

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

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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Indigenous Environmental Network, *et al.*,  
*Plaintiffs-Appellees*,

v.

United States Department of State, *et al.*,  
*Defendants-Appellants*,

and

TransCanada Keystone Pipeline, LP, *et al.*,  
*Intervenors-Defendants-Appellants*.

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On Appeal from the United States District Court  
For the District of Montana  
Great Falls Division  
No. 4:17-cv-00029-BMM

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**THE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN  
RESERVATION'S UNOPPOSED AMICUS CURIAE BRIEF IN  
OPPOSITION TO INTERVENORS-DEFENDANTS-APPELLANTS'  
MOTION FOR STAY**

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## STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a) this unopposed amicus brief in opposition of Intervenor-Defendants-Appellants' ("TransCanada") motion to stay is filed by the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation ("Tribes"). The Tribes' are federally recognized tribes under 25 U.S.C. § 5131(a) and 25 C.F.R. § 83 et seq. As a sovereign nation, the Tribes have authority to file this amicus brief.

The Tribes are an interested party because the proposed action—the construction of the Keystone XL Pipeline ("Keystone")—would cross the Missouri and Milk Rivers just upstream of the Reservation's boundaries. Thus, an oil spill from Keystone poses a significant risk to the Tribes' land, water right, and water sources, and pallid sturgeon. Additionally, Keystone will be constructed on several of the Tribes' sacred-cultural sites west of the Reservation. Finally, allowing preconstruction and construction activities will have negative effects on tribal resources.

These risks were inadequately discussed in the United States Department of State's ("Department") supplemental environmental impact statement<sup>1</sup>—in violation of the National Environmental Policy Act of 1969 ("NEPA") and the

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<sup>1</sup> *Final Supplemental Environmental Impact Statement for the Keystone XL Project*, United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs (Jan. 2014). Hereinafter "2014 SEIS."

National Historic Preservation Act of 1966 (“NHPA”). 42 U.S.C. § 4321 et seq.; 54 U.S.C. § 300101 et seq. Therefore, the Tribes oppose TransCanada’s motion for stay of the District Court’s injunction.

This brief was authored in whole by the Tribes’ legal counsel. Only the Tribes contributed money for preparing and submitting this brief.

### **BACKGROUND**

The Fort Peck Indian Reservation was created by the Treaty of Fort Laramie and ratified by Congress by Act of May 1, 1888. 25 Stat. 113. The southern border of the Tribes’ Reservation is the mid-channel of the Missouri River. *Id.* The western boarder of the Reservation is the mid-channel of Porcupine Creek until its confluence with the Milk River and then the mid-channel of the Milk River. *Id.* Keystone would cross the Missouri and Milk Rivers just upstream of the border of the Tribes’ Reservation boundaries.

The Missouri River crossing is a major part of the whole Keystone construction. It is the largest river Keystone will cross and is one of only a few rivers that will be crossed by horizontal directional drilling (HDD).

All the water needed for the Tribes to use on the Reservation was reserved by the United States. *Winters v. United States*, 207 U.S. 564, 577 (1908). The amount was quantified as 1,050,472 acre-feet per year of water in the Tribes’ compact with the State of Montana. Mont. Code Ann. § 85-20-201 (2017). This

water right “is held in trust by the United States for the benefit of the Tribes.” *Id.*;  
*See* 25 U.S.C. § 162a(d)(8).

This water right supplies water to the Assiniboine and Sioux Rural Water Supply System (“ASRWSS”). The ASRWSS is a \$302 million water supply project which will supply water to 30,000 people on the Fort Peck Indian Reservation and surrounding areas in Montana when completed.<sup>2</sup> Keystone’s crossing of the Missouri River is approximately 57 miles upstream of the ASRWSS’ water intake. The Tribes are concerned that an oil spill from the Pipeline could destroy the ASRWSS and its sophisticated water filtration equipment. In addition, there are two irrigation intakes located 10 and 14 miles downstream of where Keystone will cross the Missouri River. Due to previous oil and gas exploration, the ASRWSS is the only source of potable water on the Reservation. Thus, Keystone patently threatens the only public water supply on the Reservation; endangering the health, safety, and welfare of the Tribes and surrounding communities. *Montana v. United States*, 450 U.S. 544 (1981).

