Consolidated Case Nos. 18-36068, 18-36069, 19-35036, 19-35064, 19-35099

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INDIGENOUS ENVIRONMENTAL NETWORK, *et al.*,

Plaintiffs–Appellees–Cross-Appellants,

v.

UNITED STATES DEPARTMENT OF STATE, *et al.*,

Defendants–Appellants–Cross-Appellees,

and

TRANSCANADA KEYSTONE PIPELINE, LP, *et al.*,

Intervenor-Defendants–Appellants–Cross-Appellees.

On Appeal from the U.S. District Court for the District of Montana
Nos. 4:17-cv-00029-BMM and 4:17-cv-00031-BMM

NORTHERN PLAINS' OPPOSITION TO TRANSCANADA'S MOTION FOR STAY PENDING APPEAL

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RULE 26.1 DISCLOSURE STATEMENT

Plaintiffs-Appellees/Cross-Appellants Northern Plains Resource Council, Bold Alliance, Center for Biological Diversity, Friends of the Earth, Natural Resources Defense Council, and Sierra Club represent that each is a non-profit organization with no parent corporation and no outstanding stock shares or other securities in the hands of the public. No publicly held corporation owns any stock in any of the organizations.

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INTRODUCTION

The district court correctly enjoined construction of the Keystone XL pipeline after determining that the Department of State (State) and the Fish and Wildlife Service (Service) (collectively, Federal Agencies) violated the law when they rushed to approve the project using incomplete and outdated environmental review documents. After issuing the injunction, the district court twice confirmed it—each time carefully considering TransCanada's arguments, and each time tailoring the injunction as the court deemed appropriate. Now, TransCanada asks this Court to stay the injunction, thus allowing TransCanada to construct the pipeline before the Court can consider the merits on appeal.

A stay is not warranted. TransCanada has not carried its burden of showing that it is likely to succeed on the merits of its appeal or that it will be irreparably harmed absent a stay. Nor has it shown that the remaining two stay factors tip in its favor. Plaintiffs Northern Plains Resource Council, Bold Alliance, Center for Biological Diversity, Friends of the Earth, Natural Resources Defense Council, and Sierra Club (collectively Northern Plains) respectfully request that the Court preserve the status quo and deny TransCanada's motion.

BACKGROUND

I. Factual background

This case challenges federal agency approvals for the proposed Keystone XL pipeline, a massive pipeline that would transport up to 830,000 barrels per day of tar sands crude oil from Alberta, Canada across Montana, South Dakota, and Nebraska, where it would connect to an existing pipeline that supplies refineries on the Gulf Coast. SupplAppx66.

TransCanada first applied for a cross-border permit for Keystone XL in 2008, pursuant to Executive Order 13,337. *Id.* Executive Order 13,337 delegates the decision to grant a permit to State, unless any of eight consulting agencies disagrees with the decision and refers the dispute to the President. 69 Fed. Reg. 25,299, 25,299-300 (May 5, 2004). Because issuance of the permit is a "major Federal action" triggering the National Environmental Policy Act (NEPA), State prepared an Environmental Impact Statement (EIS) for the project. 74 Fed. Reg. 5019, 5020 (Jan. 28, 2009). State ultimately denied the 2008 application. SupplAppx67.

TransCanada submitted a second application in 2012. SupplAppx71. Pursuant to the Endangered Species Act (ESA), State submitted a Biological Assessment to the Service in 2012, and in 2013, the Service issued a Biological

Opinion. SupplAppx70. State also released a Draft Supplemental EIS in 2013, and a Final Supplemental EIS in 2014, under NEPA. SupplAppx65-66.

In 2015, State again denied the permit. Appx184-87. In the Record of Decision (ROD) and National Interest Determination, State found that Keystone XL was contrary to the national interest, citing foreign policy and climate concerns. Appx213-15.

