") states that the construction right-of-way will be 110 feet wide, along approximately 875 miles of pipeline. DOS 5952. This equates to: 110 feet x 5,280 feet per mile x 875 miles = 580,800 square feet per mile x 875 miles = 508,200,000 square feet. Divided by 43,560 square feet per acre yields 11,666 acres – an area roughly the size of *8,800 football fields*.

Mowing in the construction right-of-way would have significant impacts on the environment. For example, more than 9 square miles of the right-of-way will

be permanently converted from scrub-shrub and forest wetlands to emergent wetlands. DOS 6781. And the remaining area would be subject to "long-term impact[s] based on the slower growth rate of trees and shrubs, which may require decades for complete regeneration." *Id.* These wetlands that will be permanently (or near-permanently) and irreparably destroyed provide important habitat for aquatic and terrestrial species, protect natural drainage patterns and root systems, reduce erosion, and maintain water quality, among other functions. DOS 6782. Yet TransCanada's preconstruction activities will cause irreparable harm to these important habitats, including but not limited to "[p]ermanent loss of wetlands," "permanent modification of surface and subsurface flow patterns," "permanent modification of wetland vegetation," and "[l]oss or alternation of wetland soil integrity." DOS 6782-6784.

Furthermore, the FSEIS reveals that "biologically unique landscapes and vegetation communities of conservation concern" exist along the pipeline's proposed route and will face significant impacts from pre-construction and construction-stage clearing. DOS 6809. The construction right-of-way will "cross an estimated 356 miles of native grassland," much of which has never been tilled, and which may take decades to recover. DOS 6809. Further, it will take between five and 15 years for sagebrush shrubland disturbed in the construction phase to become re-established. DOS 6810. It may take up to 50 years for disturbed bottomland forest and upland and wetland forest communities in the construction right-of-way to reestablish. DOS 6810-6811. The loss of these essential habitats

is both significant and irreparable.

Further, this mowing appears similar to the mowing and windrowing that the U.S. Fish and Wildlife Service determined TransCanada may *not* perform in South Dakota, as it could cause impermissible "habitat loss for other species, including grassland birds." FWS 2062; *see also* FWS 39 (South Dakota Field Office concerned about clearing for pipeline right-of-way harming grassland bird habitat, and the need for mitigation to address "grassland birds that are disappearing").

Indeed, there can be no debate about mowing's pernicious effects, since mowing is specifically intended to *degrade* the habitat sufficiently to *prevent* species from nesting along TransCanada's preferred right-of-way, and thereby, interfering with TransCanada's construction schedule. Ramsay ¶ 18. Forcing species to abandon, and thereafter avoid, the pipeline's proposed right-of-way will cause significant and irreparable environmental harm. *See*, *e.g.*, *National Wildlife Federation v. National Marine Fisheries Service* ("*NWF v. NMFS*"), 235 F.Supp.2d 1143, 1159 (W.D. Wash. 2002) (activity that degrades critical habitat when species are not present still harms those species, because it "mak[es] the species' return less likely").

TransCanada's preconstruction work "off of "TransCanada's requested right-of-way will likewise cause irreparable harm. The FSEIS states that pipe storage yards "would be required at 30- to 80-mile intervals," and should be located near the pipeline right-of-way. DOS 5979. Each pipe storage yard would

be 30 to 40 acres. *Id.* The Project includes 355.9 acres of pipe storage yards in Montana, 345.6 acres of pipe storage yards in South Dakota, and 56.1 acres for pipe storage in North Dakota. DOS 5980. The 2018 DSEIS for the Keystone Mainline Alternative Route ("DSEIS") contemplates 280.0 acres of pipe storage yard in Nebraska. DSEIS 2-4. Aggregating these acreages yields a total of 1,037.6 acres to be cleared for pipe storage yards alone. This is roughly equivalent to the size of 780 football fields.