The ASRWSS was created by the Fort Peck Reservation Rural Water System Act of 2000. 114 Stat. 1451. Under the Act “[t]itle to the Assiniboine and Sioux Rural Water System shall be held in trust by the United States...” 114 Stat., at 1453. Currently, the United States holds title to the ASRWSS. “One of the

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<sup>2</sup> The ASRWSS is approximately 70% complete.

fundamental common-law duties of a trustee is to preserve and maintain trust assets.” *United States v. White Mt. Apache Tribe*, 537 U.S. 465, 475 (2003).

Therefore, the Department has a trust responsibility to protect the ASRWSS and the Tribes’ water right.

## ARGUMENT

The Tribes respectfully request the Court deny TransCanada’s motion to stay the District Court’s injunction of preconstruction and construction activities and halt TransCanada’s efforts for seeking any required state and federal permits.

“The standard for evaluating stays pending appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction.”

*Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983).

A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

*Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). Courts should not entertain an application for a stay except in the most extraordinary of circumstances.

*Volkswagenwerk A. G. v. Falzon*, 461 U.S. 1303 (1983).

### **I. TransCanada is unlikely to succeed on the merits because it has refused to address the merits of the case in its motion to stay.**

TransCanada has refused to address the merits of the case. Dkt. Entry 19, at 9. The District Court’s order found the Department violated NEPA and the Administrative Procedure Act of 1946 (“APA”). 5 U.S.C. § 501 et seq.; Doc 218.

Thus, by refusing to address these issues TransCanada has not shown it is likely to succeed on the merits.

**II. TransCanada is unlikely to suffer irreparable harm because the postponement of preconstruction activities or the 2019 construction season are only temporary harms.**

TransCanada states “the injunction inflicts *significant* harm...” Dkt. Entry 19, at 3 (emphasis added). Thus, TransCanada admits it will not suffer *irreparable* harm. The only harms TransCanada complains of are the loss of the 2019 construction season and approximately \$949 million in earnings. Dkt. Entry 19, at 3-4. However, “[i]f...the harm will be merely monetary [that] will not usually support injunctive relief.” *Am. Trucking Ass’ns v. City of Los Angeles*, 559 F.3d 1046, 1057 (9th Cir. 2009). Therefore, TransCanada’s claim of lost profits is not a basis to claim irreparable injury.

So is the loss of the 2019 construction season. TransCanada cites *James River Flood Control Ass’n v. Watt* for the proposition that the loss of the “opportunity to begin the project this season” is irreparable injury. 680 F.2d 543, 544 (8th Cir. 1982). However, the Court overruled the district court because the district court did not make adequate findings of facts to support its preliminary injunction. *Id.* The 8th Circuit later determined that if the district court cites specific evidence the preliminary injunction will be upheld. *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng’rs*, 826 F.3d 1030, 1039, (8th Cir. 2016).

Here, the District Court cited numerous facts in its amended order of why construction activities should be enjoined. Doc. 232. Additionally, the District Court correctly analyzed the biased NEPA process theory—showing that allowing construction activities would bias the Department’s NEPA decision-making process in the future. *Id.* Therefore, the loss of one construction season is not irreparable injury. The term irreparable injury means the injury is impossible to rectify or repair. A delay in construction does not meet that standard.

Finally, TransCanada then seeks to include U.S. workers and state and local economies in the types of harm the injunction will cause. However, to issue a stay, TransCanada must show it *personally* will be subject to irreparable harm. *See Winter supra.* It cannot ride the coattails of other entities that are not parties to this litigation.

