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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INDIGENOUS ENVIRONMENTAL NETWORK; NORTH COAST RIVERS ALLIANCE, — 18-36068

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF STATE; et al.,

Defendants,

and

TRANSCANADA KEYSTONE PIPELINE LP; TRANSCANADA CORPORATION,

Intervenor-Defendants-Appellants.

NORTHERN PLAINS RESOURCE COUNCIL; et al., — 18-36069

Plaintiffs-Appellees,

FORT BELKNAP INDIAN COMMUNITY; ROSEBUD SIOUX TRIBE,

Intervenors,

v.

THOMAS A. SHANNON, JR., IN HIS OFFICIAL CAPACITY; et al.,

Defendants,

and

TRANSCANADA KEYSTONE PIPELINE, LP; TRANSCANADA CORPORATION,

Intervenor-Defendants-Appellants.

INDIGENOUS ENVIRONMENTAL NETWORK; NORTH COAST RIVERS ALLIANCE, 19-35036

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF STATE; et al.,

Defendants-Appellees,

TRANSCANADA KEYSTONE PIPELINE, LP; TRANSCANADA CORPORATION,

Intervenors-Defendants-Appellees.

NORTHERN PLAINS RESOURCE COUNCIL; et al., 19-35064

Plaintiffs-Appellants,

FORT BELKNAP INDIAN COMMUNITY; ROSEBUD SIOUX TRIBE,

Intervenors,

v.

TRANSCANADA KEYSTONE PIPELINE, LP; TRANSCANADA CORPORATION,

Intervenors-Defendants-Appellees.

INDIGENOUS ENVIRONMENTAL NETWORK; et al., 19-35099

Plaintiffs-Appellees,

FORT BELKNAP INDIAN COMMUNITY; ROSEBUD SIOUX TRIBE,

Intervenors,

v.

UNITED STATES DEPARTMENT OF STATE; et al.,

Defendants-Appellants,

and

TRANSCANADA KEYSTONE PIPELINE, LP;
TRANSCANADA CORPORATION,

Intervenor-Defendants.

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

TRANSCANADA'S REPLY IN SUPPORT OF MOTION TO DISMISS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, TransCanada Keystone Pipeline, LP and TransCanada Corporation make the following disclosures:

TransCanada Keystone Pipeline, LP, is a Delaware limited partnership wholly owned by TransCanada Keystone Pipeline, LLC and TransCanada Keystone Pipeline GP, LLC, which are indirectly wholly owned by TransCanada Corporation.

TransCanada Corporation is a Canadian public company organized under the laws of Canada. No publicly held corporation owns 10% or more of TransCanada Corporation's stock.

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INTRODUCTION

All of the claims at issue in the consolidated appeals and cross-appeal arise from two inextricably related documents: (1) the 2017 Presidential Permit the Department of State ("State") granted TransCanada to construct oil pipeline facilities across the U.S. border, and (2) the Record of Decision/National Interest Determination ("ROD/NID") State issued to justify that permit. The President's decision to revoke the 2017 permit and to issue a new permit for the same facilities stripped the 2017 permit and ROD/NID of any continuing legal significance, and thus indisputably mooted the claims before this Court. Plaintiffs' efforts to stave off a finding of mootness and its ordinary consequences rest on a series of untenable arguments.[1]

First, plaintiffs suggest that State may still be obligated to update its environmental analysis to comply with National Environmental Policy Act ("NEPA") or the Endangered Species Act ("ESA"). But the President's revocation of the 2017 permit means that State cannot have any legal obligation to update its environmental analysis to justify the issuance of that permit.

Second, tacitly recognizing this, plaintiffs repeatedly try to recast their claims, referring to failures by the entire federal government to evaluate the pipeline's

[1] For ease of reference, TransCanada refers to the intervenors and appellees/cross-appellants collectively as "plaintiffs."

environmental impacts and raising concerns about actions by the Bureau of Land Management ("BLM") and Army Corps of Engineers ("the Corps"). But mootness is determined on the basis of the claims in the case, and this case involves no claims against the entire federal government. Indeed, plaintiffs have no ripe claims concerning *future* decisions that BLM and the Corps will make about *different* permits. Unripe claims against these agencies—that are not even parties to this case—cannot save their current claims from mootness.

