Jeffery J. Oven
Mark L. Stermitz
Jeffrey M. Roth
CROWLEY FLECK PLLP
490 North 31st Street, Ste. 500
Billings, MT 59103-2529
Telephone: 406-252-3441
Email: joven@crowleyfleck.com
mstermitz@crowleyfleck.com
jroth@crowleyfleck.com

Peter R. Steenland
Peter R. Whitfield
Lauren C. Freeman
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
Telephone: 202-736-8000
Email: psteenland@sidley.com
pwhitfield@sidley.com
lfreeman@sidley.com

Counsel for TransCanada Keystone Pipeline, LP and TransCanada Corporation

IN THE 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 **DEFENDANT-INTERVENORS' REPLY IN SUPPORT OF MOTION TO STAY THE COURT'S ORDER ON SUMMARY JUDGMENT PENDING APPEAL**

Defendant-Intervenors TransCanada Corporation and TransCanada Keystone Pipeline LP ("TransCanada") have satisfied each of the four factors necessary to obtain a stay pending appeal. Plaintiffs have failed to show otherwise.

I. TransCanada Is Likely To Prevail on the Merits of Its Arguments

A. The APA and ESA Do Not Authorize Judicial Review of the Presidential Permit

Plaintiffs repeat their arguments that this Court can review a Presidential Permit under the APA and the ESA because, in 2008, State acknowledged that it was subject to NEPA. (Doc. 235 in CV 17-31-GF-BMM at 5-6; Doc. 247 CV 17-31-GF-BMM at 5). But State's authority to issue cross-border oil pipelines derives *entirely* from the *President's* inherent constitutional powers, and is conferred—and controlled—by an express delegation from him. Thus, the fact that State "issued the permit itself," (Doc. 247 at 4-5) does not change the fact it was exercising inherent *presidential* powers when it did so. Indeed, Plaintiffs nowhere explain how an agency subject to the control of the President can unilaterally alter the nature of presidential actions that the President instructs it to make.[1]

[1] Plaintiffs also ignore State's later recognition, during both the Obama and Trump administrations, that issuance of a Presidential Permit "is *Presidential in nature* and therefore the requirements of NEPA [and] the ESA *are inapplicable*." November 2015 ROD/NID at 3 (emphases added); March 2017 ROD/NID at 3 (same). Plaintiffs do not explain why State's earlier statements are legally dispositive, while its latter statements are irrelevant.

Nor did the President waive his authority to overrule State's decision. He waived only State's obligation to inform other agencies of its decision, and the right of those agencies to object and seek his intervention. *See* January 24, 2017 Memorandum, § 3(a)(ii)(B)(iv) (waiving E.O. 13337 §§ (1)(g), (h), & (i)). Nothing in these provisions purported to bar the President himself from rejecting State's decision. And Plaintiffs do not dispute that the President could have amended his prior Memorandum at will. Because the President had "complete, unfettered discretion over the permitting process" and retained the "authority to direct the [agency] in making policy judgments," *NRDC v. Dep't of State*, 658 F. Supp. 2d 105, 111 (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 799 (1992)), issuance of the Presidential Permit remained presidential action not reviewable under the APA or ESA.

Even assuming that State's decision constituted "agency action," the APA forecloses review because issuance of a Presidential Permit rests on an entirely discretionary judgment. Contrary to Plaintiffs' claim, State's NEPA regulations cannot supply the relevant standard, because Executive Order 13337 authorizes issuance of a Presidential Permit based on a "national interest" determination. *See* E.O. 13337 § 1(g). As State explained during the Obama Administration, "[n]o statute establishes criteria for this determination," which can be based on a range

of factors "including but not limited to foreign policy; energy security; [and] environmental, cultural, and economic impacts." Nov. 2015 ROD/NID at 3. State's exercise of the President's discretionary foreign affairs power is not reviewable under the APA. *See Detroit Int'l Bridge Co. v. Canada*, 883 F.3d 895 (D.C. Cir. 2018); *Jensen v. Nat'l Marine Fisheries Serv.*, 512 F.2d 1189 (9th Cir. 1975).[2]

Nor does the ESA provide the necessary cause of action. The fact that its language is broader than the APA's cause of action (Doc. 247 at 7) is irrelevant. Like the APA, the ESA lacks the express statement necessary to show that Congress intended to subject the President to suit.

