Nos. 18-36069, 19-35036, 19-35064, 19-35099

In the United States Court of Appeals for the Ninth Circuit

NORTHERN PLAINS RESOURCE COUNCIL; BOLD ALLIANCE; CENTER FOR BIOLOGICAL DIVERSITY; FRIENDS OF THE EARTH; NATURAL RESOURCES DEFENSE COUNCIL; SIERRA CLUB, Plaintiffs - Appellees, v. THOMAS A. SHANNON, Jr., in his official capacity; UNITED STATES DEPARTMENT OF STATE; RYAN K. ZINKE, in his official capacity; U.S. DEPARTMENT OF THE INTERIOR; BUREAU OF LAND MANAGEMENT; UNITED STATES FISH AND WILDLIFE SERVICE, Defendants, and TRANSCANADA KEYSTONE PIPELINE, LP; TRANSCANADA CORPORATION, Intervenor-Defendants-Appellants.	18-36069
INDIGENOUS ENVIRONMENTAL NETWORK; NORTH COAST RIVERS ALLIANCE, Plaintiffs - Appellants, v. UNITED STATES DEPARTMENT OF STATE; THOMAS A. SHANNON, Jr., in his official capacity as U.S. Under Secretary of State; UNITED STATES FISH AND WILDLIFE SERVICE, a federal agency; JAMES W. KURTH, in his official capacity as Acting Director of the U.S. Fish and Wildlife Service; RYAN K. ZINKE, in his official capacity as U.S. Secretary of the Interior, Defendants - Appellees, and	19-35036

TRANSCANADA KEYSTONE PIPELINE, LP; TRANSCANADA CORPORATION, Intervenor-Defendants-Appellees.	
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INDIGENOUS ENVIRONMENTAL NETWORK; NORTH COAST RIVERS ALLIANCE; NORTHERN PLAINS RESOURCE COUNCIL; BOLD ALLIANCE; CENTER FOR BIOLOGICAL DIVERSITY; FRIENDS OF THE EARTH; NATURAL RESOURCES DEFENSE COUNCIL; SIERRA CLUB, Plaintiffs - Appellees, v. UNITED STATES DEPARTMENT OF STATE; THOMAS A. SHANNON, Jr., in his official capacity; UNITED STATES FISH AND WILDLIFE SERVICE; JAMES W. KURTH; RYAN K. ZINKE, in his official capacity; U.S. DEPARTMENT OF THE INTERIOR; BUREAU OF LAND MANAGEMENT,	19-35099

Defendants - Appellants,

and

TRANSCANADA KEYSTONE PIPELINE, LP;
TRANSCANADA CORPORATION,

Intervenor-Defendants.

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

United States' Reply in Support of Motion to Dismiss

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I. This case is moot because the challenged permit has been revoked.

The Court may adjudicate a case only if an actual controversy exists at "all stages of review." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). That limit is "inflexible and without exception." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94–95 (1998). Here, the Court no longer has jurisdiction over this case because there is no actual controversy before it.

Plaintiffs, of course, object to the Keystone XL pipeline. But they may not put those objections before the Court in the abstract. Instead, they must present a "case or controversy" to the Court; they must identify some alleged violation of some law by some defendant. The construction of oil pipelines across private land, however, is almost entirely unregulated by the federal government. *See Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 33 (D.C. Cir. 2015). If this pipeline did not cross federal land, the U.S.-Canada border, or navigable waters, no federal permit would be required to build it.

Thus, Plaintiffs could not simply sue TransCanada to stop the pipeline. They had to find a hook—a federal agency action to serve as the basis of their case. They chose a permit issued by an official at the State Department. That permit was issued on March 23, 2017, when the Under Secretary of State for Political Affairs acted under authority delegated by the President (the "2017

permit"). The permit authorized TransCanada to cross the U.S.-Canada border with the Keystone XL pipeline. Plaintiffs argued that the Under Secretary had approved the permit for reasons that were "arbitrary and capricious" and thereby violated the Administrative Procedure Act ("APA"). They also argued that he made his decision before he was sufficiently informed about the potential environmental effects of the pipeline, as required by the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA").