Third, plaintiffs denigrate the President's actions as an impermissible attempt to defeat judicial review at the behest of a private litigant. The President, however, is *not* subject to NEPA, the ESA, or the Administrative Procedure Act ("APA"). The district court did not hold to the contrary, but instead concluded that *State* was subject to these statutes when State exercised delegated presidential authority. As plaintiffs recently stated, "judicial review" under these statutes was the "price of delegation[s]" by Presidents to agencies. Northern Plains' Opp'n to Mot. for Stay ("NP Stay Opp'n"), at 11, ECF No. 21-1.

This theory thus recognizes that the President can choose to avoid this cost by exercising his constitutional authority directly. The President did so here. He also subsequently revoked Executive Order 13,337 and replaced it with a new process in which State merely provides advice, and the President alone will grant or deny Presidential Permits. *See* Exec. Order No. 13,867, 84 Fed. Reg. 15,491 (Apr. 15,

2019) (Exhibit A). Separation-of-powers principles and the respect due to the head of a co-equal branch of government preclude courts from treating such actions as mere "gamesmanship" that justifies invocation of exceptions to mootness or the usual practice of vacating judgments in cases that become moot on appeal.

Finally, plaintiffs' arguments for retaining an injunction based on now-moot claims rely, once again, on speculation that they may be harmed by future decisions by the Corps and BLM. Such claims are plainly unripe—and thus beyond the jurisdiction of the court. Reliance on them to maintain the district court's injunction would also improperly relieve plaintiffs of their burden of establishing an entitlement to injunctive relief: plaintiffs cannot show that they are likely to demonstrate inadequacies in environmental analyses and permitting decisions that have not even been issued.

In short, settled principles dictate dismissal of the appeals and cross-appeal, vacatur of the judgment, and dissolution of the injunction.

I. THE CONSOLIDATED APPEALS AND CROSS-APPEAL SHOULD BE DISMISSED AS MOOT.

A. Revocation Of The 2017 Permit Has Mooted The Claims At Issue.

Plaintiffs ignore that mootness is determined on the basis of the claims asserted. *See Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 877 (9th Cir. 2006) (refusing to consider in mootness analysis issues "beyond the complaint in this case"). Indeed, plaintiffs try to reframe their claims as challenges to the failure

of the "federal government … to fully consider the project's environmental impacts." Northern Plains' Opp'n to Mots. to Dismiss ("NP Br."), at 28, ECF No. 49-1. *See also id*. at 7 ("[t]he heart of this case is the sufficiency of the *federal government's* environmental review of the Keystone XL pipeline") (emphasis added). But an examination of the claims currently at issue in the consolidated appeals and cross-appeal confirms that they are moot.

Those claims are against State, the Fish and Wildlife Service ("FWS"), and officials of these agencies—*not* the entire federal government, BLM, or the Corps. These claims depend on two central assertions. First, that State engaged in agency, not presidential, action—and thus was subject to the APA, NEPA and the ESA—when it issued the 2017 Presidential Permit. Second, that the ROD/NID State issued to justify the 2017 permit violated these statutes. Based on these claims, plaintiffs sought invalidation of the 2017 ROD/NID and an injunction barring pipeline construction until State cured the asserted defects of the ROD/NID.

Thus, all of plaintiffs' actual claims arise out of—and seek relief with respect to—the 2017 ROD/NID. The legal effect of that document, in turn, was to justify issuance of the 2017 permit. The President's revocation of the 2017 permit, however, stripped State's 2017 ROD/NID of any legal effect. Accordingly, revocation of the 2017 permit, by itself, mooted the claims before this Court.

Indeed, no ruling of this Court can provide effective relief with respect to those claims. Plaintiffs seek affirmance of (1) the district court's determination that issuance of the 2017 permit and accompanying ROD/NID was "agency action," (2) its findings that issuance of that permit and ROD/NID violated NEPA and the APA, and (3) the relief it ordered to remedy those violations. Each such ruling, however, would constitute an advisory opinion about the validity of *legally inoperative* documents and the appropriate means of addressing defects in such documents. Similarly, a ruling in plaintiffs' favor on the cross-appeal, *see* NP Br. 17-18, would be an advisory opinion on how the FWS should have complied with the ESA in connection with the same legally inoperative documents.[2]

Some plaintiffs acknowledge that revocation of the 2017 permit moots the claims in the appeals and cross-appeal. *See* Partial Opp'n of Indigenous Environmental Network, et al., to Mots. to Dismiss ("IEN Br."), at 4, ECF No. 47. The other plaintiffs have failed to show otherwise.

