Urgent Motion Under Circuit Rule 27-3(b)

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

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

and

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

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

MOTION OF APPELLANTS FOR STAY PENDING APPEAL
URGENT MOTION UNDER CIRCUIT RULE 27-3(b)
Action Necessary by March 15, 2019

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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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PRELIMINARY STATEMENT

Pursuant to Federal Rule of Appellate Procedure 8(a) and Ninth Circuit Rule 27-3, appellants TransCanada Corporation and TransCanada Keystone Pipeline LP ("TransCanada") respectfully move for a stay pending appeal of orders that the U.S. District Court for the District of Montana issued on November 8 and 15, and December 7, 2018 in two cases that, for a time, were consolidated in the district court (Nos. 4:17-cv-00029-BMM and 4:17-cv-00031-BMM). Undersigned counsel contacted counsel for the other parties and was advised that the Department of State and other federal defendants do not oppose this motion, but the plaintiffs do oppose it.

The plaintiffs in these actions challenge issuance of a Presidential Permit allowing TransCanada to construct and operate 1.2 miles of border-crossing oil pipeline facilities as part of the Keystone XL project (the "Project"), an expansion of the company's existing Keystone pipeline system. The district court ruled that, in issuing the permit, the State Department (State) violated the National Environmental Policy Act (NEPA), the Administrative Procedure Act (APA), and the Endangered Species Act (ESA). The court vacated State's 2017 conclusion that issuance of the permit would serve the national interest, and enjoined all construction of the pipeline, as well as certain preconstruction activities. *See* ECF Nos. 218 (Appx53-106), 220 (Appx48-49), & 231 (Appx32-47).

TransCanada moved to stay the injunction in the district court on December 21, 2018, requesting that it be allowed to proceed, at its own risk and expense, with preconstruction activities and construction of the pipeline—either in its entirety or, at minimum, outside the areas where the court found that State had failed adequately to assess the environmental impacts of pipeline construction. On February 15, the district court granted partial relief, allowing TransCanada to engage in certain preconstruction activities (*i.e.* transporting pipe and preparing pipe storage and container yards), but not others (preparing worker camps), and continuing to bar all pipeline construction. ECF No. 252 (Appx1-31).TransCanada now seeks a stay from this Court prior to March 15, 2019, to ensure that it and thousands of U.S. workers do not suffer irreparable harm from the district court's *ultra vires* and overbroad orders.

TransCanada has a strong likelihood of prevailing on appeal. First, the statutes plaintiffs have invoked—the APA, NEPA, and the ESA—do not authorize judicial review of decisions to issue Presidential Permits for border-crossing facilities, which are an exercise of the President's inherent constitutional authority over foreign affairs and national security. *See* Part I, *infra*. As State explained during the Obama administration, because a national interest determination "is *Presidential* in nature," "NEPA [and] the ESA … *are inapplicable*" to issuance of such a permit. Appx187 (emphases added).

Accordingly, courts have recognized that State's exercise of delegated presidential authority to issue the types of permits at issue here, as well as agency decisions made pursuant to delegations of other discretionary presidential authority, are not subject to judicial review under the APA. The district court erred in failing to follow this authority. Indeed, its reasoning raises the same separation-of-power concerns that led the Supreme Court to conclude that discretionary presidential action is not reviewable under the APA. *See Franklin v. Massachusetts*, 505 U.S. 788 (1992); *Dalton v. Specter*, 511 U.S. 462 (1994).

In addition, the district court improperly enjoined construction of not only the 1.2 miles of pipeline governed by the Presidential Permit, but of any part of the Project in the United States, as well as construction of worker camps. The district court reasoned that, once TransCanada begins building even worker camps, the resulting "bureaucratic momentum" would bias State's further analysis of the project's environmental impacts. Appx30. But it is improper to presume that government agencies will fail to discharge their duties. Indeed, it is particularly improper to assume that State will skew its analysis of what is in the nation's best interests in order to protect construction costs that a private corporation incurs at its own risk.

