Case No. 19-35099
(Consolidated with Case Nos. 18-36068, 18-36069, 19-35036, 19-35064)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INDIGENOUS ENVIRONMENTAL NETWORK *et al.*,

Plaintiffs/Appellees,

and

ROSEBUD SIOUX TRIBE *et al.*,

Intervenors/Appellees,

v.

UNITED STATES DEPARTMENT OF STATE *et al.*,

Defendants/Appellants,

and

TRANSCANADA CORPORATION *et al.*,

Intervenors/Defendants.

On Appeal from the United States District Court
For the District of Montana
Hon. Brian M. Morris, District Judge
Case Nos. 4:2017-cv-00029-BMM, 4:2017-cv-00031-BMM

COMBINED OPPOSITION TO MOTIONS TO DISMISS

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Intervenors/Appellees Rosebud Sioux Tribe and Fort Belknap Indian Community ("the Tribes") submit this combined opposition the United States' and TransCanada's motions to dismiss this appeal and vacate the district court's order.

BACKGROUND

In 2017, Under Secretary of State for Political Affairs, Thomas A. Shannon, Jr., issued a permit to TransCanada to build the Keystone XL Pipeline. Plaintiffs Indigenous Environmental Network et al. ("IEN") and Northern Plains Resource Council et al. ("NPRC") sued the United States challenging the permit. TransCanada intervened as a defendant. The United States and TransCanada moved to dismiss the claims on the grounds that the issuance of the permit was Presidential action, not subject to the requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, or the Endangered Species Act ("ESA"), 16 U.S.C. § 1531, and not otherwise subject to judicial review under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706.

The District Court denied the motion to dismiss, holding that the issuance of the permit was agency action, subject to judicial review. *See Indigenous Envtl. Network v. U.S. Dep't of State*, No. CV-17-29, 2017 WL 5632435 (D. Mont. Nov. 22, 2017). The court ultimately held that the State Department violated both the NEPA and the APA in issuing the permit. *See Indigenous Envtl. Network v. U.S. Dep't of State*, 347 F. Supp. 3d 561 (D. Mont. 2018). The court vacated the State

Department's record of decision ("ROD"), enjoined the construction of the pipeline, and remanded the final supplemental environmental impact statement ("FSEIS") and ROD to the State Department. *Id*. at 591. This appeal subsequently followed.

On September 10, 2018, the Tribes also sued the State Department and its officials for violations of the APA, NEPA, and the National Historic Preservation Act ("NHPA"), 54 U.S.C. § 300101. Compl. for Declaratory and Injunctive Relief, *Rosebud Sioux Tribe v. U.S. Dep't of State,* No. 4:8-cv-00118 (D. Mont. Sept. 10, 2018), ECF No. 1. The Tribes' claims are somewhat different in that they are based on the Tribes' unique status as federally recognized tribes and their unique rights under the NHPA, as well as the status of their lands and water systems. However, one claim does overlap with NPRC's case, thus prompting the Tribes intervention in the present case to litigate two issues: the threshold question of jurisdiction and the one overlapping claim. The Tribes' other claims remain pending at the District Court.

On March 29, 2019, the President purported to revoke the 2017 permit and to issue a new permit himself pursuant to his "inherent constitutional authority." 84 Fed. Reg. 13,101 (Apr. 3, 2019). The United States and TransCanada now argue that the issuance of the new permit moots this appeal. In addition, TransCanada has moved for vacatur of the District Court's decision. The United States supports the vacatur motion by TransCanada.

ARGUMENT

I. This Court Should Remand to the District Court to Consider These Issues in the First Instance.

This is not a court of first resort. This Court should remand these cases to District Court to determine, in the first instance, whether the cases are now indeed moot. *See, e.g. Doe v. Trump*, No. 18-35015, 2018 WL 1774089, at *1 (9th Cir. Mar. 29, 2018). The District Court is properly situated to consider mootness, vacatur, and can entertain motions to amend the parties' complaints. The District Court can stay any further action in the present case pending resolution of the issue of the validity of the new permit, its effect if valid, and whether it effectively revokes the old permit. Given the District Court's familiarity with the facts in these cases developed over the past two years, and its ability to resolve factual disputes, it is appropriate to provide the District Court the opportunity to evaluate these complex issues in the first instance. *See id*.