B. The Revocation Of The 2017 Permit Is Legally Effective.

Tacitly acknowledging the dispositive impact of the revocation of the 2017 permit, plaintiffs suggest that the district court must determine whether the President

[2] Finally, plaintiffs' asserted "interest in upholding" the rulings in their favor below, relates to future permitting decisions by BLM and the Corps. NP Br. 13-14. Unripe claims concerning different permitting decisions by different agencies that have not been issued cannot save plaintiffs' current claims from mootness. *See infra* § I.D.1.

"effectively revoke[d] the old permit," and whether that permit could somehow be "revived." Combined Opp'n to Mots. to Dismiss ("Rosebud Br."), at 3, 5, ECF No. 50-1. *See also* NP Br. 6 (the President "*purported* to rescind the" 2017 permit) (emphasis added). But the President plainly extinguished the 2017 permit.

Presidents have claimed inherent constitutional authority to grant or deny permits for border-crossing infrastructure for nearly 150 years. During that time, Congress has enacted statutes governing some cross-border facilities, *see, e.g.*, 33 U.S.C. § 535 (International Bridge Act), but has not done so for oil pipelines. Thus, State's authority to issue the 2017 permit was derived exclusively from a delegation of the President's constitutional authority, as embodied in Executive Order 13,337. Nothing in that Order, or in the President's 2017 Memorandum to State, purported to preclude the President from revoking permits State issued. Indeed, plaintiffs offer no legal analysis suggesting that the President's revocation of the 2017 permit was legally ineffective.

Instead, plaintiffs rely on email exchanges with Department of Justice lawyers, and on the Department's position concerning a pending motion to dismiss in a related case, to suggest that the effect of the revocation is uncertain. Rosebud Br. 6. This evidence is irrelevant. Representations by Department lawyers cannot alter the legal effect of actions that Presidents take in the exercise of their inherent constitutional powers.

C. The Validity Of The New Permit Is Irrelevant.

For the reasons just discussed, the mootness of plaintiffs' claims does not depend on the validity of the new Presidential Permit. *Cf.* Rosebud Br. 3-5; NP. Br. 8. It is the President's revocation of the earlier permit that stripped the 2017 ROD/NID of legal significance, and thereby mooted plaintiffs' claims. Accordingly, cases like *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000) (per curiam), *United States v. Larson*, 302 F.3d 1016 (9th Cir. 2002), and *NRDC, Inc. v. Winter*, 518 F.3d 658 (9th Cir.), *rev'd*, 555 U.S. 7 (2008), are inapposite.

None of these cases involved revocation of the action giving rise to plaintiffs' claims. In *Adarand*, an unsuccessful bidder for a federal highway project challenged a contract-award preference given to businesses certified as disadvantaged. The government claimed mootness not because the certifications awarded to others had been revoked, but because plaintiff had obtained its own certification. The claims remained live, however, because plaintiff's certification could still be deemed invalid. *See* 528 U.S. at 221-24.

Similarly, in *Winter*, the Navy did not revoke its decision to conduct training exercises without studying their effects on whales. Instead it claimed that a determination by the Council on Environmental Quality ("CEQ") relieved it of that duty. *See* 518 F.3d at 678. But if, as the plaintiffs alleged, CEQ's determination was

invalid, plaintiffs' challenge to the Navy's refusal to study the effects of the exercises was plainly still live.

Finally, in *Larson*, there was no revocation of an allegedly improper admission of evidence. The government claimed the challenge to that decision was mooted by a stipulation establishing the defendant's guilt. But if the stipulation was an invalid surrender of constitutional rights, the Court would have to address the validity of the suppression ruling. *See* 302 F.3d at 1020-21.

In each case, therefore, the invalidity of a subsequent action could have caused the plaintiffs' challenge to "spring back to life," because the challenged action had not been revoked. But any supposed invalidity in the new Presidential Permit can have no such effect here. If plaintiffs can somehow establish—through entirely new claims—that the President cannot issue permits for cross-border pipeline facilities, that will mean that TransCanada lacks a permit to build such facilities. It will not—and cannot—breathe life into the 2017 permit that the President revoked, and thus revive plaintiffs' challenge to the 2017 ROD/NID.