B. State Is Not Obligated To Supplement Its NEPA Analysis

1. Mainline Alternative

In order to defend this Court's ruling that State must supplement its NEPA analysis to consider the Mainline Alternative route through Nebraska, Plaintiffs resort to mischaracterization. TransCanada did not claim that the new route had no different environmental impacts. IEN Br. at 9-10 (Doc. 239 in CV 17-29-GF-

[2] The fact that plaintiffs claim they did not challenge whether the permit "was in the national interest," (Doc. 247 at 8), only underscores the impropriety of their claims. This Court *vacated* State's national interest determination and, through its injunction, *nullified* the authority conferred by the Presidential Permit based on a standard unrelated to E.O. 13337's governing "national interest" standard.

BMM). Instead, it argued that State had no duty to supplement because the "new information" arose after it issued the Presidential Permit. The potential impacts of the Mainline Alternative, whether significant or not, are thus irrelevant to whether State had an obligation to supplement its NEPA analysis. *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1155 (9th Cir. 2008). Nor does it matter that the Mainline Alternative route is a connected action. Because there was no major federal action for State to take after issuing the Presidential Permit, it had no legal duty to supplement its NEPA analysis.

2. *New Information on Oil Prices, Spills, and GHG Emissions*

Plaintiffs have likewise failed to show that new information regarding oil prices, oil spills, or a study on dilbit provides a basis for believing that Keystone XL will have a *significantly* different impact on the environment than that already disclosed in the Final Supplemental Environmental Impact Statement (FSEIS).

With respect to oil prices, this Court held only that an oil price analysis is relevant to "Keystone's impact on tar sands production." Order at 18 (Doc. 218 in CV 17-29-GF-BMM). But such impacts occur in Canada, and NEPA does not require State to analyze those impacts. *See* TransCanada's Br. in Supp. Summ. J. at 58-61 (Doc. 171 in CV 17-29-GF-BMM); Fed. Defs. Br. in Supp. Summ. J. at

38-45 (Doc. 173 in CV 17-29-GF-BMM).[3] The new price information, therefore, cannot establish that the Project will have *significantly* different environmental impacts.[4] The Northern Plains Plaintiffs argue that Keystone XL might increase oil production in Alberta in low-price oil scenarios. But it is illogical to suggest there would be a greater amount of oil production in this region if oil prices were low instead of high. Thus, there is no basis for requiring State to supplement its analysis to discuss how lower oil prices may impact oil production in Canada.

Similarly, Plaintiffs have failed to show how "new" information regarding oil releases from existing pipelines changes the spill risk analysis State already performed. In fact, the new information does not indicate that spill risk incident rate has increased over the historical average. The data consists of only a few

[3] Moreover, insofar as oil prices are relevant to the level of GHG emissions associated with tar sands development, the FSEIS indicates that the GHG emissions attributable to Keystone XL should not include the full lifecycle emissions associated with the crude extraction and combustion because a midstream project on its own is unlikely to increase production or downstream use, DOSKXLDMT02502, and this Court did not reject that conclusion. Doc. 218 at 19-23.

[4] IEN claims that low oil prices might reduce oil production and related economic benefits, but neither of those potential consequences is relevant to a significant unevaluated *environmental* impact. Insofar as IEN believes oil prices are relevant to the national interest determination, there is no obligation to revise a national interest determination as a result of new information.

incidents, whereas the average risk rate State relied on was composed of over a thousand incidents during a 10-year period.