The major stumbling block to Plaintiffs' case was that the Under Secretary acted under a delegation of authority from the President, and Presidential action is not subject to judicial review under the APA and not subject to NEPA or the ESA. The district court, however, ruled that this Presidential action had been transformed into reviewable agency action by the President's delegation of authority to the Secretary of State—a delegation that was specific to the Keystone XL pipeline and applied to this permit only—because that delegation did not reserve the final decision for the President. The United States respectfully submits that the district court was wrong, and that this Presidential action remained Presidential (and unreviewable). But in any event, the Under Secretary's approval of the 2017 permit was the basis for the district court's exercise of jurisdiction.

That permit has now been revoked. The Court has thus lost jurisdiction, and there is no longer any actual controversy between the parties. The legal and factual questions that the district court decided—including whether the President's delegation made the permit subject to judicial review and whether the environmental analysis prepared to inform the Under Secretary's decision was adequate—are irrelevant. No part of the Keystone XL pipeline will be constructed under the 2017 permit. It is dead, and this case is moot because that permit was the heart of the dispute between the parties.

Consequently, the United States has moved to dismiss these now moot appeals. The broad theme of Plaintiffs' oppositions is that this case is not moot because nothing has changed. The only difference, they argue, is "the signature" on the permit—this is just "a new permit for the same pipeline," and "the same legal issues still apply." Northern Plains' Combined Opposition to TransCanada's and Federal Defendants' Motions to Dismiss as Moot 1, 2, 16–17 (Apr. 23, 2019) ("NPRC Opp."). The Court, they propose, should simply move forward with its review of the pipeline.[1]

[1] Ironically, the same Plaintiffs who once argued that the 2017 permit was subject to judicial review because it was delegated to the State Department and not issued directly by the President, now argue that this distinction is meaningless.

To be sure, there is a new permit, issued directly by the President himself. Plaintiffs have already filed new complaints challenging that permit. But those are different cases, and they cannot be decided here because neither the new permit nor the President are before the Court in this case. The legal and factual issues presented by those new cases, moreover, will be entirely distinct because the new permit has been issued directly by the President and is indisputably a Presidential action, not subject to the APA, NEPA, or the ESA. But *this appeal* is not about the new permit. Plaintiffs sued to challenge a specific action by a specific federal agency—the Under Secretary's approval of the 2017 permit—and that controversy has now run its course. The revocation of the 2017 permit ended any actual controversy between the parties about that permit.

This does not mean that the environmental effects of the Keystone XL pipeline will escape review. Construction of the pipeline will require additional permits from other federal agencies: for example, it will require a right-of-way from the Bureau of Land Management ("BLM") to cross federal land and authorizations from the U.S. Army Corps of Engineers ("Corps") to cross the Missouri River in Montana. The agencies' issuance of those permits will be subject to NEPA and the ESA and to later judicial review. But BLM and the Corps have not issued those permits yet (and they are not "imminent"); there

is no final environmental impact statement, final biological opinion, or other final agency action for the Court to review (or administrative records on which to conduct that review); and BLM and the Corps are not even parties here. Plaintiffs may ultimately decide to challenge any permits issued by BLM or the Corps, but those claims are not ripe and are not before this Court.

II. Plaintiffs cannot evade mootness by reframing this case as a challenge to the pipeline itself or the old environmental review.

Plaintiffs attempt to reframe this case as a challenge to the pipeline itself. But this case was not about "the pipeline" per se. It was about the Under Secretary's approval of the 2017 permit and whether that approval was lawful. Once the permit was revoked, there was nothing left for the district court to decide, and there is nothing left for this Court to decide. It no longer matters whether the Under Secretary's decision complied with the APA, NEPA, or the ESA. Plaintiffs' suggestion that the parties should continue to litigate these moot questions—and that the Court should decide them—is wrong.

Even more importantly, the basis for the Court's jurisdiction has also changed completely. If the Under Secretary had merely issued a new permit under the same authority and supported by substantially the same reasoning and environmental analysis, then the source of this Court's jurisdiction would be the same and this case might not be moot. But that is not what happened: the new permit was issued directly by the President himself, and it is

undisputed that the President's approval of that permit is not subject to NEPA or the ESA and not subject to judicial review under the APA. The President, moreover, is not a party to this case. The Court, therefore, no longer has jurisdiction over Plaintiffs' claims—if their challenges to the new permit can proceed at all, they must proceed under new legal theories.

Plaintiffs, however, offer no such theories. Instead, they try to shift the focus of this litigation away from their now-moot claims to other issues. They offer three basic variations on this theme: (1) this case is really about the pipeline itself; (2) this case is really about the SEIS and the biological opinion; and (3) this case is about enjoining the State Department and TransCanada.