* * *

In short, plaintiffs' claims were rendered moot by the President's revocation of the 2017 permit. The legal effect of that action is clear as a matter of law. *Cf. United States v. Brandau*, 578 F.3d 1064, 1069-70 (9th Cir. 2009) (remanding for determination of how new *discretionary* policy was being implemented). And

because the President has revoked State's authority to issue Presidential Permits in the future, *see* Exec. Order No. 13,867, it is "absolutely clear that the allegedly wrongful behavior [of State] could not reasonably be expected to recur." *Adarand*, 528 U.S. at 224. Plaintiffs' current claims are therefore moot.[3]

D. No Exception To The Mootness Doctrine Applies.

1. The "Collateral Legal Consequences" Exception.

Plaintiffs claim that the adequacy of the "environmental review documents at issue"—*i.e.*, the 2017 ROD/NID and the Supplemental Environmental Impact Statement ("SEIS") on which it relied—remains "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." NP Br. 20 (quoting *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 122 (1974)). This claim is baseless. It is one of many instances in which plaintiffs attempt to deny the mootness of their *current* claims based on *unripe future* claims that they may have against *different* agencies that *may* issue *different* permits based on *future* environmental analyses.

[3] Accordingly, there is no basis for remanding for the district court to examine any "factual questions." In fact, the discovery plaintiffs seek concerning the role, if any, that State will play with respect to environmental analyses being conducted by BLM and the Corps, *see* NP Br. 7, has nothing to do with whether their challenge to the inoperative 2017 ROD/NID is moot. That discovery concerns currently unripe claims about different permitting decisions BLM and the Corps are expected to make in the future. *See infra* § I.D.1.

Plaintiffs contend that, if this case is dismissed as moot, "*agencies* may continue to rely on the current, legally deficient, environmental review." *Id.* at 21 (emphasis added). These "agencies," however, are the Corps and BLM, which have always had to issue additional permits authorizing TransCanada to construct facilities crossing the Missouri River or federally owned land. *See* SupplAppx002, 004-005, ECF No. 49-2. *See also* NP Br. 14 and Rosebud Br. 7 (both referring to future actions by the Corps and BLM). But these agencies are not even "parties" to the underlying suit.

Nor do these agencies and plaintiffs currently have "adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." NP Br. 20. To the contrary, BLM has not granted permits for construction of the project over federal lands, and the Corps has not issued a section 408 permit for construction under the Missouri River. Any claims plaintiffs may have with respect to such future permits, and RODs issued to justify them, are unripe. *See Rattlesnake Coal. v. EPA*, 509 F.3d 1095, 1104 (9th Cir. 2007) ("EPA does not take a final agency action until it completes its review of the [relevant] application" and, "[a]bsent final agency action, there [i]s no jurisdiction in the district court to review [a] NEPA claim"); *Or. Nat. Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1118 (9th Cir. 2010) ("[o]nce an EIS's analysis has been solidified in a ROD, an agency has taken final agency action, reviewable under" the APA); *see also* 40

C.F.R. § 1505.2 (requiring agency to prepare a ROD "[a]t the time of its decision"). In fact, plaintiffs initially asserted a claim against BLM with respect to its future permitting decisions, and that claim was dismissed as unripe. Order, ECF No. 219 (Exhibit B).[4]

Finally, there is no evidence that BLM has adopted a "fixed and definite" policy in which it has "declared positively," *Super Tire*, 416 U.S. at 123-24, that it will not study the environmental impacts that State allegedly failed to study. To the contrary, the Federal Defendants represent that State is "working to complete an updated SEIS" that "will address all of the issues that the district court identified" and that BLM "will be able to rely on it" if and when it issues its own permits. United States' Reply in Support of Mot. to Dismiss at 8-9, ECF No. 51. *See also* 83 Fed. Reg. 48,358 (Sept. 24, 2018) (notice of draft SEIS for alternative route in Nebraska); 83 Fed. Reg. 62,398 (Dec. 3, 2018) (notice of intent to issue "updated SEIS" in response to district court ruling).