II. Should this Matter Not be Remanded for Consideration by the District Court, the United States and TransCanada Failed to Carry Their Heavy Burden of Demonstrating That the Decision Below is Moot.

The party arguing for mootness has a heavy burden to demonstrate that fact. *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000). The United States' and TransCanada's arguments that this appeal is moot are based entirely on the premise that President Trump's March 29 executive action successfully revoked the

2017 permit, that the new permit is itself valid, and that it governs all action going forward. U.S. Mot. to Dismiss, Dkt 34, at 1-12; Appellants' Mot. to Dismiss, Dkt. 35-1, at 9-13. The United States' and TransCanada's argument fails to acknowledge that an action can only be mooted by a subsequent *legal* action. If the subsequent action is itself illegal, it has no effect on the previous action. *Adarand*, 528 U.S. at 223-224; *United States v. Larson*, 302 F.3d 1016, 1020 (9th Cir. 2002) ("The stipulation moots Larson's challenge to the suppression ruling only if it is valid."); *Nat. Res. Def. Council, Inc. v. Winter*, 518 F.3d 658, 679 (9th Cir. 2008), *rev'd on other grounds*, 555 U.S. 7 (2008) (noting approvingly that district court rejected the argument that the new action by a non-party agency needed to have its legality addressed in a new action, and that the district court decision to continue to exercise jurisdiction over NEPA claim "firmly grounded in the familiar principle that only a valid subsequent action can render a legal claim moot.").

Serious questions exist as to whether the President's action in issuing the new permit is legal. These questions must be resolved before any court can determine if the decision below is moot. Indeed, IEN has filed a new complaint challenging the 2019 permit, and the Tribes have moved to amend their complaint to allege that the 2019 permit is invalid for a variety of reasons, including that the 2019 permit violates three different treaties between the Tribes and the United States, and also violates federal rights-of-way statutes that require the consent of the Tribes. First Am.

Compl., *Rosebud Sioux Tribe v. U.S. Dep't of State*, No. 4:8-cv-00118 (D. Mont. April 23, 2019), ECF No. 51. The proposed amended complaint names the President as a defendant and includes claims directly against him based on his actions. It is by no means certain that a court will find the President's actions legal and this court should not assume so.

The United States and TransCanada also have the heavy burden to demonstrate that the challenged conduct "cannot reasonably be expected to start up again." *Adarand*, 528 U.S. at 222. The 2019 permit demonstrates that the challenged conduct has already started up again. If the new permit is ultimately found to be invalid, there is every reason to expect another new permit will be issued, or that the United States and TransCanada will argue that the 2017 permit is "revived" because the 2019 permit was inadequate to revoke it. This latter possibility is a real one.

In the Tribes' district court action challenging the 2017 permit, the United States and TransCanada filed a motion to dismiss before the President purported to revoke the 2017 permit. After the new permit was issued, the United States filed a new motion to dismiss, but refused to withdraw its previous motion to dismiss. The United States' refusal to withdraw its first motions to dismiss indicates that it does not view the old permit to be totally dead, without possibility of revival. The United States seems to be holding that motion and its arguments in reserve. In addition,

after the 2019 permit was issued, NRDC asked counsel for the United States, "[i]s it your position that the 2017 State Department permit is revoked regardless of the validity of the new permit?" Rather than providing an unqualified "yes," counsel for the United States instead responded, "[w]hether the revocation would survive if the new permit were somehow found to be invalid seems like it might depend on the specific theory a court adopted to find the new permit invalid." Exh. A. Thus, while the United States has argued in the present motion that the 2019 permit renders the 2017 void, it is unwilling to agree the 2017 permit cannot be revived. Therefore, the challenged conduct is occurring now and it is likely it could begin again.