Plaintiffs' argument that State needed to address the NAS study is similarly deficient. State acknowledged that dilbit is more challenging to cleanup if there is a release to surface water, and it disclosed that TransCanada would consult with emergency responders to update its mitigation plans to incorporate the new information. There is no basis to conclude that State was unaware of the manner in which dilbit interacted differently in water compared to other crudes, and thus no basis for deeming State's prior analysis inadequate.

Finally, Plaintiffs suggest that a revised GHG analysis using a different model could have demonstrated 5 – 20% more GHGs from the Project, but do not explain why such a potential impact is significant. Neither the Court nor Plaintiffs identified any meaningful environmental impacts that could result from Keystone XL even if a revised GHG analysis predicts emissions at the upper end of that spectrum. In fact, State concluded that the impacts of project-level GHG emissions are very small – a conclusion Plaintiffs never disputed.

C. State Did Not Need To Consider the Cumulative Impact of the Line 67 Project in the FSEIS

Plaintiffs' argument concerning the cumulative impacts of the Keystone XL and Line 67 projects is based on meaningless formalism. State analyzed the combined effects in a single EIS issued in August 2017 – just months after issuing

the Presidential Permit to TransCanada – and found the Line 67 project to be in the national interest notwithstanding the potential cumulative GHG impacts of both projects. There is no reason to believe State would have reached a different conclusion if it had analyzed the same cumulative impacts several months earlier in the FEIS for the XL Project. And nothing in NEPA requires such duplication.

D. State's NEPA Analysis Adequately Analyzed Cultural Resource Impacts

State's inability to assess cultural impacts on 1,038 acres that were inaccessible when the FEIS was completed did not render the FEIS invalid: the Keystone XL Programmatic Agreement insures that any cultural impacts in these areas will be identified and addressed prior to construction. This places this matter squarely within those such as *HonoluluTraffic.com v. Federal Transit Administration*, 742 F.3d 1222 (9th Cir. 2014) and *City of Alexandria v. Slater*, 198 F.3d 862 (D.C. Cir. 1999). Thus, it was error for the Court to require complete surveys before finalizing the FSEIS.

E. Supplementation of the ESA Analysis Is Unwarranted

The oil new spill data does not reveal that Keystone XL may affect listed species in a manner not previously considered. As noted above, the new information does not show that spill risk incident rate has increased over the historical average, so there is no reason for State to conclude a spill or release is significantly more likely to occur. Additionally, the spill volume data is irrelevant

because the biological assessment indicated that "spill volume cannot be predicted for any species mitigation habitat/habitat." DOSKXLDMT0010211. Plaintiffs fail to explain how the new information would allow spill volume to be analyzed in a way that would change this conclusion or alter the analysis of the potential impacts to protected bird species.

Apparently recognizing this, IEN now claims that the Court found that State's consultation with FWS in 2012 did not reflect "significant subsequent changes and improvements in … data, including its 'list[ing] as threatened the northern longearred bat and the rufa red knot,' its identification of 'the American burying beetle as the only listed species likely to be adversely affected by Keystone after it was proposed again in 2017,' and Nebraska's approval of the new Mainline Alternative route." IEN Br. at 20 (citing Doc. 218 at 37). But the Court made no such findings. These quotes come from the Court's discussion of the "Factual Background," not the portion where it found an ESA violation. That finding was based on only on new data about oil spills (Doc. 218 at 44), which, as just discussed, does not provide a basis for an ESA violation.

F. The Injunction Is Overly Broad

In defending the scope of this Court's injunction, Plaintiffs misconstrue the Ninth Circuit's decision in *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113 (9th

Cir. 2005), and ignore its recognition that an injunction can only prevent harms attributable to NEPA/ESA violations.