[4] Plaintiffs claim that BLM's decision is "imminent," NP Br. 11, but imminent action is not final agency action. NP also refers to "final action" by the Corps, *id.*, but these are verifications that TransCanada can avail itself of Nationwide Permit 12 for construction in certain wetlands. The Corps' verifications do not require additional NEPA analysis; the Corps' NEPA obligations arise when it "promulgat[es] nationwide permits—not when someone seeks to act under the permit." *Sierra Club, Inc. v. Bostick*, 787 F.3d 1043, 1053 (10th Cir. 2015) (relying on *Snoqualmie Valley Pres. All. v. U.S. Army Corps of Eng'rs*, 683 F.3d 1155 (9th Cir. 2012) (per curiam)).

2. The "Voluntary Cessation" Exception.

The "voluntary cessation" exception is also unavailable. The 2017 permit was revoked by the President, not State. And after TransCanada moved to dismiss the appeals (but before plaintiffs filed their oppositions), the President also revoked Executive Order 13,337 and replaced it with Executive Order 13,867, which vests permitting authority for cross-border oil pipeline facilities solely in the President, and limits State to an advisory role. *See* 84 Fed. Reg. at 15,491-92. As a result, it is "absolutely clear that the allegedly wrongful behavior"—*i.e.*, State's issuance of a Presidential Permit and ROD/NID in violation of the APA and environmental laws—"could not reasonably be expected to recur." *NRDC, Inc. v. Cty. of Los Angeles*, 840 F.3d 1098, 1102 (9th Cir. 2016).

Recognizing this, plaintiffs argue that it does not matter "whether *State* will reissue the permit, but rather whether the *federal government* will continue to fail to fully consider the project's environmental impacts." NP Br. 23 (emphases added). But, as discussed above, plaintiffs' claims are not against the entire federal government. They are against particular agencies and officials, none of whom can again engage in the "allegedly wrongful behavior" of issuing a permit for cross-border oil pipeline facilities, and an accompanying ROD/NID, in violation of NEPA, the APA or the ESA.

The possibility that different agencies will "fail to fully consider the project's environmental impacts" when making different permitting decisions is not a recurrence of the "allegedly wrongful behavior" at issue here. For example, the Corps applies a different regulatory standard when issuing section 408 permits than the standard State applied for Presidential Permits. *See* 33 C.F.R. pt. 325, app. B (describing Corps' NEPA review). Moreover, State is updating the SEIS to address alleged deficiencies in its analysis. To the extent relevant under its regulations, BLM can rely on that expanded analysis in its future permitting decision and ROD. *See supra* p.11.Thus, any supposed shortcomings in the future decisions by the Corps or BLM will not be a recurrence of the *same* wrongful behavior at issue here. And plaintiffs will have the ability to challenge such shortcomings if and when they occur.[5]

Finally, plaintiffs claim that the President impermissibly sought "to divest the federal courts of jurisdiction" and "evade judicial oversight." NP Br. 23, 16; *see also* Rosebud Br. 8 (referring to the President's "improper[]" "manipulation"). These claims do not justify invocation of the "voluntary cessation" exception.

[5] The argument that the plaintiffs cannot rely on unripe claims and must instead "challenge … new approvals" of *different* permits by *different* agencies "when they occur" is obviously not an argument that can be made "in *any* voluntary cessation case." NP Br. 26.

It is settled that the APA and NEPA do not apply to the President. *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (President not subject to APA); 40 C.F.R. § 1508.12 (President not subject to NEPA). Moreover, *Franklin*'s rationale—that Congress must expressly state that it intends a statute to apply to the President, 505 U.S. at 801—compels the conclusion that the ESA also does not govern the President, as that statute likewise fails to mention the President. *See* 16 U.S.C. §§ 1532(7), 1536(a)(2). In the decision below, the district court concluded that these statutes applied to *State's* decision, even though State acted pursuant to a delegation of the President's authority. As plaintiffs recently told this Court, judicial review under these statutes was "the price of delegation." NP Stay Opp'n 11.