By contrast, the injunction inflicts significant harm on TransCanada, U.S. workers, and local economies. If TransCanada cannot resume preconstruction

activities by March 15th, and actual pipeline construction by August 1st, it will lose the entire 2019 construction season. TransCanada estimates that, as result, it will not generate some 6,600 U.S. construction jobs in 2019; (2) pay over $2 billion in U.S. contractor awards and wages; and (3) pay $460 million in payments to local utilities and taxes to U.S. State and local governments. In addition, TransCanada would lose approximately $949 million in earnings. *See* Part II, *infra*

BACKGROUND

1. Consideration and Approval of the Presidential Permit.

It has long been recognized that "the proper conduct of the foreign relations of the United States requires that executive permission be obtained for the construction and maintenance at the borders of the United States" of border-crossing facilities such as oil pipelines. Exec. Order (E.O.) 11423 § 1(a), 33 Fed. Reg. 11,741 (Aug. 20, 1968). In 1968, President Johnson delegated the power to review and issue such permits to the State Department. *Id.* President George W. Bush thereafter revised the process State uses to determine whether a permit for such facilities "would serve the national interest." E.O. 13337 § 1(g), 69 Fed. Reg. 25,299, 25,300 (Apr. 30, 2004).

Pursuant to Executive Order 13337, TransCanada sought a Presidential Permit for border-crossing facilities required for Keystone XL, a proposed pipeline to transport crude from Canada to the United States. In response, State coordinated

a multi-year review of the environmental impacts of the Project throughout its U.S. route. President Obama denied TransCanada's initial application in January 2012.

TransCanada renewed its application in May 2012, and State completed its environmental analysis in January 2014. On November 6, 2015, State issued a Record of Decision/National Interest Determination ("ROD/NID") in which it denied the permit. Appx184-216. State recognized that the Project would yield "meaningful" economic benefits and that TransCanada had "agreed to mitigate" many of its potential environmental and cultural impacts. Appx215-216. State concluded, however, that approval would not be in the national interest because it would be perceived to undermine U.S. climate leadership in the international arena. *Id.*

Critically, State explained that a determination as to whether cross-border pipeline facilities will "serve the national interest" is "Presidential in nature, and therefore the requirements of NEPA [and] the ESA … are inapplicable." Appx187. "Nevertheless, *as a matter of policy* and in order to inform [its] determination regarding the national interest," State reviews the impacts of proposed projects "in a manner consistent, where appropriate, with these statutes." *Id.* (emphasis added).

On January 24, 2017, President Trump issued a memorandum inviting TransCanada to re-apply and instructing State to treat its prior environmental analysis as satisfying, "[t]o the maximum extent permissible by law," "all

applicable requirements of" NEPA and any other law requiring executive department consultation or review, including Section 7(a) of the ESA. Memorandum of January 24, 2017: Construction of the Keystone XL Pipeline, 82 Fed. Reg. 8663, § 3(a)(ii)(A)&(B) (Jan. 24, 2017) [hereinafter January 24, 2017 Memorandum]. The memorandum also waived provisions of E.O. 13337 that afford other agencies notice of State's decision, and an opportunity to disagree and request the President's intervention. *Id.* § 3(a)(ii)(B)(iv), 82 Fed. Reg. at 8663-64.

TransCanada re-applied, and in March 2017 State issued a new ROD/NID in which it found that the Project would serve the national interest. Appx183. State reiterated that its determination was "Presidential action, made through the exercise of Presidentially delegated authorities," and therefore the requirements of NEPA, the ESA, and the APA "that do not apply to Presidential actions are also inapplicable here." Appx155.

2. Proceedings Below.

Plaintiffs sued State and certain federal officials, alleging violations of NEPA, the ESA, and the APA. TransCanada intervened and, together with the federal defendants, moved to dismiss. Defendants argued that the grant of a Presidential Permit is presidential action, and thus not reviewable under the APA, NEPA, or the ESA. The district court denied the motions. *See* Appx120-152.

On cross-motions for summary judgment, the district court ruled that State was obligated, under NEPA, to prepare another supplemental environmental impact statement (SEIS) to assess a post-approval alteration in the pipeline's route through Nebraska. *See* Appx107-119. Several months later, the court rejected most of plaintiffs' remaining claims, but held that State had to update the SEIS it prepared in 2014 (1) to reflect new information about oil prices, greenhouse gas emissions, and oil spills that did not exist in 2014, and (2) to expand the survey of cultural resources that may be impacted by the Project to cover 1,038 acres that had not been surveyed before the completion of the 2014 SEIS. *See* Appx103, Appx105. The court also vacated the 2017 ROD/NID and instructed State to provide a "reasoned explanation" for the change from its 2015 national interest determination. Appx104. It also instructed State and the Fish and Wildlife Service to consider whether recent data regarding oil spills would alter prior conclusions that the Project was not likely to adversely affect avian species protected under the ESA. Appx105. Finally, it enjoined any activities in furtherance of the construction or operation of the pipeline. Appx106. Following dismissal without prejudice of plaintiffs' remaining claim, the court entered final judgment. *See* Appx48-49.