In January 2017, President Trump issued a Memorandum inviting TransCanada to reapply, directing State to make a permitting decision within sixty days of TransCanada's application, and waiving the presidential appeal provision of Executive Order 13,337. 82 Fed. Reg. 8663 (Jan. 30, 2017). After TransCanada reapplied, State issued a new ROD and National Interest Determination on March 23, 2017, reversing the prior decision and concluding that Keystone XL would serve the national interest. Appx183. Rather than update the environmental review documents, State relied on the existing ones. Appx155, 157-59. State then issued a cross-border permit, which allowed TransCanada to construct and operate Keystone XL along the route analyzed in the EIS. SupplAppx61.

II. Procedural background

Northern Plains filed suit against Federal Agencies under NEPA, the ESA, and the Administrative Procedure Act (APA). TransCanada intervened to defend the approval.

In a series of rulings, the district court found that it had jurisdiction over the case and that Federal Agencies broke the law. The court first rejected the argument that State's issuance of the permit constituted unreviewable presidential action. Appx131-42. The court similarly rejected the argument that State's and the Service's actions were unreviewable under the ESA. Appx145-49.

On the merits, the district court found that Federal Agencies violated NEPA, the ESA, and the APA. Specifically, the court held that State failed to prepare a supplemental EIS evaluating critical new information on: (1) Keystone XL's new and unanalyzed route through Nebraska, Appx107-19; (2) the significant changes in oil prices since 2014, which could materially alter State's analysis of the project's effect on tar sands development, Appx68-70; (3) the cumulative climate impacts from State's approval of another tar sands pipeline expansion, Appx71-75; and (4) major oil pipeline spills since 2014, including a spill from TransCanada's own Keystone I pipeline, Appx80-83. The district court also found other NEPA violations alleged by the Indigenous

Environmental Network plaintiffs in a consolidated case, including that State failed to survey 1,038 acres for cultural resources. Appx78-79.

The court similarly found that State's 2012 Biological Assessment and the Service's 2013 Biological Opinion violated the ESA because they "relied on outdated information regarding potential oil spills," and ordered the agencies to update those analyses. Appx95-96.

Finally, the district court held that State's reversal—first denying the project in a 2015 ROD and then approving it in a 2017 ROD on the same factual record—was arbitrary because State "simply discarded prior factual findings related to climate change to supports its course reversal." Appx83-87.

These are not minor or technical violations—they go to the heart of the most controversial issues surrounding Keystone XL: the pipeline's impacts related to climate change, oil spills, endangered species, and its route through an entire state.

The district court found that these violations warranted vacating the ROD and enjoining construction of the pipeline. Appx106. After TransCanada moved to amend the injunction, the court narrowed the injunction to allow TransCanada to conduct surveys and provide security at existing pipe yards,

but found that any other construction or "pre-construction"[1] activities would "irreparabl[y] harm" Northern Plains. Appx45-46. Not satisfied with that result, TransCanada moved to stay the entire injunction. After a thorough hearing, the district court again narrowed the injunction, allowing TransCanada to transport and store pipe in certain areas. Appx31. The district court continued to bar any other activities, Appx31, and reaffirmed that TransCanada was unlikely to succeed on the merits of its appeal, Appx5-18.

ARGUMENT

This Court reviews the district court's denial of a stay for abuse of discretion. *See California v. Nw. Pac. R. Co.*, 726 F.2d 505, 506 (9th Cir. 1984). "A stay is not a matter of right, even if irreparable injury might otherwise result." *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017) (citation omitted). Rather, it is an exercise of judicial discretion guided by four factors: (1) whether the movant has made a strong showing that it is likely to succeed on the merits; (2) whether the movant will be irreparably injured absent a stay; (3) whether the stay will substantially injure the other parties; and (4) where the public interest lies. *Id.*

[1] Although TransCanada labels certain ground-disturbing activities, such as constructing work camps, "pre-construction" rather than "construction," there is no legal basis for that distinction. What matters is whether these activities would affect the environment. *See infra* section III.

Courts reach the last two factors only if the applicant satisfies the first two, most critical factors. *Id.* The movant bears the burden of justifying a stay. *Id.* TransCanada has failed to meet its burden on any of the four factors and its motion should be denied.