The obvious corollary to this theory is that the President can avoid paying that price by taking actions directly himself. That is what the President did by revoking the 2017 permit and issuing a new one himself. That was plainly a legitimate exercise of his inherent constitutional authority. The Court should decline plaintiffs' invitation to treat that exercise as an improper effort to moot a claim, and thereby evade the jurisdiction of the courts. Such a ruling would frustrate the President's freedom of action in an area where he is not subject to the requirements of environmental laws, and thus raise significant separation-of-powers concerns.

3. The "Capable of Repetition" Exception.

This is not one of the "extraordinary cases in which the complained of activity may be repeated and yet evade review." *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1329 (9th Cir. 1992). The "complained of activity" was State's issuance of a Presidential Permit and supporting ROD/NID in violation of the APA, NEPA and the ESA. As discussed above, that activity cannot be repeated since the delegation to State in Executive Order 13,337 has been revoked. Nor can future Presidential Permits be issued in violation of those laws.

Moreover, insofar as plaintiffs rely on future decisions by BLM and the Corps, NP Br. 27-28, any shortcomings in those future decisions will not involve the same "complained of" wrong. *Supra* p.13. Indeed, plaintiffs' reliance on these future permitting decisions fails for the additional reason that, as this Court has held, the continued existence of a case or controversy cannot be established through "speculative contingencies." *Helliker*, 463 F.3d at 877 (quoting *Hall v. Beals*, 396 U.S. 45, 49-50 (1969) (per curiam)). Plaintiffs' speculation is particularly inappropriate here. Unlike State, which argued (correctly) that NEPA and the ESA did not apply to the issuance of Presidential Permits pursuant to delegated Presidential authority, BLM and the Corps are subject to those laws when issuing permits to cross waters and federal lands. They thus have every incentive to comply with those laws, and the government has represented that the "appropriate federal

agencies are conducting the environmental reviews required by the law and will engage in any ESA-required consultation with the [FWS]." United States' Mot. to Dismiss, at 12, ECF No. 34. It is settled that courts "cannot assume that government agencies will not comply with their NEPA obligations in later stages of development." *Conner v. Burford*, 848 F.2d 1441, 1448 (9th Cir. 1988). Collectively, these factors are more than sufficient to refute plaintiffs' speculative theory that the "complained of activity" may be repeated by other agencies.

Plaintiffs likewise cannot satisfy the second prong of this exception. They acknowledge that "completion of part, or all, of the pipeline would not moot all of [their] claims." NP Br. 28. This is because, even if the project is completed, a court can still set aside the agency's decision and order the agency to conduct further environmental analysis. *See, e.g.*, *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1106 n.2, 1128 (9th Cir. 2012) (vacating FWS's Biological Opinion and BLM ROD relying on it and remanding for additional analysis even though "pipeline was completed and put into service during the pendency of th[e] lawsuit"). Thus, the very claims plaintiffs rely on—the possible inadequacy of future agency environmental reviews, NP Br. 28—will *not* evade judicial review if their current claims are dismissed as moot.

What plaintiffs are really claiming is that they fear irreparable injury from construction. *See id.* at 29 (completion of some or all of the project could "caus[e]

irreparable injury"). But that is not a basis for concluding that their future claims will evade judicial review. It is an argument about whether the existing injunction should be dissolved, which TransCanada addresses below. *Infra* § III.

II. THE DISTRICT COURT'S JUDGMENT SHOULD BE VACATED.

When an appeal becomes moot, "[t]he established practice . . . is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *accord Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997); *Ctr. for Biological Diversity v. Marina Point Dev. Co.*, 566 F.3d 794, 805 (9th Cir. 2009) (ESA claims became moot on appeal, so "there is no further jurisdiction to proceed, and the district court's judgment under the ESA must be vacated"). Plaintiffs cite *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), for the proposition that vacatur is an equitable decision. NP Br. 31; IEN Br. 5; Rosebud Br. 9. Plaintiffs claim it would be inequitable to vacate the judgment here because TransCanada benefits from the President's recent actions and sought those actions. NP Br. 32-33; Rosebud Br. 10. Separation-of-powers principles, however, foreclose this claim.