"[C]ontractor yards would be required at approximately 60-mile intervals." DOS 5979. Each contractor yard "would occupy approximately 30 acres." *Id.* Suitable sites would need to be level, without structures, and not forested. . . ." *Id.* While the FSEIS states that TransCanada would "[w]here practicable, seek out sites that have been previously disturbed," it does not quantify what portion of sites would fall into that category. DOS 5979. The FSEIS discloses 161.3 acres of contractor yards in Montana, and 258.6 acres of contractor yards in South Dakota. DOS 5980. In addition, the DSEIS contemplates 59.1 acres of contractor yards in Nebraska. DSEIS 2-4. This totals 479 acres of contractor yards, roughly equivalent to 360 football fields.

Plaintiffs and the environment will clearly be harmed by these "pre-construction" activities. The February 8, 2018 Declaration of Kathleen Meyer (ECF 153) establishes that she is "familiar with the exceptional scenery and fish and wildlife that would be harmed by construction of the Keystone XL Pipeline project and its associated land clearing, access road building and maintenance"

and related workers' camps. *Id.* ¶7. And the February 7, 2018, Declaration of Joye Braun (ECF 150) ("Braun") establishes that native ecosystems along the pipeline route provide food and medicine for her people, and that the threatened degradation of those habitats would endanger their culture and health as important plants are lost. Braun ¶¶ 3-4. Likewise the February 9, 2018, Declaration of Tom B.K. Goldtooth (ECF 148) ("Goldtooth") notes that the impacts from infrastructure "that would be built to support construction and operation of the pipeline . . . would harm the surface and groundwater supplies, fish and wildlife, clean air and aesthetic and spiritual resources on which Indigenous Peoples rely for their sustenance and survival." Goldtooth ¶10. And the February 8, 2018, Declaration of Frank Egger (ECF 154) ("Egger") discusses how activities that will remove native vegetation and disturb wildlife habitat would harm his enjoyment of Montana's outstanding watershed resources. Egger ¶¶ 15, 17.

The FSEIS states approximately eight temporary construction camps will be established (DOS 5982), each between 50 and 100 acres, so "the construction worker camps may be the most visible evidence of the proposed Project, particularly for camps sited amid agricultural or rangeland areas." DOS 6937. While the FSEIS assumes four camps in Montana, three in South Dakota, and one in Nebraska, it also states that "the final number and size of camps would be determined based on the *time available to complete construction and to meet* [*TransCanada's*] *commercial commitments*." DOS 5982 (emphasis added).

The FSEIS assumes that approximately 50 acres of each camp "would be

used for housing and administration facilities" using "modular units." DOS 5983. Each camp includes a "convenience store; recreational and fitness facilities; entertainment rooms and facilities; telecommunications/media rooms; kitchen/dining facilities; laundry facilities; and security units," as well as an infirmary. *Id.* Each camp's housing will include "dormitory-like units that house roughly 28 occupants per unit," with 600 beds per camp, and 300 recreational vehicles, which will also be used to house up to 400 people. DOS 5983. And each camp will include a wastewater treatment facility. *Id.* Collectively, the contractor camps will be able to house up to *8,000 people*, and occupy between 400 and 800 acres. *Id.* Picking the middle of this range, the acreage of the existing vegetation to be removed and occupied by these camps would be roughly equivalent to 300 football fields.

As detailed in Joye Braun's February 7, 2018, Declaration, the influx of workers to these work camps will harm her local tribal community as the workers bring increased drug use and crime, including increased violence against women. Braun ¶ 5; *see also* Goldtooth ¶ 14 (workers at work camps will cause "socially and environmentally disruptive activities [that] degrade the natural beauty and tranquility of the lands and waters, displace wildlife, destroy the delicate balance of man with Nature, and threaten the health, safety and well being of the Tribal community").

The site preparation of 1,916 to 2,316 acres for pipe storage yards, construction yards and worker camps, as with TransCanada's mowing work, will

likewise remove available habitat for nesting birds and other wildlife as each site is made barren. To prepare these sites, TransCanada will use borrow materials, such as gravel, to level and prepare the ground, and compact the existing soil. DOS 5969. The FSEIS indicates that 134,400 total cubic yards of borrow material will be used at contractor yards. DOS 5971. It states that TransCanada will use "about 7,000 cubic yards of gravel . . . for each pipe yard." DOS 5969. Thus, TransCanada will be acquiring and spreading approximately 210,000 cubic yards of gravel for the pipe storage yards.[1] DOS 5969. These 1,916 to 2,316 acres of land, once leveled and graveled, will be rendered inhospitable for native plants and animals indefinitely.