The 2019 permit itself raises issues as to whether, even if valid, the decision below is not still relevant. The new permit provides as follows:

> The construction, connection, operation, and maintenance of the Facilities (not including the route) shall be, in all material respects and as consistent with applicable law, *as described in the permittee's application for a Presidential permit filed on May 4, 2012, and resubmitted on January, 26, 2017*.

84 Fed. Reg. at 13,101, art. 1(2) (emphasis added). The definition of facilities makes clear that it refers to the length of the pipeline:

> The term 'Facilities,' as used in this permit, means the portion in the United States of the international pipeline project associated with the permittee's application for a Presidential permit filed on May 4, 2012, and resubmitted on January 26, 2017, and any land, structures, installations, or equipment appurtenant thereto.

Id. at 13,101. These provisions acknowledge the continued obligation of TransCanada and t to comply with the NEPA, the ESA, and the APA, as well as other applicable law. Moreover, the 2019 permit's incorporation of the 2017 permit application means they are interdependent, making the decision below highly relevant.

Since the 2019 permit incorporates the 2017 permit and relies on the same environmental studies, which have already been found to violate the law, the same issues now before this court will very likely occur again as soon as the Bureau of Land management and the U.S. Army Corps of Engineers issue their respective approvals for the pipeline. Therefore, the issues on appeal remain very much alive and not moot, and the decision below is very relevant and must not be vacated.

III. If the Court Finds This Action Moot, It Should Follow Normal Procedure and Remand the District Court to Weigh the Equities so as to Determine if the Extraordinary Remedy of Vacatur is Warranted.

The United States and TransCanada participated in extensive litigation leading to the district court's decision, which came out adverse to them. That decision held that the State Department did not adequately consider the environmental consequences of the pipeline and that the State Department failed to provide a reasoned explanation for its decision to issue the 2017 permit. The argument that the case is now moot because of the unilateral action by President Trump puts the United States in the untenable position to seek vacatur of the decision

below. *See U.S. Bancorp Mort. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 23 (1994) (substantially limiting *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), which is relied on heavily by the United States). Therefore, the United States seeks credibility on this issue by having TransCanada move for vacatur and the United States only supporting that motion. Dkt. 34, at 16-18; Dkt 35-1, at 14. In support of TransCanada's transparent attempt to vacate the decision against them below, the United States claims that President Trump did not try to manipulate the judicial process improperly by issuing a new permit—instead, all he was doing was clarifying that the issuance of a presidential permit is Presidential action, and therefore vacatur is proper.

Apparently, the United States wants to distinguish that situation from one where the President would have tried to avoid the judgment below so that a new presidential permit could be issued, which apparently would have been improper manipulation. Dkt 34, at 17. The distinction is totally unpersuasive. The District Court held that it had jurisdiction because the President did not retain veto power over the permit decision and it was thus agency action. It is no coincidence that the 2019 permit purports to "write around" this decision by restricting the decision to the President himself. The manipulation to avoid the decision below is transparent and should not be countenanced.

When considering equitable relief such as vacatur, courts must consider the public interest, but this is totally ignored by the United States and TransCanada. As the Supreme Court noted in *Bancorp*, the public interest in the judicial process is extremely important. As the Court explained:

> From 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. . . .
>
> Respondent won below. It is petitioner's burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate not merely equivalent responsibility for the mootness, but equitable entitlement to the extraordinary remedy of vacatur . . . . Petitioner's voluntary forfeiture of review constitutes a failure of equity that makes the burden decisive, whatever respondent's share in the mooting may have been. . . .
>
> As always, when federal courts contemplate equitable relief, our holding must also take account of the public interest. "Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.