A. Plaintiffs challenged the 2017 permit, not the pipeline.

Northern Plains first argues that this case was never really about the 2017 permit at all. NPRC Opp. at 7. This is nonsensical. In its own complaint, the primary relief that Northern Plains sought was "an injunction setting aside the Department's cross-border permit." Third Amended Complaint, Docket No. 58, at 71, No. 4:17-cv-00031-BMM (filed Aug. 4, 2017) ("NPRC Complaint"). The district court also understood that Plaintiffs were asking the court "to enjoin and set aside the Department's cross-border permit" and record of decision ("ROD"). Order, Docket No. 211, at 50 (Nov. 8, 2018). The court granted precisely that relief, ordering "the Department's ROD issued on

March 23, 2017" "VACATED." *Id.* at 54. As Northern Plain notes, the district court did not "vacate the permit," but this is a meaningless distinction because the court vacated the *approval* of the permit.

If this case were not about the 2017 permit, then how did the district court have jurisdiction? The court held that it had jurisdiction because the Under Secretary's approval of the 2017 permit was agency action subject to NEPA and the ESA and subject to judicial review under the APA. Order, Docket No. 93, at 28 (Nov. 22, 2017). Northern Plains does not explain how the district court had jurisdiction without the permit or how this Court can continue to exercise jurisdiction now that the permit has been revoked.

Similarly, Northern Plains argues that this case is not moot because "there is no plan to cancel Keystone XL." NPRC Opp. at 21. But as we have already discussed, the federal government does not have any general authority to regulate the construction of domestic oil pipelines. Nothing in the law gives the Court jurisdiction over an abstract protest against a pipeline, untethered to an alleged violation of the law. Instead, Northern Plains must challenge a specific agency action, and the action that Northern Plains chose—the 2017 permit—is gone. That renders their claims moot.

B. Plaintiffs' challenges to the old SEIS and the old biological opinion are just as moot as their case against the revoked permit.

Plaintiffs next argue that this case is not moot because the "heart of this case" is not "the permit itself," but rather "the sufficiency of the federal government's environmental review of the Keystone XL pipeline." NPRC Opp. at 7. We start with the facts.

With respect to NEPA, the State Department prepared a supplemental environmental impact statement ("SEIS") in 2014, and the Under Secretary relied on that SEIS when he approved the 2017 permit. The district court rejected most of Plaintiffs' challenges to that SEIS, but it did conclude that the State Department had failed to consider some relevant information. Order, Docket No. 211, at 30 (Nov. 8, 2018). The district court remanded the 2017 permit to the State Department so that it could supplement its SEIS. *Id.* at 54. With the assistance of BLM and other agencies, the State Department is now working to complete an updated SEIS. In that updated SEIS, the State Department will address all of the issues that the district court identified. The State Department will complete this work even if the Court dismisses this case as moot and vacates the district court's judgment.

The State Department is under no obligation to prepare this SEIS. In fact, no SEIS is required for the new permit because it was issued by the

President and the President is not subject to NEPA. U.S. Mot. at 6 n.1. Nonetheless, the State Department will complete the updated SEIS so that other federal agencies, including BLM and the Corps, will be able to rely on it in the future if and when they issue their own permits related to the pipeline.[2]

With respect to the ESA, the State Department prepared a "biological assessment" in 2012 and then consulted with the U.S. Fish and Wildlife Service ("FWS"). FWS completed a "biological opinion" in 2013 (and later updated that opinion in two "concurrence" letters). As with the SEIS, the district court rejected many of Plaintiffs' challenges to the biological opinion, but it nonetheless remanded the opinion to the FWS to address certain issues. Order, Docket No. 211, at 53 (Nov. 8, 2018).

In light of the revocation of the 2017 permit, the FWS has withdrawn its biological opinion. No opinion is required for the new permit because it was issued by the President, and the President is not subject to the ESA. U.S. Mot. at 6 n.1. BLM and the Corps will be required to comply with the ESA if and when they issue their own permits and authorizations related to the pipeline.

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[2] NEPA authorizes federal agencies to delegate the preparation of an environmental impact statement to other federal agencies or private contractors, 40 C.F.R. § 1506.5(c), and this practice is common. In this matter, it is simply more efficient for the State Department to update the SEIS, even though it no longer has any formal role in the approval of permits for the pipeline, because of all the work it has already done on this project.