The proposed clearing and preparation of off-right-of-way storage yards, contractor yards and worker camps would also cause irreparable greenhouse gas emission impacts before the Department of State has had a chance to re-analyze the Project's global warming impacts pursuant to this Court's Order. ECF 218 at 19-23, 31-35. The FSEIS fails to estimate the greenhouse gas emissions from these off-right-of-way activities, but its discussion of other Project-related emissions indicates that the impacts could be substantial.

For example, the FSEIS estimates that the planned open-burning clearing of about 75 of the acres in the proposed right-of-way would alone emit 55.1 metric

[1] 1,037.6 acres of pipe storage yards, divided by approximately 35 acres per yard equals 30 pipe storage yards. 30 multiplied by 7,000 equals 210,000 cubic yards.

tons of CO_2-equivalent. DOS 7209-7210.[2] Off-right-of-way site clearing through open burning would likely cause similar greenhouse gas emissions per acre.

In addition, to the extent that preparation of the off-right-of-way yards and camps involves manufacturing or construction of buildings or equipment proposed for erection or use on the sites, that "capital equipment" also has substantial lifecycle greenhouse gas emission impacts. Capital equipment includes "buildings, equipment, pipelines, rolling stock" and related materials. DOS 18651. While "[n]one" of the lifecycle studies cited in the FSEIS "included the GHG impacts associated with capital equipment and construction of facilities, machinery, and infrastructure needed to produce oil sands," according to "Bergerson and Keith, the relative percentage increase to [wells-to-wheels] GHG emissions from incorporating capital equipment is between 9 and 11 percent (Bergerson and Keith 2006)." DOS 12376. That is in the ballpark of 15 million metric tons of annual CO_2e emissions from capital equipment (9-11 percent of the 2014 FSEIS' estimated 147-168 million metric tons of annual CO_2e emissions). DOS 7235.

Thus, the activities discussed in paragraph 18 are sufficiently damaging that granting TransCanada's motion would cause massive irreparable harm. Should State determine that it no longer wishes to approve the pipeline, TransCanada will

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[2] Table 4.14-1, note "e," explains that clearing by open burning is proposed for approximately 0.5 percent – or just over 76 acres – of the approximately "15,296 acres of land [that] are expected to be disturbed in total." DOS 7210.

have irreparably disturbed, and in many cases destroyed, thousands of acres of existing vegetation and wildlife habitat.

B. PLAINTIFFS HAVE NO AVAILABLE REMEDY AT LAW

TransCanada asserts that "there is no need to assess" whether other remedies are available. TC 9. By so arguing, TransCanada attempts to avoid the explicit concession that there is no available and adequate remedy at law. But that concession cannot be avoided. Courts have repeatedly and expressly held that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Productions Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 545 (1987); *see also League of Wilderness Defenders / Blue Mountains Biodiversity Project v. Connaughton* ("*League of Wilderness Defenders*"), 752 F.3d 755, 764-767 (9th Cir. 2014). So too here, the irreparable injury caused by TransCanada's construction preparation activities cannot be adequately remedied by any other available remedy. *Amoco Productions*, 480 U.S. at 545.

C. THE BALANCE OF HARDSHIPS TIPS IN PLAINTIFFS' FAVOR

TransCanada erroneously argues that a temporary delay in creating preconstruction jobs, and missing the 2019 construction season creates "significant irreparable harm," tipping the balance of the hardships in its favor.

TC 10-11. But TransCanada's argument fails for two reasons.

First, TransCanada's claimed harms are temporary in nature. Therefore, as numerous courts – including the Ninth Circuit – have held, the balance of hardships tips toward plaintiffs "because the harms they face are permanent, while the intervenors face temporary delay." *League of Wilderness Defenders*, 752 F.3d at 765 (citing *Amoco Production Co.,* 480 U.S. at 545).