I. TransCanada has not made a strong showing that it is likely to succeed on the merits

A. Northern Plains' NEPA claims are judicially reviewable

TransCanada's jurisdictional arguments are based on a wholesale mischaracterization of Northern Plains' case. The State Department—not the President—made the final, discretionary decision to issue the permit and ROD for Keystone XL. There is no dispute that State's issuance of these documents "mark[ed] the 'consummation' of the agency's decisionmaking process" and were decisions "from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Accordingly, those are "final agency action[s]" reviewable under the APA, *id.*, and thus, NEPA.

TransCanada's reliance on *Franklin v. Massachusetts* is misplaced; *Franklin* concerned an agency's submission of a nonbinding report to the President under a statute that committed the final, discretionary decision to the President himself. 505 U.S. 788, 797-98 (1992). The agency's submission was "purely advisory and in no way affected the legal rights of the relevant actors." *Bennett*,

520 U.S. at 178. Here, State did not "recommend" or "advise" that the President issue a ROD or permit for Keystone XL—State took those actions itself, pursuant to a memorandum that waived any presidential right to review State's decision. *See* 82 Fed. Reg. at 8663; 69 Fed. Reg. at 25,299; *cf. Tulare Cty. v. Bush*, 185 F. Supp. 2d 18, 28 (D.D.C. 2001) (agency action unreviewable where agency had no discretion and was simply carrying out President's directives).

It makes no difference under the APA whether the agency was acting pursuant to an executive order or other presidential guidance. *See Chamber of Commerce v. Reich*, 74 F.3d 1322, 1326-27 (D.C. Cir. 1996) ("[T]hat the [agency's] regulations are based on the President's Executive Order hardly seems to insulate them from judicial review under the APA."); *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of the Navy*, 383 F.3d 1082, 1088-90 (9th Cir. 2004) (President's involvement in redesign of missile program did not insulate Navy's discretionary conduct from APA and NEPA review). Indeed, courts routinely apply APA review to agency actions arising out of congressional delegations of authority, even though Congress itself is not subject to the APA.

State's own regulations require it to conduct NEPA review for each major departmental action, including permits for international pipelines. 22 C.F.R. § 161.7(c)(1). In fact, State recognized in 2009 that issuance of the

Keystone XL permit "would constitute a major Federal action that may have a significant impact upon the environment within the meaning of [NEPA]" and decided to prepare an EIS. 74 Fed. Reg. at 5020. When TransCanada reapplied in 2012, State again conceded it must "evaluate the potential environmental effects of the proposed project consistent with [NEPA and State's] regulations." 77 Fed. Reg. 27,533, 27,534 (May 10, 2012). The district court thus correctly found that State's NEPA analysis was a legally required process reviewable under the APA—not a voluntary "act of grace." Appx127-28; *see also Or. Nat. Desert Ass'n v. BLM*, 625 F.3d 1092, 1118-19 (9th Cir. 2010) (once an EIS is "solidified in a ROD," the agency "has taken final agency action, reviewable under [the APA]").

Three other district courts—including two in this Circuit—have likewise held or assumed that the APA authorizes judicial review of State permitting decisions made under Executive Order 13,337. *Sierra Club v. Clinton* held that a NEPA challenge to the agency's issuance of a permit for another pipeline was reviewable under the APA because "the State Department's FEIS constitutes a final agency action." 689 F. Supp. 2d 1147, 1157 (D. Minn. 2010). *Protect Our Communities Foundation v. Chu* held that State took reviewable final agency action when it issued a permit and EIS for a powerline. 2014 WL 1289444, at *1, 4-6 (S.D. Cal. Mar. 27, 2014). And *Border Power Plant Working Group v.*

Department of Energy adjudicated a NEPA challenge to a powerline permit, recognizing that "[a]n agency's decision not to prepare an EIS under NEPA is a final administrative decision reviewable under the [APA]." 260 F. Supp. 2d 997, 1018 (S.D. Cal. 2003).

TransCanada relies on three other district-court opinions to argue that State's approval is unreviewable, but those cases turned on different facts concerning State's authority: they relied, at least in part, on a provision in Executive Order 13,337 allowing referrals to the President. *NRDC v. U.S. Dep't of State*, 658 F. Supp. 2d 105, 111 (D.D.C. 2009); *Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1081 (D.S.D. 2009); *White Earth Nation v. Kerry*, 2015 WL 8483278, at *7 (D. Minn. Dec. 9, 2015). Here, President Trump's Memorandum specifically *waived* that provision for Keystone XL, meaning there was no avenue by which the final decision could reach the President's desk. *See* 82 Fed. Reg. at 8663.