513 U.S. at 24, 26 (citations omitted). As *Bancorp* makes clear, vacatur is about equity and the cases in this Circuit are in total agreement on this point. *Nat'l Union Fire Ins. Co. of Pittsburgh v. Seafirst Corp.*, 891 F. 2d 762, 766 (9th Cir. 1989); *Blair v. Shanahan*, 38 F.3d 1514, 1521 (9th Cir. 1994); *Ringsby Truck Lines, Inc. v. W. Conference of Teamsters*, 686 F.2d 720 (9th Cir. 1982); *Allard v. DeLorean*, 884 F.2d 464, 467 (9th Cir. 1989) (a dissatisfied litigant should not be allowed to destroy the collateral consequences of an adverse judgment by destroying his own right of appeal). The public interest here is magnified, since the very point of the decision

below is that the public interest in the environment has so far not been protected. Were the decision below to be vacated, the United States and TransCanada will avoid its collateral estoppel effects if the old permit is revived, a most inequitable situation given the public interest has not been protected. These reasons support a remand to the District Court, not vacatur of its order.

Additionally, the United States attempts to characterize TransCanada as a party "who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, [and who] ought not in fairness be forced to acquiesce in the judgment."' *Bancorp*, 513 U.S. at 25. TransCanada characterizes the situation as follows: "Thus, vacatur is appropriate to ensure that TransCanada cannot be prejudiced in the future by judgments that it was unable to repeal due to the Presidents' actions." Dkt. 35-1, at 14. These characterizations bear little resemblance to reality. It strains credulity to think that TransCanada was not complicit in the strategy of issuing a new permit in an attempt to avoid the adverse decision below. If the case is remanded for consideration by the District Court of the equities of vacating the decision, the District Court could take evidence to determine TransCanada's participation in the decision to issue a new permit.

The United States and TransCanada cite several cases for the proposition that when a party, usually an intervenor, does not itself cause the mootness, they can seek vacatur. None of those cases parallel the unique facts of this case. These cases deal

generally with broad regulation or legislation that applies to the public in general. *See, e.g., Humane Soc'y. of U.S. v. Kempthorne*, 527 F.3d 181 (D.C. Cir. 2008) (delisting of wolves from endangered species list); *Wyoming v. Zinke*, 871 F.3d 1133 (10th Cir. 2017) (regulations governing hydraulic fracking under review for purpose of recission); *Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207 (10th Cir. 2005) (roadless rule applicable to certain areas of the National Forest System replaced). The one exception, *Public Utilities Commission of California v. Federal Energy Regulatory Commission*, 100 F.3d 1451 (9th Cir. 1996), is based on wildly different facts. There, the recipient of a permit, after the granting of the permit was appealed, refused to accept the permit and the case became moot. *Id*. at 1461. The situation here could not be more different. Here, TransCanada, the direct applicant for a permit, is directly accommodated by the President in an attempt to vitiate an adverse decision. TransCanada received everything it wanted. It is hardly the victim of the "vagary of circumstances."

If this case is found to be moot, the decision below should not be vacated. At most, the "established practice of remanding the case to the district court "to determine whether to grant the "'extraordinary remedy of vacatur"' is appropriate. *Cammermeyer v. Perry*, 97 F.3d 1235 (9th Cir. 1996); *Mayfield v. Dalton*, 109 F.3d 1423, 1427 (9th Cir. 1997). The remand would include consideration of the decision to grant an injunction and to remand to the agency. If the new permit is found to be

effective to revoke the old permit, but not to be effective as a new permit, the injunction must stay in place since there will be no permit at all. Conversely, if the new permit is found to be invalid and ineffective to revoke the old permit, the decision below would control.

CONCLUSION

For the foregoing reasons, the Tribes respectfully request that this Court remand this matter to the District Court so that the District Court can take these matters up in the first instance or alternatively deny Defendants' motions to dismiss as moot.

RESPECTFULLY SUBMITTED this 23rd day of April, 2019.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the forgoing **RESPONSE TO MOTIONS TO DISMISS** complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(a)(C) because it contains 2,937 words, and complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 27(d)(a)(E) because this brief has been prepared in a proportionally spaced typeface using 14-point Times New Roman typeface.

/s/ Natalie A. Landreth
Natalie A. Landreth

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April, 2019, the forgoing **COMBINED RESPONSE TO MOTIONS TO DISMISS** was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Natalie A. Landreth
Natalie A. Landreth