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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INDIGENOUS ENVIRONMENTAL NETWORK, ET AL.,
Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF STATE, ET AL.,
Defendants,

and

TRANSCANADA KEYSTONE PIPELINE, LP, ET AL.,
Intervenor-Defendants-Appellants.

On Appeal from the United States District Court for the District of Montana
No. 4-17:cv-00029-BMM

PARTIAL OPPOSITION OF INDIGENOUS ENVIRONMENTAL NETWORK, ET AL., TO MOTIONS TO DISMISS FILED BY TRANSCANADA AND UNITED STATES

STEPHAN C. VOLKER
ALEXIS E. KRIEG
STEPHANIE L. CLARKE
JAMEY M.B. VOLKER
LAW OFFICES OF STEPHAN C. VOLKER
1633 University Avenue
Berkeley, California 94703-1424
Telephone: (510) 496-0600
Facsimile: (510) 845-1255
email: svolker@volkerlaw.com

Attorneys for Plaintiffs-Appellees/Cross-Appellants
INDIGENOUS ENVIRONMENTAL NETWORK and
NORTH COAST RIVERS ALLIANCE

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Indigenous Environmental Network and North Coast Rivers Alliance make the following disclosures:

Indigenous Environmental Network is a non-profit public benefit corporation organized as the Indigenous Educational Network of Turtle Island and incorporated under the laws of Minnesota.

North Coast Rivers Alliance is a non-profit unincorporated association of conservation leaders from the western and northern United States and Canada.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

After a hard-fought, two-year battle before both the District Court and this Court, the defendants lost. The 2017 Presidential Permit they attempted to defend was clearly, and profoundly, unlawful, as the courts have repeated ruled. In tacit recognition of that unassailable fact, the Trump Administration has revoked its 2017 Permit. Accordingly, the plaintiffs' legal victory is complete, and there is no reason to continue the merits litigation.

However, rather than concede defeat and acknowledge the need to conform to applicable law before considering whether to issue a further Presidential Permit, the Trump Administration has instead sought to escape the consequences of its unlawful conduct. By purporting to issue a second Presidential Permit on March 29, 2019, the Trump Administration has attempted to circumvent the authoritative rulings and indisputable jurisdiction of the federal courts. Fortunately, the lawfulness of that gambit will soon be adjudicated by the Honorable Brian B. Morris of the Montana District Court.

Wielding an extraordinary measure of chutzpah for which the Trump Administration has blazed new trails, the defendants seek vacatur of the District Court's Judgment. The request is groundless. First, it is settled law that a party may not escape the consequences of an adverse judgment below by claiming his

voluntary action has mooted the litigation. That is exactly the case here. Second, the public interest strongly favors retention of the Judgment below because it well serves the intense national interest in the weighty matters raised by this litigation and the District Court's correct adjudication of it. Third, the equities strongly favor vindication of the plaintiffs' correct legal arguments and sound rejection of the defendants' incorrect ones, by preserving the Judgment below and assuring the plaintiffs receive the benefits from that Judgment to which they are entitled.

ARGUMENT

I. THE IEN PLAINTIFFS DO NOT DISPUTE THAT THE APPEALS ARE MOOT.

On March 23, 2017, the Trump Administration issued a Presidential Permit ("2017 Permit") authorizing TransCanada Keystone Pipeline L.P., et al. ("TransCanada") to construct and operate an 875-mile long pipeline and related facilities known as the Keystone XL Pipeline (the "Project") to transport up to 830,000 barrels per day ("BPD") of tar sands crude oil from Alberta, Canada to existing pipeline facilities near Steele City, Nebraska. On March 27, 2017, plaintiffs Indigenous Environmental Network and North Coast Rivers Alliance (collectively, "IEN Plaintiffs") filed a Complaint for Declaratory and Injunctive Relief in Montana District Court, Great Falls Division, seeking a court order

declaring the 2017 Permit unlawful, and enjoining defendants from taking action to implement it. On March 30, 2017, led by the Northern Plains Resource Council, a second group of conservation organizations filed suit.

On November 8, 2018, the Honorable Brian B. Morris ruled that the Trump Administration's approval of the 2017 Permit violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq., and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), (D). By Order filed March 15, 2019 this Court, per the Honorable Barry G. Silverman and Richard C. Tallman, denied TransCanada's motion for stay pending appeal, finding that "TransCanada has not made the requisite strong showing that they are likely to prevail on the merits." *Id.* at 4. The Motions Panel further ruled that "[t]he record shows that the district court carefully considered all applicable factors in denying the stay of its injunction." *Id.*

In short, the District Court ruled, after a thorough review of the extensive record in this matter, that the 2017 Permit was unlawful and accordingly, the defendants should be enjoined from taking any action to implement that approval. This Court rejected TransCanada's motion to stay that injunction. Neither defendant sought further review of this Court's March 15 Order.