The other cases TransCanada cites are not NEPA cases, but rather involve substantive challenges to underlying agency action. *See Jensen v. Nat'l Marine Fisheries Serv.*, 512 F.2d 1189 (9th Cir. 1975); *Detroit Int'l Bridge Co. v. Gov't of Canada*, 189 F. Supp. 3d 85 (D.D.C. 2016); *Ancient Coin Collectors Guild v. U.S. Customs & Border Prot.*, 801 F. Supp. 2d 383 (D. Md. 2011). Here,

regardless of whether State's substantive "national interest" determination is reviewable, State's compliance with NEPA is. *Infra* section I.B.

TransCanada argues that presidential actions should not become subject to judicial review simply because the President delegates them. But that is the price of delegation. Congress passed the APA to ensure unelected agency officials are "accountable to the public and their actions subject to review by the courts." *Franklin*, 505 U.S. at 796. In any event, President Trump's Memorandum acknowledges State's NEPA obligations. 82 Fed. Reg. at 8663 (State to consider 2014 EIS as satisfying NEPA "[t]o the maximum extent permitted by law"). Executive Order 13,337 likewise recognizes that State must evaluate a project "in light of any statutory or other requirements or other considerations." 69 Fed. Reg. at 25,300. Thus, TransCanada's separation-of-powers argument rings hollow because even the presidential delegation recognizes that State's decision would remain subject to applicable laws, including NEPA.

The President did not issue a permit or ROD for Keystone XL, nor did the President direct State to do so. State's issuance of the ROD and permit for Keystone XL constitutes purely agency action, reviewable under the APA and NEPA.

B. State's actions are not committed to agency discretion

TransCanada's argument that State's decision is committed to agency discretion similarly mischaracterizes Northern Plains' case as a direct challenge to the permit. Although *Detroit International Bridge Co. v. Government of Canada*, 883 F.3d 895, 903-04 (D.C. Cir. 2017), held that the national interest determination required by Executive Order 13,337 was committed to agency discretion, that decision does not apply here because Northern Plains contests whether State complied with NEPA, the APA, and the ESA—not whether the permit for Keystone XL was in the national interest.

Courts have long held that an agency's NEPA compliance is reviewable under the APA even if the underlying permitting decision is not. In *Calvert Cliffs' Coordinating Committee, Inc. v. U. S. Atomic Energy Commission*, the court did not review the Commission's decision to grant a construction permit, only whether the Commission complied with NEPA in granting that permit. 449 F.2d 1109, 1112 (D.C. Cir. 1971); *see also Jones v. Gordon*, 792 F.2d 821, 824 (9th Cir. 1986) (although substantive challenge to permit was unavailable, court had jurisdiction to review whether agency violated NEPA's procedural requirements).

The APA establishes a "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Mich. Acad. of Family*

Physicians, 476 U.S. 667, 670 (1986). One "narrow" exception is where a decision is "committed to agency discretion" because there is "no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Here, NEPA limits State's discretion and provides meaningful standards for review. In fact, the district court *already applied* those standards without trouble and without delving into questions of national interest. Appx103-19.

TransCanada further argues that State's actions are committed to discretion because they relate to foreign affairs, relying on a single sentence in *Jensen*, 512 F.2d at 1191. However, *Jensen* predates the Supreme Court's holding in *Heckler*, which "clarif[ied] what it means for an action to be 'committed to agency discretion by law.'" *Pac. Nw. Generating Co-op v. Bonneville Power Admin.*, 596 F.3d 1065, 1078 n.8 (9th Cir. 2012) (questioning whether pre-*Heckler* holding remained good law).[2] Thus, NEPA may apply in the context of foreign affairs.