In that context, the FWS will prepare a new biological opinion (or concurrence letter). At that time, the FWS will ensure that any new biological opinion addresses the issues identified by the district court, and it will do that even if the Court dismisses this case as moot and vacates the district court's judgment.

Turning back to Plaintiffs' argument, they claim that this case is not moot because it is really about "the sufficiency of the federal government's environmental review." NPRC Opp. at 7. But that argument fails because their claims challenging the old SEIS and the old biological opinion are now just as moot as their claims against the revoked 2017 permit.

NEPA and the ESA do not exist in a vacuum. No federal agency was obligated to prepare an environmental impact statement or a biological opinion for the Keystone XL pipeline just because it was proposed. Instead, those obligations are triggered when a federal agency takes action, and the action here was the Under Secretary's approval of the 2017 permit, according to the district court. When that action was revoked, it rendered Plaintiffs' ESA and NEPA claims moot too. The question presented in this case was not "does the Keystone XL pipeline violate NEPA or the ESA?"; rather, the questions were "did the [State] Department violate NEPA *when it approved Keystone*?," and "did the Department and FWS violate the ESA and APA *in approving Keystone*?" Order, Docket No. 211, at 4, 35 (Nov. 8, 2018) (emphasis added).

The Plaintiffs' challenge to the old SEIS and biological opinion died with the 2017 permit. They cannot simply amend their complaint to bring those same challenges against the new permit because the President is not subject to the APA, NEPA, or the ESA.[3]

Northern Plains also argues that its NEPA and ESA claims are not moot because BLM and the Corps may *eventually* issue permits for this pipeline that will trigger environmental review. NPRC Opp. at 9. But such claims are plainly not ripe because BLM has not *actually* issued any right-of-way yet and the Corps has not authorized the pipeline to cross the Missouri River, and these permits are not "imminent."[4] Indeed, the district court dismissed

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[3] Plaintiffs do not assert that the APA, NEPA, or ESA apply to the President. Nonetheless, we note that the Supreme Court has held that the APA does not apply to the President. *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (holding that, because "the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements"); *Dalton v. Specter*, 511 U.S. 462, 470 (1994) ("actions of the President . . . are not reviewable under the APA"). NEPA applies only to "agencies of the Federal Government," 42 U.S.C. §§ 4332, 4333, and NEPA's regulations explicitly define the term "Federal agency" to exclude "the President," 40 C.F.R. § 1508.12. In addition, NEPA does not provide a private right of action, and so plaintiffs can obtain judicial review of alleged NEPA violations only under the APA, which does not apply to the President. *See Nuclear Information & Resource Service v. NRC*, 457 F.3d 941, 950 (9th Cir. 2006). Similarly, Section 7(a)(2) of the ESA applies only to a "Federal agency," and the statute's definition of "Federal agency" does not include the President. 16 U.S.C. §§ 1532(7), 1536(a)(2).

[4] BLM has issued no permits or rights-of-way for this project. The Corps has not taken the actions necessary to allow the pipeline to cross the Missouri

Northern Plains' claims against BLM for that very reason. Order, Docket No. 212 (Nov. 15, 2018). Even if there were ripe claims against BLM and the Corps that could be adjudicated by this Court, that would not keep alive Plaintiffs' original claims against the State Department, the old SEIS, and the old biological opinion.

Northern Plains also predicts that the updated SEIS and new biological opinion may re-use some of the existing environmental analysis. As discussed above, both the State Department and the FWS are committed to addressing the issues with their environmental analysis identified by the district court. If Northern Plains still objects to the updated SEIS and any new biological opinion once they are completed, it can sue to challenge them after BLM and the Corps take their permitting actions. But such objections must be

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River (specifically, issuing permission under Section 408 of the Rivers and Harbors Act). Both agencies currently expect to reach final decisions on those permits and other authorizations in the fall of 2019, after the State Department completes its updated SEIS. Under the Corps's general permit known as Nationwide Permit 12, individual permits are not required for the construction of utility line projects that will not result—in total—in the loss of more than one-half acre of the "waters of the United States." 82 Fed. Reg. 1860 (Jan. 6, 2017). The use of Nationwide Permit 12 is subject to additional limitations and conditions, and its issuance was subject to its own environmental review under NEPA and the ESA. The construction activities associated with the pipeline's crossing of the Yellowstone River in Montana and the Cheyenne River in South Dakota have been authorized under Nationwide Permit 12. The Corps is not a party to this case, and Plaintiffs have not challenged the application of Nationwide Permit 12 to this project.

adjudicated in the context of a live controversy; they may not be based on mere speculation about eventual contents of those documents.