On December 7, 2018, the court clarified that TransCanada could conduct cultural, biological, or other surveys and maintain security at existing sites, but could not engage in preconstruction activities such as preparing right-of-way

storage and contractor yards and worker camps. *See* Appx45-46. The court concluded that plaintiffs would suffer irreparable harm because "the 'bureaucratic momentum' created by the[se] activities would bias" State's further NEPA analysis. Appx37.

TransCanada appealed and, on December 21, 2018, moved the district court for a stay. *See* Def.-Intervenors' Mem. Supp. Mot. for Stay Pending Appeal, ECF No. 235 (case No. 4:17-cv-00031). In addition to challenging the basis for any judicial review, TransCanada argued that the injunction was overbroad. *Id.* at 23-24. Among other things, it sought permission to engage in preconstruction activities on private land outside the pipeline right-of-way, and argued that it should be allowed to construct the pipeline either in all areas outside the 1.2-mile corridor governed by the permit or, at a minimum, outside of two areas—*i.e.*, Nebraska and 1,038 acres of mostly privately-held land—where the court found that State had failed to engage in an adequate assessment of construction impacts. Def.-Intervenors' Reply Supp. Mot. to Stay the Ct.'s Order on Summ. J. Pending Appeal 1o-12, ECF No. 248 (case No. 4:17-cv-00031).

On February 15, 2019, the district court granted limited relief for two preconstruction activities and otherwise denied the stay. Appx1-31. TransCanada now moves this Court for full relief by March 15.

ARGUMENT

This Court must consider (1) whether TransCanada "has made a strong showing that [it] is likely to succeed on the merits"; (2) whether TransCanada "will be irreparably injured absent a stay"; (3) whether a stay "will substantially injure the other parties interested in the proceeding"; and (4) "where the public interest lies." *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1246 (9th Cir. 2018) (quoting *Nken v. Holder*, 556 U.S. 418, 433-34 (2009)). All four factors support a stay here.

I. TRANSCANADA IS LIKELY TO SUCCEED ON THE MERITS.

On appeal, TransCanada will challenge the district court's substantive resolution of plaintiffs' NEPA, APA, and ESA claims, and demonstrate that State had no duty to update its 2014 SEIS based on post-2014 information. Given space limitations, however, TransCanada will not address those rulings here, and instead seeks a stay based on the district court's errors in its case-dispositive threshold rulings concerning judicial review and the impermissible scope of its injunction.

A. State's Issuance Of A Presidential Permit Is Not Subject To Review Under The APA.

1. Issuance of a Presidential Permit under Executive Order 13337 is presidential action not subject to APA review.

Plaintiffs' claims under both the APA and NEPA must be brought under the APA's cause of action, as NEPA has none. *See San Carlos Apache Tribe v. United*

States, 417 F.3d 1091, 1097-99 (9th Cir. 2005). The APA, however, does not subject the President's discretionary actions to judicial review. *Franklin*, 505 U.S. at 800-01. And State's issuance of a Presidential Permit is *presidential*—not agency—action.

Three courts have squarely held that State's decisions under E.O. 13337 involve presidential action not subject to APA review. *White Earth Nation v. Kerry*, No. 14-4726 (MJD/LIB), 2015 WL 8483278, at *7 (D. Minn. Dec. 9, 2015) (decision authorizing replacement of cross-border pipeline segment was "Presidential in nature and should not be subject to judicial review"); *Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1082 (D.S.D. 2009) (because "actions taken pursuant to Executive Order 13337 are presidential in nature," plaintiffs' "NEPA … and APA claims must fail"); *NRDC Inc. v. U.S. Dep't of State*, 658 F. Supp. 2d 105, 111 (D.D.C. 2009) (challenge to State's issuance of a Presidential Permit for pipeline is a "challenge [to] a presidential act, which is not reviewable under the APA").