As shown above, Plaintiffs will suffer irreparable injury from TransCanada's preconstruction activity. For example, TransCanada will conduct site preparation activities on 1,916 to 2,316 acres for pipe storage yards, construction yards and worker camps, and will acquire approximately 300,000 cubic yards of gravel to prepare those sites. DOS 5969, 5983; Ramsay ¶ 18. Furthermore, if TransCanada is allowed to proceed it would mow the right-of-way, which would convert scrub-shrub and forested wetlands to emergent wetlands (DOS 6781), create long-term impacts on shrublands (DOS 6800), and disturb native vegetation communities (DOS 6801). These activities would create irreparable impacts that could not "be adequately remedied by money damages and [are] often permanent or at least of long duration." *Amoco Production Co.,* 480 U.S. at 545.

By contrast, the potential impacts of an injunction to TransCanada are only *temporary* in nature. TransCanada states that if this Court were to enjoin preconstruction activity, it would "miss[] the 2019 construction season." TC 10. It attempts to paint this delay as a permanent loss of jobs, but that is simply

incorrect. *Id.* If the Project is approved after adequate environmental review, TransCanada could begin construction a year later. While Ramsay claims that if "TransCanada were to suspend work . . . for a matter of several weeks, the construction season would be lost and these jobs would be lost," he fails to acknowledge that the loss would be for *one construction season only*. Ramsay ¶ 24.

The financial injury that TransCanada claims is likewise temporary. TC 11. Ramsay manipulates the math to claim a financial impact far greater than would actually occur. Ramsay ¶ 26. Delaying construction by one year would not cause TransCanada's March 2021 to March 2022 earnings to be delayed by 20 years, as claimed. *Id.* Rather, it would simply delay those earnings by one year – until March 2022 to March 2023. By misstating the delay as continuing until the end of the "current 20-year shipper contract terms," TransCanada overstates the impact from this minor twelve-month delay. *Id.*

These temporary delays that TransCanada will face pale in comparison to the irreparable and potentially permanent impacts that would occur to the environment if TransCanada were allowed to conduct its preconstruction activities. Furthermore, if TransCanada proceeds with preconstruction activity, it will result in an irretrievable waste of both public and private resources, especially if the Project is not approved after adequate environmental analysis. TransCanada cannot be allowed to irreparably harm the environment on the hope that the State Department will approve the Project after it is adequately reviewed.

Second, all of the cases that TransCanada cites to support its position are inapposite. While this Court "may consider economic harm when determining whether to grant injunctive relief," unlike the cases cited by TransCanada, here the widespread and irreparable environmental injury clearly outweighs the merely temporary delay in construction that TransCanada may face. TC 11 (citing *Protect Our Communities Foundation v. U.S. Department of Agriculture*, 845 F.Supp.2d 1102, 1118 (S.D.Cal. 2012), *aff'd* 473 F.Appx. 790 (9th Cir. 2012)).

For example, in *Committee of 100 on Federal City v. Foxx* (*"Committee of 100*"), 87 F.Supp.3d 191, 220 (D.D.C. 2015), the harms cited by plaintiffs had "not established that any environmental effects of the construction activity will be severe or irreparable," and the harms were "speculative at best." *Id.* Here, however, TransCanada's preconstruction activities will cause immediate and irreparable harm by creating thousands of acres of construction yards and other staging areas, destroying vegetation and habitat, and causing permanent impacts to species that utilize those habitats. Unlike *Committee of 100*, the slight construction delay that TransCanada may face here does not outweigh these significant environmental harms. *Id.*; *League of Wilderness Defenders*, 752 F.3d at 765; *Amoco Production Co.,* 480 U.S. at 545.

TransCanada's reliance on *James River Flood Control Association v. Watt*, 680 F.2d 543, 544 (8th Cir. 1982), likewise fails. TC 11. In that case the court found that there was no identified "factual basis for the conclusion that the [plaintiff] or the public will suffer irreparable harm if construction proceeds." *Id.*

That conclusion contrasts sharply with the facts here, where the record shows that the Project's preconstruction activities will substantially and irreparably harm the environment. DOS 5969, 5983, 6781, 6800, 6801.