C. There is no effective relief left to grant.

Finally, Northern Plains argues that its claims are not moot because the Court can still grant "effective relief." NPRC Opp. at 13–17. But the revocation of the 2017 permit gives Plaintiffs all the relief that they sought. They asked the district court to "enjoin and set aside" the "cross-border permit," and that permit has now been revoked by the President. *See* Order, Docket No. 211, at 50 (Nov. 8, 2018). There is no relief left to grant here.

Northern Plains argues that it still has a "concrete interest in . . . ensuring that State and/or BLM and the Corps correct the legal errors identified by the court." NPRC Opp. at 14. But Northern Plains offers no basis for the Court's jurisdiction over the State Department, now that the 2017 permit has been revoked, and no basis for the Court's jurisdiction over BLM or the Corps, who are not even parties to this case. Moreover, as discussed above, the State Department and the FWS are already committed to addressing the issues identified by the district court.

Similarly, Northern Plains argues that the Court can grant "effective relief" by continuing to enjoin TransCanada from working on the pipeline. NPRC Opp. at 15. The district court enjoined certain aspects of construction to

prevent the project from acquiring "bureaucratic momentum" that could "skew the [State] Department's future analysis and decision-making." Supplemental Order Regarding Permanent Injunction, Docket No. 231, at 10 (Dec. 7, 2018). But now that the 2017 permit has been revoked and a new permit issued by the President, the State Department will not be engaging in any future "decision-making," and there is no longer any legal justification for this injunction.

Northern Plains argues that its cross-appeal is "not moot" and remains "entirely unaffected by the New Permit." NPRC Opp. at 17. In that cross-appeal, Northern Plains resurrects various challenges to the FWS's old biological opinion that were rejected by the district court. But this is not a proper cross-appeal, and the Court lacks jurisdiction over it. A cross-appeal is appropriate only when it is necessary to secure a favorable modification of the judgment. *See, e.g., Gilliam v. Nevada Power Co.*, 488 F.3d 1189, 1192 n.3 (9th Cir. 2007). Here, Northern Plains does not seek to modify the judgment because it has already received complete relief: the biological opinion has been set aside. This is not a proper cross-appeal; it is simply an offer of additional arguments in support of the judgment.

In any event, even if this were a valid cross-appeal, it would still be moot because the action analyzed by the old biological opinion—the 2017 permit—

has been revoked, and the biological opinion itself has been withdrawn. A challenge to an old, withdrawn biological opinion that no agency is relying on does not present a live controversy.

III. None of the exceptions to mootness applies here.

Plaintiffs also argue that, even if the revocation of the 2017 permit would otherwise moot this case, it falls within one of the recognized exceptions to mootness. None of these exceptions applies.

A. The "voluntary cessation" exception does not apply because this violation cannot recur.

Northern Plains argues that the "voluntary cessation" exception to mootness applies because "it is not absolutely clear Federal Defendants' violations will not recur." NPRC Opp. at 22. But it *is* absolutely clear that the Secretary of State will not issue another border-crossing permit for the Keystone XL pipeline; the President has already issued that permit and the Secretary of State no longer has the authority to do so. The 2017 permit is dead and cannot come back.

The cases cited by Northern Plains do not suggest otherwise. In *Natural Resources Defense Council v. City of Los Angeles*, 840 F.3d 1098, 1102 (9th Cir. 2016), for example, this Court held that a challenge to a Clean Water Act permit did not become moot when a new permit was issued by the same agency under the same authority (because both permits included "substantially

the same" limitations). But here, the new permit was not issued by the same agency under the same authority, and the basis for the district court's exercise of jurisdiction—its conclusion that the Under Secretary's approval of this permit was reviewable "agency action"—cannot be extended to the President. Although Northern Plains argues that the updated SEIS and any new biological opinion will be "substantially the same," that is mere speculation, and such claims are plainly not ripe.

Northern Plains also argues that these "violations" are sure to "recur" because "TransCanada still plans to build the pipeline" and because "environmental analysis of the pipeline is ongoing." NPRC Opp. at 22. But as we have already discussed, this case is not—and cannot be—a referendum on the pipeline, unconnected to any federal agency action. Because the action challenged by Northern Plains (the 2017 permit) has been revoked, and because the old biological opinion has been withdrawn and the SEIS is being updated, this case is moot.