Having lost at both the trial and appellate levels, both defendants have now conceded that the 2017 Permit was unlawful, and that all actions they might otherwise take thereunder should be enjoined. Lest there be any lingering doubt, on March 29, 2019, the Trump Administration revoked the 2017 Permit. 82 Federal Register 164467 (April 4, 2019).

Accordingly, the IEN Plaintiffs' challenge to the 2017 Permit was successful. The District Court ruled that it was unlawful, and that defendants' actions thereunder should be enjoined. This Court refused to disturb that injunction. In tacit recognition of its illegality, three weeks ago the Trump Administration officially revoked the 2017 Permit. Since the 2017 Permit has been fully adjudicated to be unlawful by the federal courts, and has accordingly been revoked by the Trump Administration, the merits litigation challenging the 2017 Permit is now moot.[1]

II. THE DEFENDANTS' REQUESTS FOR VACATUR OF THE JUDGMENT BELOW ARE WITHOUT MERIT.

The defendants' requests for vacatur of the Judgment should be denied. As

[1] Although it does not appear to the IEN Plaintiffs that any exceptions to the mootness doctrine apply, the IEN Plaintiffs understand that other parties-plaintiff may take a different view. Accordingly, the IEN Plaintiffs have not addressed the requirements of those exceptions in this Partial Opposition. Thus, the scope of any potential exceptions to the mootness doctrine, and their application to this proceeding, are beyond the scope of this Partial Opposition.

noted, District Judge Morris's Judgment declaring the 2017 Permit unlawful and enjoining the defendants from taking any action thereunder correctly adjudicated the 2017 Permit to be unlawful. That Final Judgment is now beyond attack by any party.

Having lost a hard-fought, two-year battle on the merits in the District Court, capped by this Court's affirmance of the District Court's injunction pending appeal, the defendants should not be rewarded for their obstinacy and gamesmanship with vacatur of the Judgment below. This is particularly so where, as is plain in this case, they revoked the challenged decision because their efforts to defend it in court were repeatedly rejected by both the District Court and this Court.

Rejecting the defendants' requests for vacatur is fully consistent with governing law. The Supreme Court ruled in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24 (1994) that "[f]rom the beginning we have disposed of moot cases in the manner 'most consonant to justice . . . in view of the nature and character of the conditions which have caused the case to become moot.'" 513 U.S. at 24 (internal citations omitted). And, the Court emphasized that the "principal condition to which we have looked is *whether the party seeking relief from the judgment below caused the mootness by voluntary*

action." *Id.*, (emphasis added).

That is, of course, precisely the case here. The same Trump Administration that had issued the unlawful 2017 Permit, also revoked that Permit when it became clear that it could not be successfully defended in federal court.

The Ninth Circuit has followed the Supreme Court's binding precedent – and compelling reasoning – on this point, ruling repeatedly that vacatur of a district court decision is appropriate only when the party seeking relief from the judgment below did not cause the mootness by its voluntary action. *Chemical Producers and Distributors Association v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006) (holding that vacatur of the district court decision against the plaintiff-appellant association was appropriate because the association did not cause the case to become moot despite its legislative advocacy in favor of legislation displacing the challenged law); *Alliance for the Wild Rockies v. Savage*, 897 F.3d 1025, 1032 (9th Cir. 2018) (holding that vacatur of the district court decision against the plaintiff-appellant environmental group's ESA claim was proper because the ESA claim was rendered moot when the federal defendants completed reconsultation, rather than as a result of any action of the party requesting vacatur – the environmental group). *Accord*, *Mayfield v. Dalton*, 109 F.3d 1423, 1437 (9th Cir. 1997) (noting that the "pivotal question is 'whether the party seeking

relief from the judgment below caused the [non-justiciability] by voluntary action,'" and holding that because "it was not plaintiffs-appellants who mooted the appeal," their request for vacatur of the lower court decision against them was appropriate (quoting *Bancorp*, 513 U.S. at 24)).

As the Supreme Court made clear in *Bancorp*, the overarching principle that guides consideration of a vacatur request is the public interest: "[W]hen federal courts contemplate equitable relief," including consideration of requests for vacatur, they must "take account of the public interest." *Bancorp*, 513 U.S. at 26. And, because "'[j]udicial precedents are presumptively correct and valuable to a legal community as a whole,'" preserving judgments is often in the public interest. *Id.*, quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J. dissenting)).

That is certainly true here, where the District Court opined on matters of immense national importance and clarified the role of the President and the need for compliance with national environmental laws in the permitting of pipelines that cross international borders. Indeed, the public interest in the Judgment is heightened by the fact that these issues have spawned divergent judicial opinions. *See* TransCanada Appendix C (Appx. 064-096; District Court's November 22, 2017 Order Denying Motions to Dismiss); *Protect Our Communities Foundation*

v. Chu, 2014 WL 1289444 (S.D. Cal. 2014); *Sierra Club v. Clinton*, 689 F.Supp.2d 1147 (D. Minn. 2010); *Natural Resources Defense Council v. U.S. Department of State*, 648 F.Supp.2d 105 (D.C. Cir. 2009); *Sisseton-Wahpeton Oyate v. U.S. Department of State*, 659 F.Supp.2d 1071 (D.S.D. 2009); *White Earth National v. Kerry*, 215 WL 8483278 (D. Minn. 2015).