Similarly, in *Alaska Survival v. Surface Transportation Board*, 704 F.3d 615 (9th Cir. 2012), the balance of hardships only tipped toward defendant's economic harms *after* the court had decided to "allow the project to move forward." *Id*. at 616. At that point, "the weight to be given Petitioners' assertions of hardship because of environmental harm [was] weakened." *Id.* Here, by contrast, construction of the Keystone XL Project is *barred* until an adequate environmental analysis is completed and the Project is approved based on that analysis. The irreparable environmental impacts that preconstruction activities would cause are not a foreordained conclusion here and the resources that those activities threaten must be protected.

Furthermore, the Ninth Circuit has made clear that while "[b]oth the economic and environmental interests are relevant factors, and both carry weight in this analysis," where plaintiffs and the public will face permanent irreparable harm and the defendant will face only a temporary delay, the balance of hardships favors the plaintiff. *League of Wilderness Defenders*, 752 F.3d at 765; *see also Sierra Club v. U.S. Forest Service*, 843 F.2d 1190, 1195 (9th Cir. 1988) ("when environmental injury is 'sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment.'" (citing *Amoco Production Co.,* 480 U.S. at 545)); *Save the Yaak Committee v. Block*, 840 F.2d

714, 722 (9th Cir. 1988) ("the risk of environmental injury is sufficiently likely to authorize enjoining further reconstruction and timber sales").

Finally, should TransCanada choose to continue its efforts to build the Keystone XL Pipeline before it acquires the necessary permits, the economic harm it would suffer would be strictly self-inflicted. If TransCanada chooses to proceed at its own risk, it cannot then rely on that voluntary commitment of resources to claim that the balance of hardships weighs in its favor. *Sierra Club v. U.S. Army Corps of Engineers*, *supra*, 645 F.3d at 997; *Davis v. Mineta*, *supra*, 302 F.3d at 1116.

Because the irreparable harm that the public and Plaintiffs will suffer if TransCanada is allowed to proceed with preconstruction activity far outweighs the modest harms of Project delay, the balance of hardships favors an injunction.

D. THE PERMANENT INJUNCTION SERVES THE PUBLIC INTEREST

TransCanada relies upon the Department of State's findings regarding the *completed* Keystone XL Pipeline to argue that the injunction is against the public interest. TC 11-12. Yet TransCanada has not asked this Court to amend the judgment to permit construction and operate the Keystone XL Pipeline pending State's compliance with NEPA. Thus, State's national interest findings are irrelevant to the preconstruction activities contemplated in paragraph 18.

As shown, TransCanada's preconstruction activities will alter the landscape of 1,916 to 2,31 acres of pipe storage yards, construction yards and worker camps,

as well as approximately 875 miles of 110-foot-wide pipeline construction right-of-way. TransCanada's mowing, clearing, and leveling of these lands will displace wildlife, alter the quantity and quality of existing habitat, and discourage its future use. If State does not reissue an approval for the Project, the harm stemming from these site preparation activities will continue as the stripped lands will take years to return to their prior condition.

Further, this Court's Order confirms that State failed to analyze the cumulative climate impacts of the Keystone XL Pipeline, and acted arbitrarily when it ignored the 2015 Record of Decision's finding that the Project was not in the national interest, due to climate change considerations, including "the need to keep global temperature below two degrees Celsius above pre-industrial levels." ECF 218 at 21-23, 34-35.

Indeed, the U.S. Global Change Research Program's ("USGCRP's") Fourth National Climate Assessment states that "the impacts and costs of climate change are already being felt in the United States, and recent extreme weather and climate-related events can now be attributed with increasingly higher confidence to human-caused warming."[3] It states that "[m]any lines of evidence demonstrate

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[3] USGCRP, 2018: *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II* [Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, and B.C. Stewart (eds.)]. U.S. Global Change Research Program, Washington, DC, USA. doi: 10.7930/NCA4.2018; Chapter 29, available at https://nca2018.globalchange.gov/chapter/29/ (last accessed December 4, 2018).