For its part, Rosebud Sioux argues that the "voluntary cessation" exception applies because there are "[s]erious questions" about whether "the new permit is legal," and because the 2017 permit may be "revived" if the new permit is found to be "inadequate to revoke it." Rosebud Sioux Tribe's Combined Opposition to Motion to Dismiss 3–4, 5 (Apr. 23, 2019) ("Rosebud

Opp."). But while some Plaintiffs have already sued to challenge the new permit, none of those Plaintiffs argues that the President somehow lacked the authority to revoke the 2017 permit. In any event, such an argument would be meritless because the 2017 permit was issued under the President's delegation of authority, and the President must necessarily have the authority to revoke it. Similarly, no one is arguing that the 2017 permit should be reinstated. Thus, even were Plaintiffs to prevail on their challenges to the new permit, that victory would do nothing to "revive" the 2017 permit. Moreover, the State Department has withdrawn its record of decision for the 2017 permit, and so it cannot be "revived."

Adarand Constructors, Inc. v. Slater, 528 U.S. 216, 223–24 (2000), does not show otherwise. In that case, a challenge to Colorado's "disadvantaged businesses" program was not moot, even though the State granted that certification to the plaintiff after the case began, because the certification had not been accepted by the federal government. *Id*. Here, in contrast, the President's revocation of the 2017 permit is complete and requires no further approval. It enjoys a presumption of regularity, and that presumption will not be overcome since no party is arguing against it. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). *Adarand* is not relevant.

B. This case is not capable of repetition while evading review.

Northern Plains argues that this case is not moot because it is "capable of repetition while evading review." NPRC Opp. at 27–30. But that exception does not apply here because this case is neither "capable of repetition" nor of "evading review," much less both.

This case is not capable of repetition because the 2017 permit will not be reissued. Northern Plains again claims that this case is not about the 2017 permit, but (as discussed above) those arguments are wrong. The speculation that there may be defects in some future environmental analysis is not enough to evade mootness, especially in light of the State Department's and the FWS's commitment to address the district court's concerns.

This case will also not "evade review" because the 2017 permit was (and the 2019 permit is) unlimited in duration, and there is no reason to believe that the lifespan of the pipeline will be so short that it would thwart judicial review.[5] Northern Plains relies on a series of cases in which the challenged action expired quickly, lasting only between one month and three years. *Moore v. Urquhart*, 899 F.3d 1094, 1100 (9th Cir. 2018) (one or two months); *Pacific*

[5] There is one exception: the permits do provide that they will expire five years from the date of their issuance if TransCanada fails to begin construction within that period.

Coast Federation of Fishermen's Ass'ns v. U.S. Department of the Interior, 655 F. App'x 595, 597 (9th Cir. 2016) (two years); *Johnson v. Rancho Santiago Community College District*, 623 F.3d 1011, 1019 (9th Cir. 2010) (three years). But here, no aspect of this action expires within three years, and the courts will have adequate time for review.

Northern Plains persists, arguing that the case is "of too short a duration" to be "fully litigated" before construction begins. NPRC Opp. at 28–29. But this badly confuses an argument about the need for preliminary injunctive relief to protect the status quo—which Plaintiffs are free to seek in their cases challenging the new permit—and an argument about an exception to mootness. Northern Plains does not cite any cases where a court has adopted this as a standard for "evading review."

C. There are no collateral legal consequences here.

Finally, Northern Plains argues that this case is not moot because the agencies' "environmental review documents"—notably, the State Department's old SEIS and the FWS's old biological opinion—will have "collateral legal consequences." NPRC Opp. at 20–22. This exception to mootness applies when a "challenged governmental activity" has a "continuing and brooding presence" that continues to affect plaintiffs. *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 122 (1974). Northern Plains

argues that these documents still have consequences because BLM and the Corps may rely "on the current, legally deficient, environmental review" in the future when they approve permits for this project. NPRC Opp. at 21.

This is not true. The 2017 permit has no "collateral legal consequences" because it has been revoked. The FWS's old biological opinion has no consequences because it has been withdrawn. The State Department's old SEIS has no consequences because no agency has taken final action in reliance on it. Neither BLM nor the Corps will rely on the old SEIS or the old biological opinion when they take action. Both the State Department and the FWS are committed to addressing the district court's concerns in their updated SEIS and any new biological opinion (or concurrence letter). Again, mere speculation that some future environmental analysis may be defective is not sufficient to avoid mootness.