A line of post-*Jensen* cases confirms that courts routinely apply NEPA to agency actions involving foreign affairs and national security. "[A] weak

[2] *Jensen* is also not a NEPA case. As the district court noted, *Jensen* involved an APA challenge to the agency's approval of a regulation arising out of an international treaty. Appx140; *see also Chu*, 2014 WL 1289444, at *8 (distinguishing *Jensen* on this ground).

connection to foreign policy is not enough to commit an agency action to the agency's discretion." *ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059, 1069 (9th Cir. 2015). Similarly, "[t]here is no 'national defense' exception to NEPA." *No GWEN All. of Lane Cty., Inc. v. Aldridge*, 855 F.2d 1380, 1384 (9th Cir. 1988) (applying NEPA to Air Force's construction of radio towers to be used in nuclear war); *Ground Zero*, 383 F.3d at 1083-89 (applying NEPA to Navy's implementation of missile-upgrade program directed by the President). If "foreign policy" and "national security" considerations did not preclude review in those cases, review is certainly not precluded here, where the agency is deciding whether to allow a private company to build a commercial project on U.S. soil. To adopt TransCanada's view would mean that State—an agency whose entire mission involves foreign affairs—would never be subject to NEPA. That cannot be.

C. Northern Plains' ESA claim is also reviewable

TransCanada's arguments regarding Northern Plains' ESA citizen-suit claim against State and the Service also fail. First, this claim challenges actions taken by agencies, not by the President, and is therefore reviewable. *Supra* section I.A.

Second, even if this Court were to find that State's issuance of the permit is a "presidential action," *Franklin* and the other APA cases TransCanada

relies on do not apply in this context because ESA citizen-suit claims are not governed by the APA. *See Bennett*, 520 U.S. at 173-77; *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495-96 (9th Cir. 2011).

The only question, then, is whether sovereign immunity for the ESA claim has been waived. It has. The ESA's citizen-suit provision allows suits against "any person, including the United States and any other governmental instrumentality or agency." 16 U.S.C. § 1540(g)(1)(A). A "person," in turn, includes "any officer, employee, agent, department, or instrumentality of the Federal Government." *Id.* § 1532(13). This is a much broader waiver of sovereign immunity than the APA's, which is limited to "agency action." *See Franklin*, 505 U.S. at 796. The ESA's plain language indicates Congress's intent to make all federal government actors, including the President and agencies acting under presidential authority, subject to the ESA's waiver of sovereign immunity. TransCanada fails to cite a single decision that holds otherwise.

Because TransCanada has not shown that it is likely to succeed on the merits, its motion for a stay must be denied.

D. The district court had authority to enjoin the entire project

The district court properly rejected TransCanada's argument that judicial authority is limited to the area within 1.2 miles of the Canadian border.

Appx115. To begin, the permit is not so limited. It states that Keystone XL "must be constructed and operated as described in the 2012 and 2017 permit applications [and] the 2014 EIS." Appx115; SupplAppx61. The permit further incorporates oil spill response plans and other conditions from the EIS, none of which is limited to the border crossing. SupplAppx61, 63. Thus, neither the permit nor the court's authority is limited to the 1.2-mile border area.

But even if the permit were so limited, the district court would still have authority to enjoin the entire project. TransCanada's reliance on *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1118 (9th Cir. 2005), is misplaced, since there the Ninth Circuit *affirmed* an injunction that covered an *entire* project site, despite the Army Corp of Engineers' permitting authority extending to only 5% of the land. The Court first held that the Corps had "responsibility under NEPA to analyze all of the environmental consequences of a project," not just the areas under its permitting jurisdiction. *Id.* at 1122. While the Court stated that the "authority to enjoin development extends only so far as the Corps' permitting authority," it clarified that the district court had power to "enjoin the entire project" because the waters subject to federal jurisdiction could not be segregated from other lands. *Id.* at 1123-24.

Here, the pipeline's border crossing is *not* separate and independent from any other parts of the pipeline, or from ancillary activities, such as worker

camps. The various sections of the pipeline are components of one continuous project. Indeed, if the court's injunctive authority were limited to just the 1.2-mile border area, there would be no teeth to NEPA's requirement to analyze *all* the environmental impacts of the project because the court would be powerless to prevent environmental harm in the face of NEPA violations.