The specific exception to vacatur that plaintiffs invoke requires a showing that a party *caused* the mootness, *U.S. Bancorp*, 513 U.S. at 24; *Helliker*, 463 F.3d at 878-79, not simply that the party "contributed" to it. *See* NP Br. 31 (citing Tenth Circuit decision for latter standard). Critically, this Court has recognized that an

appellant's advocacy for a legislative change that moots a case "cannot be viewed as 'causing' subsequent legislation for purposes of the vacatur inquiry." *Helliker*, 463 F.3d at 879. "The principle that legislation is attributed to the legislature alone is inherent in our separation of powers." *Id.* "[L]egislative actions are presumptively legitimate," and courts must not "impugn[] the motivations" behind them. *Id.*

These same separation-of-powers principles apply here. The Court must presume that, in revoking the 2017 permit and granting the new one, the President exercised his inherent constitutional authority over border-crossing facilities to achieve legitimate policy objectives. *See* Appx027-030, ECF No. 35-2 (State's 2017 ROD/NID, identifying numerous economic and foreign relations benefits of the project). It would improperly impugn those actions to assume that TransCanada's advocacy "caused" the President to engage in actions simply to manipulate the jurisdiction of the courts to benefit a private company.[6]

As discussed above, moreover, the rationale of the decision below was that the 2017 permit and accompanying ROD/NID were subject to the APA, NEPA and the ESA because *State*, not the President, issued that permit. The President was thus entitled to pursue the benefits of the project through alternative means that avoided

[6] Contrary to plaintiffs' claim, *see* NP Br. 32-33, TransCanada made no statement that it did not advocate for a new permit. In fact, TransCanada acknowledges that it did engage in such advocacy. There is thus no need for discovery into this legally irrelevant issue.

that delegation—*i.e.* by authorizing the cross-border segment of the project himself. The fact that he has overhauled the permitting process for a host of other cross-border facilities, *see* Exec. Order No. 13,867, only underscores that his actions with respect to the project were part of a larger effort to promote the national interest.

In light of the foregoing, there is no basis for conducting a "closer inquiry" because "executive action was involved." NP Br. 32 n.7. The President is not a "lesser public bod[y]," *Helliker*, 463 F.3d at 880. He is the head of a co-equal branch of the federal government, and his actions with respect to the Keystone XL permit involve an exercise of inherent constitutional authority. It would be an affront to separation-of-powers principles to leave the judgment below in place on the theory that the President's actions are nothing more than "a blatant attempt to circumvent" the lower court's rulings, undertaken at the behest of a private litigant.

III. THE DISTRICT COURT'S INJUNCTION SHOULD BE DISSOLVED.

Because the judgment below should be vacated, the injunction based on that judgment must be dissolved. But even if there were a basis for leaving the judgment in place—and there is not—the injunction should still be dissolved.

Plaintiffs assert that "none of the material factual circumstances on which the district court based its injunction has changed" except "the signature on the permit." NP Br. 36. This is demonstrably wrong. The injunction was entered to ensure that State's efforts to correct the 2017 ROD/NID were not influenced, or skewed, by construction activities. *See* Appx160-161, Appx163 (vacating State's ROD/NID and

barring "construction or operation of Keystone and associated facilities until [State] has completed a supplement to the 2014 SEIS [incorporated into the ROD/NID] that complies with the requirements of NEPA and the APA"); Appx180 (partial stay allowing some preconstruction activities but continuing to enjoin construction and some preconstruction activities "until the Department has complied with its NEPA and APA obligations and the Department has issued a new ROD" for the Presidential Permit). The President's revocation of the 2017 permit, however, stripped that permit, and the 2017 ROD/NID justifying its issuance, of any legal effect. An injunction to correct a legally meaningless document is itself meaningless.

In addition, State's issuance of a Presidential Permit was the "major Federal action" that supposedly gave rise to the NEPA and APA obligations the injunction purports to enforce. Now, however, neither State nor any other agency can issue Presidential Permits. *See* Exec.Order 13,867. Thus, although plaintiffs want the injunction to remain in place, they have "no power to require of the court continuing enforcement of rights," *Sys. Fed'n No. 91 v. Wright*, 364 U.S. 642, 652 (1961), under the APA, NEPA and the ESA when those laws no longer apply to Presidential Permits (even assuming they previously did).