IV. The Court need not remand the question of mootness to the district court because it is purely legal and requires no fact-finding.

Northern Plains and Rosebud Sioux both argue that the Court should remand the question of mootness to the district court so that it can engage in fact-finding to determine, for example, "whether State plans to correct the legal deficiencies identified by the district court, and whether other federal permitting agencies will continue to rely on State's analysis." NPRC Opp. at

6–7; Rosebud Opp. at 3. But there is no fact-finding to be done here because, to the extent that any of these questions are relevant, the United States has already answered them above. *See supra* p. 8. The remaining issues surrounding mootness are purely legal and can be decided by this Court.

V. The Court should grant TransCanada's motion to vacate the district court's judgment and dissolve the permanent injunction.

The United States supports TransCanada's motion to vacate the district court's judgment and permanent injunction. As Plaintiffs note, the courts sometimes deny vacatur when a case is rendered moot by a party's "voluntary action"—here, the President's issuance of a new permit and revocation of the 2017 permit—but vacatur may still be granted even under those circumstances. *See, e.g., Cammermeyer v. Perry*, 97 F.3d 1235, 1239 (9th Cir. 1996) (noting that "the decision to vacate is not to be made mechanically."). Vacatur should be granted here because it is necessary to protect the rights of TransCanada, a third-party that did not moot the case through its own "voluntary action." U.S. Mot. at 18.

Plaintiffs suggest that vacatur should be denied, even with a third-party in the case, if TransCanada lobbied the President for the new permit that mooted this case. *E.g.,* NPRC Opp. at 33. This Court, however, has already held that "[l]obbying Congress or a state legislature cannot be viewed as 'causing' subsequent legislation for purposes of the vacatur inquiry." *Chemical*

Producers & Distributors Ass'n v. Helliker, 463 F.3d 871, 879 (9th Cir. 2006). The actions of a legislature must be attributed to the legislature itself, not third parties. *Id.* Because this principle is "inherent in our separation of powers," *id.*, it can and should be extended to the President as well. *But see id.* at 880 (observing that the "strength of the rule may attenuate" for bodies that "with mixed legislative and executive character"). Northern Plains argues that a "company that petitions the executive branch for a new permit contributes much more directly to mootness than does a company that lobbies for general legislation," NPRC Opp. at 32 n.7, but it cites no cases supporting this proposition, and Congress often passes targeted, narrow legislation to which an individual company may "contribute" directly.

Throughout their oppositions, Plaintiffs accuse the United States of acting improperly: they claim that the President issued this new permit only to escape the consequences of an adverse decision from the district court and to hide the Keystone XL pipeline from environmental review. None of this is true. As we have already discussed, there will be further environmental review here if and when BLM and the Corps issue permits related to the pipeline; it is simply not subject to environmental review *at this time*. Nor is the United States trying to avoid the district court's decision: both the State Department and the FWS have committed themselves to addressing the issues identified by the

district court in the updated SEIS and any biological opinion. Instead, the President's goal was to eliminate any doubt that this a Presidential action, not an agency action, and to avoid further pointless litigation about the meaning of his previous delegation to the Secretary of State.

The district court's injunction and remand to the State Department should be vacated because there is no long any legal justification for them. The court enjoined construction to protect the State Department's future decision-making, but the agency will not engage in any future decision-making now that the President himself has issued a permit. Supplemental Order Regarding Permanent Injunction, Docket No. 231, at 10 (Dec. 7, 2018). If Plaintiffs have a new legal theory to justify such an injunction, they have not presented it here, but may move for it in their challenges to the new permit.

CONCLUSION

For these reasons, we respectfully submit that the Court should dismiss these consolidated appeals as moot and remand these cases to the district court with instructions to dismiss them as moot. The Court should also grant TransCanada's motion to vacate the district court's judgment and injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I hereby certify that:

(1) This motion complies with the 5,600 word limit set by this Court's April 24, 2019 order because it contains 5,577 words, excluding the parts of the motion exempted by Fed. R. App. P. 27(a)(2)(B) & 32(f).

(2) This motion complies with the typeface and type-style requirements of Fed. R. App. P. 27(d)(1)(E), 32(a)(5)-(6), and 9th Cir. R. 27-1, because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font size and Calisto MT type style.

/s/ James A. Maysonett

JAMES A. MAYSONETT