The district court properly enjoined construction of the entire pipeline.

II. TransCanada has not shown it will suffer irreparable injury absent a stay

TransCanada's alleged harm is premised on self-inflicted and speculative financial concerns. First, TransCanada presupposes that it has a right to build Keystone XL in 2019. That is simply not the case. TransCanada has never had all its necessary permits and approvals—for example, the Corps and Bureau of Land Management have yet to approve the project, Appx238—and now State's ROD has been vacated. In nonetheless relying on a 2019 construction season and making investments accordingly—even despite this litigation—TransCanada assumed the risk that the project might be denied or delayed. It cannot now clam irreparable financial harm as a result. *N. Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988) ("investments should not be considered" when lessees made bids "with full awareness" of litigation "and chose to gamble" on EIS's adequacy). While TransCanada is free to devise a

construction schedule, the failure to meet that schedule cannot create an irreparable injury where none exists.

Similarly, TransCanada assumes that, if the injunction is lifted, it can take advantage of the 2019 construction season. TransCanada ignores that State must now prepare a legally adequate supplemental EIS and issue a new ROD, Appx51, that State and the Service must finish their ESA consultation, Appx89; Appx96, and that other agencies must issue their approvals, Appx238. These processes take time and could extend well into 2019 or beyond. *See, e.g.*, 40 C.F.R. § 1506.10(b)-(c) (requiring 45-day comment period on draft EIS and 30- to 90-day delay before decision can be made). And of course, the agencies' approvals are not a foregone conclusion, much less on the timeline TransCanada desires. Although TransCanada speculates that the injunction—and not the outstanding approvals—will cause it to miss the 2019 construction season, "[s]peculative injury does not constitute irreparable injury." *Goldie's Bookstore, Inc. v. Super. Ct. of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984).

Even assuming the injunction would cause TransCanada financial harm, "temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury"—particularly where, as here, the claimed losses are vague and unsubstantiated. *Sampson v. Murray*, 415 U.S. 61, 90 (1974);

accord Wis. Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) (denying stay where pipeline operators made "unsubstantiated and speculative allegations of recoverable economic injury"). In the event TransCanada is unable to recover some of its losses, "loss of anticipated revenues … does not outweigh the potential irreparable damage to the environment." *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2001), *abrogated on other grounds by Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010). *See infra* section III (detailing environmental damage).

TransCanada also cites lost jobs, wages, and taxes. But those are not harms *to TransCanada*. In any event, TransCanada itself argues that contractors will likely find employment elsewhere given the competitive market. *See* Appx271, 287. Similarly, the other purported economic benefits will not disappear altogether—they will simply be delayed if, as TransCanada assumes, the project is built. *See League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 765-66 (9th Cir. 2014) (finding "marginal harm" from moving "jobs and tax dollars to a future year" unpersuasive).

The cases cited by TransCanada are inapposite. In *Alaska Survival v. Surface Transportation Board*, this Court granted a request to allow a project to move forward because the corporation had already won its appeal and would soon be able to proceed with the project anyway. 704 F.3d 615, 616 (9th Cir.

2012). Additionally, the courts in *Alaska Survival* and *James River Flood Control Association v. Watt*, found significant harm to the public from delay because the projects were publicly funded. *Id.*; *James River Flood Control Ass'n*, 680 F.2d 543, 544-45 (8th Cir. 1982). That circumstance is absent here.

TransCanada has not established the "bedrock requirement" of irreparable harm. *Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011). While the Court need not address the remaining factors, *see id.*, they further underscore why the stay should not issue.

III. A stay would substantially injure Northern Plains

A. A stay would cause irreparable environmental damage

"Environmental injury, by its nature, … is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). Here, Keystone XL's 1,200-mile route crosses three states and approximately 1,000 waterways. SupplAppx69, 72. As even the 2014 EIS recognizes, environmental damage stemming from construction alone includes the release of almost 250,000 metric tons of carbon dioxide equivalents a year, the permanent loss of 52 acres of forest, and wildlife deaths from equipment collisions and habitat disturbance. SupplAppx68, 78-80. Once operational, the pipeline would further harm the people, wildlife, and habitat along its path—particularly in the event of a spill. SupplAppx73-77, 80-83, 85-120; Declaration

of Jeffrey Short, PhD ¶¶ 19-39 (detailing effects of oil spills and resulting harm to environment). And it would have significant climate impacts that will exacerbate the current crisis. SupplAppx121-22; Declaration of James E. Hansen, PhD ¶¶ 6-27 (describing Keystone XL's climate impacts and concluding that "Keystone XL is the fuse to the biggest carbon bomb on the planet").