The public interest also compels denial of vacatur because the defendants seeking vacatur clearly *benefit from*, rather than are prejudiced by, the alleged mooting event – President Trump's 2019 President Permit. In a statement regarding the 2019 Presidential Permit, TransCanada's President and Chief Executive Officer, Russ Girling, "thank[ed] President Trump for his leadership and steadfast support to enable the advancement of this critical energy infrastructure project in North America."[2] And, in its Motion to Dismiss, TransCanada admits that the "new Presidential Permit" has allowed "TransCanada [to] develop[] plans for a more ambitious 2020 construction season to try to make up for as much of the lost time as feasible." TransCanada Motion to Dismiss at 15.

If, notwithstanding the overwhelming public interest in denying the

[2] https://www.transcanada.com/en/announcements/2019-03-29president-trump-affirms-support-for-keystone-xl-project/

defendants' self-serving requests for vacatur, this Court is undecided on this point, then it should "remand to the District Court to allow it to balance the equities and determine whether it should vacate its own order." *Alliance for the Wild Rockies*, 897 F.3d at 1032 (quote); *Helliker*, 463 F.3d at 878 (same); *Mayfield*, 109 F.3d at 1427 (same).

CONCLUSION

For the foregoing reasons, the IEN Plaintiffs agree that their appeal is moot. However, there is no basis in law or fact for vacating the District Court's correct Judgment and thereby rewarding defendants' cynical efforts to escape the consequences of their unlawful conduct. Both the parties' respective equitable interests and the overarching public interest strongly favor retention of the Judgment below to serve as a beacon of the triumph of law over unlawful executive action.

Dated: April 17, 2019

Respectfully submitted,

LAW OFFICES OF STEPHAN C. VOLKER

s/ *Stephan C. Volker*
Stephan C. Volker
Alexis E. Krieg
Stephanie L. Clarke
Jamey M.B. Volker
LAW OFFICES OF STEPHAN C. VOLKER

1633 University Avenue
Berkeley, California 94703-1424
Telephone: (510) 496-0600
Facsimile: (510) 845-1255
email: svolker@volkerlaw.com
Attorneys for Plaintiffs-Appellees/Cross-Appellants INDIGENOUS ENVIRONMENTAL NETWORK and NORTH COAST RIVERS ALLIANCE

STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

Date: April 17, 2019

s/ *Stephan C. Volker*
Stephan C. Volker
Alexis E. Krieg
Stephanie L. Clarke
Jamey M.B. Volker
LAW OFFICES OF STEPHAN C. VOLKER
1633 University Avenue
Berkeley, California 94703-1424
Telephone: (510) 496-0600
Facsimile: (510) 845-1255
email: svolker@volkerlaw.com

Attorneys for Plaintiffs-Appellees/Cross-Appellants INDIGENOUS ENVIRONMENTAL NETWORK and NORTH COAST RIVERS ALLIANCE

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 1,830 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft WordPerfect 12, Times New Roman 14-point font.

Dated: April 17, 2019

s/ *Stephan C. Volker*

Stephan C. Volker
Alexis E. Krieg
Stephanie L. Clarke
Jamey M.B. Volker
LAW OFFICES OF STEPHAN C. VOLKER
1633 University Avenue
Berkeley, California 94703-1424
Telephone: (510) 496-0600
Facsimile: (510) 845-1255
email: svolker@volkerlaw.com

Attorneys for Plaintiffs-Appellees/Cross-Appellants INDIGENOUS ENVIRONMENTAL NETWORK and NORTH COAST RIVERS ALLIANCE

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2019, a copy of the foregoing **PARTIAL OPPOSITION OF INDIGENOUS ENVIRONMENTAL NETWORK, ET AL., TO MOTIONS TO DISMISS FILED BY TRANSCANADA AND UNITED STATES** was electronically served on all counsel of record via the Court's CM/ECF system.

s/ *Stephan C. Volker*

Stephan C. Volker
Alexis E. Krieg
Stephanie L. Clarke
Jamey M.B. Volker
LAW OFFICES OF STEPHAN C. VOLKER
1633 University Avenue
Berkeley, California 94703-1424
Telephone: (510) 496-0600
Facsimile: (510) 845-1255
email: svolker@volkerlaw.com

Attorneys for Plaintiffs-Appellees/Cross-Appellants INDIGENOUS ENVIRONMENTAL NETWORK and NORTH COAST RIVERS ALLIANCE