This Court can only enjoin "acts that required a [Presidential] permit," *id.* at 1123, and a Presidential Permit is required only to build the 1.2 miles of oil pipeline and facilities that cross the U.S. border. Plaintiffs nevertheless argue that preconstruction or construction of any portion of the Project is "'so interrelated and functionally interdependent'" with the cross-border facilities that it "'bring[s] the entire project within' State's—and thus this Court's—'jurisdiction.'" Doc. 235 at 22; *see also* Doc. 247 at 19. But *Save Our Sonoran* did not consider the "functional[] interdepen[ce]" or "interrelated" nature of different development *activities* involved in a single project. The Court ruled that the Army Corps of Engineers' "jurisdiction" to permit discharges into "navigable waters" encompassed the authority to permit (or not permit) development on private lands where that development "would *impact* jurisdictional waters." *See* 408 F.3d at 1123 (emphasis added). Indeed, it was "the interconnected nature of the *[navigable] washes and surrounding area*," *id.* at 1124 (emphasis added)—*i.e.*, the relationship of jurisdictional and non-jurisdictional *property*—not the interconnected nature of different construction activities, that extended the Corps' permitting authority.

State's permitting authority here is "for the construction, connection, operation, or maintenance [of oil pipeline facilities] *at the borders of the United States*." E.O. 13337 §1(a) (emphasis added); *see also* March 2017 ROD/NID at 31 (authorizing construction of facilities "at the border of the United States and Canada … in Phillips County, Montana"). Plaintiffs cannot contend that preconstruction activities, or actual construction, in South Dakota "would impact" the environment within the 1.2-mile border-crossing corridor in Montana, or that this corridor "cannot be segregated from private lands" in South Dakota.

Moreover, even if State's regulations created an enforceable duty requiring it to evaluate the environmental impacts of the entire Project, not just those within the border-crossing segment, Plaintiffs are wrong in claiming that all "Project construction is *barred* until State complies with NEPA and the ESA." Doc. 235 at 24. Because "there is no presumption of irreparable harm in procedural violations of environmental statutes," there must be a "nexus" between a procedural violation and the environmental injuries an injunction seeks to prevent. *Save Our Sonoran*, 408 F.3d at 1124-25. Here, there is none, except insofar as the Court has enjoined construction of the Project in Nebraska [and the 1,038 unsurveyed acres].

Three of the NEPA violations and the sole ESA violation were based on State's alleged failures to study impacts of the pipeline's operation (*i.e.*, impacts from oil spills and leaks and cumulative GHG emissions). *See* Doc. 218 at 51-52.

The same is true of State's failure to consider information on lower oil prices—information this Court deemed "material" to "Keystone's impact on [Canadian] tar sands production," *id.* at 18, and thus its impact on GHGs emissions. Alleged deficiencies in the assessment of *operational* impacts of a pipeline may support an injunction against its operation, but not its *construction*.

This Court based two other violations on failures to study the alternative route in Nebraska and potential cultural impacts to 1,038 acres of mostly privately-held land. These findings, however, do not justify enjoining construction *outside* these areas. And the APA violation cannot justify enjoining activities outside the 1.2-mile border-crossing corridor: State's alleged failure pertains to a change in foreign policy, not any failure to evaluate environmental impacts, and is thus relevant only to whether a permit for border-crossing facilities serves the national interest.

Plaintiffs claim they would suffer irreparable injury because preconstruction and construction activities will cause "'[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,' among other harms." Doc. 235 at 25. Other Plaintiffs claim injuries to their interest in observing endangered whooping cranes or from the noise and traffic associated with worker camps. Doc. 247 at 24-25. But none of these harms is caused by the

violations this Court found. To the contrary, the IEN Plaintiffs' quotes come *from State's 2014 FSEIS*, which shows that State evaluated these "potential" impacts.[5] And this Court rejected the claim that State failed adequately to assess the impacts on whooping cranes or other protected species, except with respect to the updated information on oil spills and leaks, which again is a potential harm from operation, not construction, of the Project.