**III. The balance of equities does not tip in TransCanada’s favor because issuance of the stay would require the Tribes to defend against federal and state permits, and construction activities would desecrate sacred-cultural sites.**

In contrast to TransCanada’s perceived harms, the Tribes will incur several actual harms if a stay is granted.

**A. Permits**

TransCanada must still receive permits to cross the Missouri River from the United States Army Corps of Engineers (“Corps”) and a water right from the Montana Department of Natural Resources and Conservation (“MDNRC”).

## 1. Section 308 Permit

TransCanada must acquire a Section 408 permits from the Corps to cross the Missouri River upstream from the ASRWSS and two irrigation intakes. However, these permits rely on the information in the Department's NEPA documents.

These permits will be invalid without a thorough analysis of the ASRWSS and other impacts the Pipeline will have on the Tribes. Thus, these permits cannot be granted until a proper NEPA analysis is made of the Missouri River crossing.

When considering a Section 408 permit, the Corps “may...permit the alteration, permanent occupation, or use of such public works when, in its judgment, such activity (1) ‘will not impair the usefulness of such work’ and (2) ‘will not be injurious to the public interest.’” *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 255 F. Supp. 3d 101, 148 (D. DC 2017) (*citing* 33 U.S.C. § 408(a)). When determining whether a project will be injurious to the public interest, “the Corps must compare ‘[t]he benefits that reasonably may be expected to accrue from’ a proposed alteration or use of the federal project ‘against its reasonably foreseeable detriments.’” *Id.*, at 150 (*citing* Engineering Circular 1165-2-216 ¶ 7.c.(4)(b)(ii)). “If the potential detriments are found to outweigh the potential benefits, then it may be determined that the proposed alteration is injurious to the public interest.” *Id.* “In making that evaluation, the Corps may consider factors such as ‘conservation, economic development, historic properties,

cultural resources, environmental impacts, water supply, water quality, flood hazards, floodplains, residual risk, induced damages, navigation, shore erosion or accretion, and recreation.” *Id.*

## 2. Water Right

“A person may not appropriate water [in Montana]...unless the person applies for and receives a permit...from [MDNRC]”. Mont. Code Ann. § 85-2-302(1) (2017). “A person has standing to file an objection...if the property, water rights, or interests of the objector would be adversely affected by the proposed appropriation.” Mont. Code Ann. § 85-2-308(3) (2017). “The [Fort Peck-Montana Compact Board] shall have jurisdiction...to resolve...any controversy over the use of surface water within the Reservation...or that flows through or adjacent to the Reservation...” Mont. Code Ann. § 85-20-201, Art. VI, § D (2017). “The Board shall consist of three members.” *Id.*, at § B(1). One is the Governor of Montana, the other is the Tribes’ Chairman, and the third is a mutually agreed upon member. *Id.*

As part of the 2014 SEIS, TransCanada was required to obtain a certificate from the Montana Department of Environmental Quality (“MDEQ”). Under TransCanada’s Certificate<sup>3</sup> from MDEQ: “Water used to pressure test the pipeline

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<sup>3</sup> *In the Matter of the Application of TransCanada Keystone Pipeline, LP (Keystone for a Certificate of Compliance under the Major Facility Siting Act,*

during construction will be discharged to upland areas within the same drainage and the quality of the water being discharged will be tested to verify that impacts are minimized.” Certificate, at 7-8. “[TransCanada] must obtain necessary permits from [MDNRC] prior to diverting water for hydrostatic testing and must not harm the holders of existing water rights or the use of water reservations.” *Id.*

TransCanada is in the process of obtaining a water right for hydraulic fracturing, horizontal directional drilling, hydrostatic testing, and dust abatement.