Keystone XL would also endanger the drinking water and disturb the way of life of Northern Plains' members who live in the pipeline's path. SupplAppx3-13, 49-58. It would impair members' professional and personal interests in observing wildlife, including the endangered whooping crane. SupplAppx17-19, 37-45. And its associated traffic, noise, and ancillary facilities, such as worker camps, would negatively affect members and their local communities. SupplAppx23-27, 31-33. Keystone XL's widespread and substantial threats to Northern Plains and its members, the environment, and the greater public are clear. *See State v. BLM*, 286 F. Supp. 3d 1054, 1073-74 (N.D. Cal. 2018) (similar environmental injuries constitute irreparable harm).

TransCanada does not, and cannot, contest these harms. Instead, it argues that they are insufficiently connected to Federal Agencies' legal violations. This argument relies on an overly narrow view of the relevant legal standard and ignores NEPA's purpose.

As this Court has "long held," injunctive relief "must be tailored to remedy the specific harm alleged." *Melendres v. Maricopa Cty.*, 897 F.3d 1217, 1221 (9th Cir. 2018). Northern Plains has shown that construction and operation of the project will cause extensive environmental and procedural harm while the supplemental environmental review is underway. Appx20-21. The present injunction "'forestall[s]'" this harm and properly preserves the status quo until State's review is complete. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 819 (9th Cir. 2018). Limiting the scope of the injunction, in contrast, would have the opposite effect and contradict NEPA and the ESA. *See* 40 C.F.R. § 1506.1(a) (NEPA prohibits activities that would "[h]ave an adverse environmental impact" or "[l]imit the choice of reasonable alternatives" during ongoing review); 16 U.S.C. § 1536(d) (ESA prohibits "irreversible or irretrievable commitment of resources" that would foreclose full review).

TransCanada is thus wrong to insist that the injunction be tailored to the specific inadequacies found by the district court. Regardless, the injunction meets this test. In claiming otherwise, TransCanada forgets that State must revise its analysis not only of the new route through Nebraska and the un-surveyed 1,038 acres of land, but also of oil markets, greenhouse gases, and oil spills. Those analyses could affect the entire project. For example, after looking

more closely at oil spill risk, State might determine that the route should be moved. *See* SupplAppx84 ("Location is a key component of the consequence of a spill."). If, however, TransCanada were to construct part of the pipeline in the meantime, State would be unlikely to require the route alteration. The D.C. Circuit aptly described this dilemma:

> Once a facility has been completely constructed, the economic cost of any alteration may be very great.... Either the [applicant] will have to undergo a major expense in making alterations in a completed facility or the environmental harm will have to be tolerated. It is all too probable that the latter result would come to pass.

Calvert Cliffs', 449 F.2d at 1128. Because State's review is incomplete, and because its NEPA and ESA violations implicate the whole project, no part of the injunction should be lifted.

B. A stay would skew agency decisionmaking

Northern Plains' environmental harm is compounded by a second, related injury: a biased environmental review. The more resources TransCanada commits to Keystone XL, the more entrenched the project and its route will become. The result is a prejudiced decision-making process, in which State and other federal agencies are discouraged from rejecting or changing the project to account for new information discovered during the supplemental environmental review. *See, e.g.*, *supra* section III.A (spill analysis may produce route modification but for project momentum); *Nat'l Wildlife*

Fed'n v. Nat'l Marine Fisheries Serv., 2017 WL 1829588, at *12 (D. Or. Apr. 3, 2017); *Calvert Cliffs'*, 449 F.2d at 1128 (if agency makes irreversible commitment of resources, review process "may become a hollow exercise").