Ultimately, the scope of the injunction rests on the theory that, if TransCanada begins even preconstruction activities, the resulting "bureaucratic momentum" will skew State's analysis of the environmental issues it has been ordered to resolve. Doc. 231 in CV 17-29-GF-BMM at 10. But that theory contradicts the ordinary presumption that government officials discharge their duties in good faith, and the Ninth Circuit's admonition that courts "*cannot* assume that government agencies will not comply with their NEPA duties in later stages of development." *Conner v. Burford*, 848 F.2d 1441, 1448 (9th Cir. 1988) (emphasis added).

Indeed, the theory is particularly inappropriate here. There is no basis for assuming that State will skew an environmental analysis in order to protect

[5] Plaintiffs also neglect to mention State's conclusion that TransCanada's mitigation and reclamation plan "would avoid or minimize many impacts on wetlands associated with construction and operation activities and would help to ensure that potential effects would be primarily short-term." DOSKXLDMT0006784.

construction investments that a foreign company and its wholly-owned subsidiaries make at their own risk—which is what TransCanada will be doing if it conducts preconstruction or construction prior to issuance of a Presidential Permit. Moreover, State must decide whether a Presidential Permit will serve the national interest—a multifaceted and high-profile judgment in which a desire to protect the sunk costs of a foreign corporation should play no role whatsoever, and where, in all events, any such consideration would be overwhelmed by weighty issues of foreign diplomacy, national security, and U.S. economic benefits.

II. TransCanada Demonstrated Irreparable Injury

Absent a stay, TransCanada will suffer irreparable harm. As described in the Ramsay Declaration, TransCanada would layoff a significant portion of its workforce, face tremendous delay costs, and lose substantial revenues if it is unable to resume preconstruction activities in the near future. *See* Ramsay Decl. ¶¶21-28 Doc. 222-1 in CV 17-29-GF-BMM**.** TransCanada cannot, as Plaintiffs claim, simply make up for lost revenues in subsequent years. *See id*. ¶26 (explaining net present value impact of losses sustained in 2021 and supposedly "recouped" 20 years later). Though Plaintiffs contend TransCanada needs to obtain certain federal permits before it can even begin construction, this is not true either. For certain areas of the pipeline, TransCanada has received the necessary

clearances it needs to commence construction. Accordingly, the current injunction imposes significant, irreparable harm on TransCanada.

Plaintiffs, conversely, will suffer no irreparable harm. As discussed above, outside of Nebraska and the 1,038 unsurveyed acres, the various environmental injuries they rely on are not cognizable for purposes of injunctive relief, because they are not related to the NEPA and ESA violations this Court found. And their theory of harms from "bureaucratic momentum" is both legally and factually untenable.

III. The Public Interest Favors a Stay

TransCanada also demonstrated the significant benefits that flow from staying the injunction pending appeal. Plaintiffs argue that the injunction must remain because the public is best served by requiring State to comply with environmental laws. As described above, however, the enjoined activities are not relevant to the additional environmental analysis the Court ordered. Accordingly, Plaintiffs' argument is hollow.

IV. Conclusion

For the reasons stated above and enumerated in TransCanada's motion, the Court should stay the injunction in this matter pending appeal of this matter before the Ninth Circuit.

Dated this 10th day of January 2019.

CROWLEY FLECK PLLP

/s/ Jeffery J. Oven
Jeffery J. Oven
Mark L. Stermitz
Jeffrey M. Roth
490 North 31st Street, Ste 500
P.O. Box 2529
Billings, MT 59103-2529
Email: joven@crowleyfleck.com
mstermitz@crowleyfleck.com
jroth@crowleyfleck.com

SIDLEY AUSTIN LLP

/s/ Peter R. Steenland, Jr
Peter R. Steenland, Jr.
Peter C. Whitfield
Lauren C. Freeman
1501 K Street, N.W.
Washington, D.C. 20005
Email: psteenland@sidley.com
pwhitfield@sidley.com
lfreeman@sidley.com

Counsel for TransCanada Keystone Pipeline, LP and TransCanada Corporation

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2), I certify that this brief contains 3,175 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 January 10, 2019 the foregoing document was served on all counsel of record via the Court's CM/ECF system.

/s/ Jeffery J. Oven