TransCanada has already applied for both permits. If either or both permits are awarded the Tribes will be forced to defend against them because the use or crossing of the Missouri River threatens the Tribes’ water right and last source of potable water. Keystone poses reasonably foreseeable detriments to the ASRWSS because the likelihood of an oil spill—especially into the Missouri River—is high. Additionally, the Fort Peck-Montana Compact Board will have to be convened. The discharge of water used for hydrostatic testing and HDD operations to upland areas will have negative impacts to the Tribes’ water quality after that water leeches back into the Missouri River. *See* Certificate, at 7-8. Therefore, the Tribes respectfully request this Court to reinstate the District Court’s original injunction insofar as it prevented TransCanada from seeking federal and state permits.

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*Findings Necessary for Certification and Determination*, Montana Department of Environmental Quality, 7-8 (Mar. 30, 2012). Hereinafter “Certificate.”

## **B. Sacred-cultural sites**

Section 106 of NHPA requires “the head of any Federal department or independent agency having authority to license any undertaking...prior to the issuance of any license, shall take into account the effects of the undertaking on any historic property.” 54 U.S.C. § 306108. Here, the permitting and construction of the Pipeline is an agency undertaking. 36 C.F.R. § 800.16(y).

The Tribes also have many sacred-cultural sites located west of the Tribes’ Reservation. Several studies of the proposed route west of the Reservation have documented numerous prehistoric and cultural sites. A number of these sites are eligible for the National Register of Historic Places. They include burial places, stone landmarks, and religious sites—several of which are on federal land. However, many of these sacred, cultural, and prehistoric sites will be desecrated and destroyed by the construction of Keystone. Thus, the injunction must be kept in place to avoid injury to these sacred-cultural sites.

## **IV. A stay would not be in the public interest because allowing preconstruction and construction activities would put pressure on local resources and pallid sturgeon.**

### **A. Local Resources**

There will several man camps located near the Tribes’ Reservation boundaries. These will be located in or near Nashua, Hinsdale, and Circle, Montana. During the fracking boom in the Bakken Formation, workers were

housed in trailer towns. These became centers for drugs and sexual violence, especially for Native American women. If man camps are constructed near the Reservation, it will cause an undue burden on Tribal law enforcement.

The movement of pipe and staging of pipe yards will also place burdens on the Tribes. These preconstruction activities require the use of large semitrailer trucks. This will lead to increases noise pollution, put additional stress on roads, and increase traffic.

### **B. Pallid Sturgeon**

The pallid sturgeon (*Scaphirhynchus albus*) is listed as an endangered species under the Endangered Species Act (“ESA”) of 1973. *See* 16 U.S.C. § 1531 et seq.; 50 C.F.R. Part 17; 55 Fed. Reg. 36641 (Oct. 9, 1990). The pallid sturgeon occurs near the Missouri River crossing, below the Fort Peck Dam in Montana. Pallid sturgeon between Fort Peck Dam and Lake Sakakawea are an important portion of the total population. However, populations of pallid sturgeon in Montana are declining, with no evidence of reproduction.

The ESA prohibits taking any endangered species. 16 U.S.C. § 1538(a)(1)(B). A taking includes “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. § 17.3. Thus, when there is a release of fracturing fluids or an oil spill TransCanada will

have caused a taking because it will have killed or injured pallid sturgeons and degraded their habitat. Allowing construction activities would put this species in danger without further, adequate analysis from the Department.

### **CONCLUSION**

The Tribes respectfully request the Court deny TransCanada's motion to stay the District Court's injunction on construction of Keystone and halt TransCanada's efforts for seeking any required state and federal permits.

DATED this 6th day of March, 2019.

/s/ Majel Russell  
Majel Russell  
*Attorney for Amicus Curiae*

## CERTIFICATE OF COMPLIANCE

I am the attorney or self-represented party.

**This brief contains 2,576 words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

DATED this 6th day of March, 2019.

/s/ Majel Russell  
Majel Russell  
*Attorney for Amicus Curiae*

## **CERTIFICATE OF SERVICE**

I certify that I electronically filed this Unopposed Amicus Brief and any attachments with the Court's CM/ECF which will automatically serve all parties of record.

DATED this 6th day of March, 2019.

/s/ Majel Russell  
Majel Russell  
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