TransCanada contends that this "bureaucratic momentum" theory is implausible because it presumes bad faith by the agencies. Not so. Rather, the theory recognizes the practical reality that the "bureaucratic steam roller" is "difficult[] [to] stop[]" once launched. *Colo. Wild Inc. v. U.S. Forest Serv.*, 523 F. Supp. 2d 1213, 1221 (D. Colo. 2007). It is also consistent with NEPA's basic premise that government decisionmakers be presented with "relevant environmental data *before* they commit themselves to a course of action." *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989). Indeed, this Court has recognized that, while it must "presume that agencies will follow the law," "bureaucratic inertia" is nonetheless a risk to be guarded against. *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1082 (9th Cir. 2010).[3]

TransCanada next contends that the "bureaucratic momentum" theory is irrelevant because Keystone XL is privately owned and financed. But each step taken in furtherance of a project "represents a link in a chain of

[3] Though the Court went on to find this risk would not bias the agency's review, it did so because there had not yet been any commitment of resources. *See* 615 F.3d at 1073-74, 1082-83. Here, TransCanada proposes to do exactly that by continuing to construct the pipeline.

bureaucratic commitment that will become progressively harder to undo the longer it continues"—regardless of who takes it. *Nat'l Wildlife Fed'n*, 2017 WL 1829588, at *12 (citation omitted). Thus, in *Colorado Wild*, the court found that the ground-disturbing activities proposed by a *private* developer risked creating "bureaucratic momentum" that would "skew" the agency's analysis "towards its original, non-NEPA compliant" decision. 523 F. Supp. 2d at 1220-21. So too here.

Northern Plains will suffer irreparable environmental and procedural injury if TransCanada begins construction before Keystone XL complies with the law. Accordingly, the Court should deny a stay.

IV. The public interest weighs against a stay

As the district court twice found, the public interest is best served by an injunction. Appx28-29, 44-46. Protecting the environment and communities along Keystone XL's route until State completes its review "is clearly in the public interest." *See Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1177 (9th Cir. 2006). So, too, is the need to hold Federal Agencies accountable to the rule of law and ensure that State's review will be unprejudiced by TransCanada's continued investment of resources. *Supra* section III.B.

TransCanada attempts to minimize these interests by falsely asserting that State's review is complete outside of Nebraska and the un-surveyed acres.

But the 2017 ROD has been vacated, Appx103-04, and State has yet to issue a new one. Before it does, State must revise its analysis of oil prices, climate change impacts, and oil spills, Appx103-04—issues that relate to the whole project. In any event, TransCanada seeks to stay the injunction in its entirety, not just those parts outside Nebraska and the un-surveyed lands.

Meanwhile, TransCanada offers no evidence to explain why the project is urgent from a national security or foreign affairs perspective, or how the absence of a stay impairs those interests. *See Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017). It cites only to the 2017 ROD—a document that is premised on an unlawful environmental review and has since been vacated. Even if TransCanada were correct about Keystone XL's national security and foreign relations benefits, they are outweighed by the statutory purposes of NEPA, the ESA, and the APA. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978) (it is "beyond doubt that Congress intended endangered species to be afforded the highest of priorities"); *Arlington Coal. on Transp. v. Volpe*, 458 F.2d 1323, 1326 (4th Cir. 1972) ("even essential highway construction must yield to the congressionally structured priority" espoused by NEPA).

Given the public interests at stake, the Court should preserve the status quo and decline to issue a stay.

CONCLUSION

For the foregoing reasons, the Court should deny TransCanada's motion for a stay pending appeal.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Northern Plains is not aware of any related cases pending in the Ninth Circuit other than the five cases identified in the caption of this brief, which the Court consolidated sua sponte on February 12, 2019.

/s/ Jaclyn H. Prange

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing brief contains 5,597 words, excluding the material exempted by Federal Rules of Appellate Procedure 27(d)(2) and 32(f). This complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2) and Circuit Rules 27-1(1)(d) and 32-3(2).

I also certify that the foregoing brief has been prepared in a proportionately spaced typeface using Microsoft Word Calisto MT 14-point font. This complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6).

/s/ Jaclyn H. Prange

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing brief on March 4, 2019 with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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