Accordingly, plaintiffs resort, yet again, to arguments based on claims they may have in the future with respect to different permits issued by agencies that are subject to the foregoing statutes. Plaintiffs assert that "ground-disturbing activities

on Keystone XL" could create "bureaucratic momentum" that could "skew[]" *future* analysis and decision-making" by unspecified "federal agencies[]." NP Br. 36 (emphasis added). These "federal agencies" are necessarily the Corps and BLM, and the "future analyses" are the environmental analyses that must accompany future permitting decisions by those agencies. Any claims plaintiffs have with respect to these future agency actions, however, are indisputably unripe.

Indeed, the district court dismissed plaintiffs' claim against BLM as unripe, *see supra* p.11, and plaintiffs conceded below that dismissal was proper under these circumstances, *see* Pls.' Combined Opp'n to Defs.' Mots. to Dismiss, at 38-39 & n.19, ECF No. 51 in Dist. Ct. Case No. 4:17-cv-00031-BMM (Exhibit C). That concession was dictated by settled law: "Until such time as the agency decides whether and how to exercise its regulatory authority," the "courts have no cause to intervene." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 164 (2010). Plaintiffs cannot rely on *unripe* claims against BLM and the Corps to justify maintenance of an injunction entered on the basis of *moot* claims they asserted against State.

Not only would maintenance of the injunction violate jurisdictional limits on the authority of courts to address non-final agency actions, it would violate the standards governing injunctive relief. To establish a right to such relief on either a preliminary or permanent basis, plaintiffs must show, *inter alia*, that they are "likely

to succeed on the merits" of their challenges to any BLM or Corps' permitting decision. *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). No such showing can be made, however, *before these agencies have even rendered their decisions*. Thus, plaintiffs are effectively asking this Court to maintain the injunction based on an *assumption* that these agencies will make improper decisions if TransCanada builds any portion of the pipeline (or assembles worker camps) in areas where it currently possesses the requisite permission to do so. Such an assumption, however, impermissibly relieves plaintiffs of their burden to demonstrate an entitlement to the extraordinary remedy of injunctive relief.

Finally, there is no merit to plaintiffs' suggestion that this Court should remand so the district court can decide whether the injunction should remain in place. NP Br. 35; Rosebud Br. 11-12. A remand could serve no legitimate purpose because the NEPA and APA provisions that the district court found to constrain *State's* issuance of the Presidential Permit do not apply to the *President*. *See supra* p.14. It is therefore "quite plain" that an injunction barring construction of Keystone XL to ensure that State's issuance of a Presidential Permit complies with NEPA and the APA "cannot be enforced" to prohibit construction activities authorized by the President pursuant to inherent constitutional authority that is not constrained by those statutes. *See, e.g.*, *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 432 (1856) (injunction directing removal of bridge and enjoining its

reconstruction cannot remain in effect after an Act of Congress declared it to be lawful); *Toussaint v. McCarthy*, 801 F.2d 1080, 1090 (9th Cir. 1986) (when a "law authorizes what had previously been forbidden, it is an abuse of discretion for a court to refuse to modify an injunction" against the previously forbidden conduct), *abrogated in part on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995).

Nor can the district court permissibly decide to leave the injunction in place to ensure proper environmental analyses by the Corps and BLM. The district court has no jurisdiction to enjoin otherwise lawful conduct by a private party in order to influence non-final agency actions. And any assumption that these agencies will conduct improper analyses in the absence of such an injunction impermissibly relieves plaintiffs of their burden to demonstrate their entitlement to injunctive relief.

CONCLUSION

For the foregoing reasons and those set forth in TransCanada's opening brief, the consolidated appeals and cross-appeal should be dismissed as moot, the district court's judgment should be vacated, its injunction dissolved, and the case should be remanded with instructions to dismiss the underlying suits.

Respectfully submitted,

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May 7, 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27(d) and Circuit Rule 27-1 I certify that the foregoing Reply in Support of Motion to Dismiss complies with this Court's April 24, 2019 order because it contains 5,504 words, excluding the material exempted by Federal Rule of Appellate Procedure 32(f).

I further certify that this motion has been prepared in a proportionately spaced Times New Roman 14-point font. This complies with Federal Rules of Appellate Procedure 27(d)(1)(E) & 32(a)(5), and Circuit Rules 27-1 & 32-3(2).

/s/ Kathleen M. Mueller
Kathleen M. Mueller

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of May, 2019, I electronically filed the foregoing Reply in Support of Motion to Dismiss with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by 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/ Kathleen M. Mueller
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