that human activities, especially emissions of greenhouse gases from fossil fuel combustion, deforestation, and land-use change, are primarily responsible for the climate changes observed in the industrial era, especially over the last six decades." *Id.* It also finds that "[n]et cumulative CO2 emissions in the industrial era will largely determine long-term global average temperature change and thus the risks and impacts associated with that change in the climate." *Id.* (footnote omitted). And, importantly, it determines that "[f]ossil fuel combustion accounts for 77 % of the total U.S. GHG emissions." *Id.*

> Impacts associated with human health, such as premature mortality due to extreme temperature and poor air quality, are commonly some of the most economically substantial. While many sectors face large economic risks from climate change, other impacts can have significant implications for societal or cultural resources. Further, some impacts will very likely be irreversible for thousands of years, including those to species, such as corals, or those that involve the exceedance of thresholds, such as the effects of ice sheet disintegration on accelerated sea level rise, leading to widespread effects on coastal development lasting thousands of years.

Id. (internal citations omitted).

Thus, the 2015 Record of Decision's discussion of the Project's climate change-related foreign-policy considerations likely *understated* the reasons that the Project is not in the public interest. AR 13007-13010. The overwhelming scientific consensus regarding the near-irreversible impacts of fossil fuel emissions on the planet must outweigh any short-term economic benefit from the Project's construction.

Should TransCanada choose to move forward with the Keystone XL

Pipeline in the absence of any additional approvals from State, it will be throwing good money after bad. By committing such resources to an uncertain project, TransCanada is neither serving the public interest or its own private interests, and proceeds at its own risk. *Sierra Club v. U.S. Army Corps of Engineers*, *supra*, 645 F.3d at 997.

E. THE INJUNCTION IS NARROWLY TAILORED TO PREVENT HARM TO THE PUBLIC AND PLAINTIFFS

Although TransCanada's motion claims the injunction is overboard, this Court's clarification of the scope of its injunction to allow the activities described in paragraphs 16 and 17 of the Ramsay Declaration eviscerates TransCanada's claim. And, Plaintiffs' clarification in their respective opposition papers that they do not oppose "cultural, biological, civil and other surveys" and "maintaining security at project sites to ensure public safety and maintaining environmental protections" removes any remaining doubt that this Court's injunction is as narrowly tailored as possible to only prevent irreparable harm to the public, the environment and Plaintiffs.

Allowing the surface-disturbing "pre-construction" activities otherwise sought in paragraph 18 would, by contrast, cause direct, widespread and irreparable harm to the public, the environment and Plaintiffs. As shown, Plaintiffs have demonstrated a "sufficient causal connection" between the surface-disturbing activities in paragraph 18 which they oppose, and the irreparable injury that NEPA, the APA and the ESA are intended to prevent until adequate

environmental review is complete. *National Wildlife Federation v. National Marine Fisheries Service*, No. 3:01-cv-0640-SI, 2017; WL 1829588 (D.Or. Apr. 3, 2017).

Furthermore, as shown, allowing the additional "pre-construction" activities sought by TransCanada would prejudice the Federal Defendants' ongoing environmental reviews as ordered by this Court. Essentially, TransCanada seeks to proceed with resource-impacting pre-construction of Keystone XL despite this Court's Orders declaring the project unlawful and setting aside its required federal approvals. Indeed, allowing TransCanada to conduct its surface-disturbing activities along the pipeline's requested route would effectively predetermine the pipeline's location despite the Federal Defendants' court-ordered further environmental reviews, rendering the entire court review and remand a "hollow gesture." *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323, 1327 (4th Cir. 1972).

V. CONCLUSION

For the reasons stated above, this Court must not amend its judgment to allow preconstruction actions that will alter the environment along, and "off-site," TransCanada's intended right-of-way.

Dated: December 5, 2018

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Dated: December 5, 2018

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2) of the District of Montana Local Rules, I certify that this Brief contains 6,422 words, excluding caption, certificates of service and compliance, table of contents and authorities, and exhibit index, as counted by WordPerfect X7, the word processing software used to prepare this brief.

Dated: December 5, 2018

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

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2018, a copy of the foregoing

IEN PLAINTIFFS' OPPOSITION TO TRANSCANADA'S MOTION TO AMEND THE COURT'S ORDER ON SUMMARY JUDGMENT

was electronically served on all counsel of record via the Court's CM/ECF system.

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