Courts have reached the same conclusion when agencies act pursuant to delegations of the President's discretionary authority under statutes. *See Detroit Int'l Bridge Co. v. Canada*, 189 F. Supp. 3d 85, 102 (D.D.C. 2016) (no APA review when agency exercised President's discretionary authority under the Constitution and the International Bridge Act), *aff'd on other grounds*, 883 F.3d

885 (D.C. Cir. 2018), *cert. dismissed*, 139 S. Ct. 378 (2018); *Ancient Coin Collectors Guild v. U.S. Customs & Border Prot.*, 801 F. Supp. 2d 383, 403-04 (D. Md. 2011) (same when President delegated his authority under Cultural Property Implementation Act), *aff'd on other grounds*, 698 F.3d 171 (4th Cir. 2012); *Tulare Cty. v. Bush*, 185 F. Supp. 2d 18, 28-29 (D.D.C. 2001) (same when President delegated his authority under Antiquities Act), *aff'd on other grounds*, 306 F.3d 1138 (D.C. Cir. 2002). Moreover, before *Franklin* established that the APA does not permit review of discretionary presidential action, this Court recognized that State's actions in approving fishing regulations pursuant to a delegation of the President's authority "[we]re those of the President, and therefore by the terms of the APA the approval of the regulation … is not reviewable." *Jensen v. Nat'l Marine Fisheries Serv.*, 512 F.2d 1189, 1191 (9th Cir. 1975) (citing APA's bar on review of wholly discretionary action).

Rejecting this authority, the district court relied on two outlier decisions—*Sierra Club v. Clinton*, 689 F. Supp. 2d 1147 (D. Minn. 2010), and *Protect Our Communities Found. v. Chu*, No. 12cv3062 L (BGS), 2014 WL 1289444 (S.D. Cal. Mar. 27, 2014)—to conclude that State's decision is subject to APA review. That conclusion does not withstand scrutiny.

First, the court concluded that State effectively conceded that its decision would be reviewable final agency action, because, in 2008, it stated that issuance

of the permit would constitute a "major federal action" and thus trigger a "duty to prepare an EIS." Appx127. *See also* Appx132 (citing *Sierra Club*'s reliance on similar facts). State's 2008 views, however, are legally irrelevant.

As noted, during both the Obama and Trump administrations, State consistently expressed the view that issuance of a Presidential Permit is presidential action *not* subject to NEPA. *See* Appx186; Appx155. More fundamentally, State cannot—by supposed "concessions" or otherwise—alter the nature of presidential actions delegated to it. State's authority to authorize cross-border oil pipelines derives entirely from the President's constitutional powers, and is conferred—and controlled—by an express delegation from him. An agency subject to the control of the President has no ability to convert a "presidential" task into "agency action." *See Jensen*, 512 F.2d at 1191 (State's actions pursuant to delegation of presidential authority "are those of the President"); *White Earth Nation*, 2015 WL 8483278 at *6 ("Even where the President delegates his inherent constitutional authority to an agency head, the action remains the action of the President"); *NRDC*, 658 F. Supp. 2d at 111 (State "stands in the President's shoes by exercising the President's inherent discretionary power under the Constitution to issue cross-border [pipeline] permits"); *Dreyfus v. Von Finck*, 534 F.2d 24, 29 (2d Cir. 1976) (explaining, in a non-APA case, that, merely because presidential power "is exercised by the President through others does not transmute it into

judicially reviewable action"). Similarly, State cannot, by its statements or actions, expand the scope of the APA's waiver of sovereign immunity, which does not extend to presidential action.

Second, the district court repeatedly stressed the finality of State's decision. *See* Appx128, Appx133-134. But this "conflat[es] the question of whether a particular action is final with the question of whether a particular action is presidential." *NRDC*, 658 F. Supp. 2d at 109. The "particular action" at issue here is plainly final, *and* plainly presidential: State exercised the President's inherent constitutional authority pursuant to an explicit delegation from him.

Third, the district court believed that the President "waived" his right to review State's decision. *See* Appx129, Appx131. But the President only waived the right of certain agencies to receive notice of State's decision and an opportunity to object and seek presidential intervention. *See* January 24, 2017 Memorandum, § 3(a)(ii)(B)(iv) (waiving E.O. 13337 §§ (1)(g), (h), & (i)). Nothing in these provisions bars the President from rejecting State's decision. Nor would such a restriction have been meaningful, as the President could amend his own memorandum at will. The President thus had "complete, unfettered discretion over the permitting process" and retained "'authority to direct the [agency] in making policy judgments.'" *NRDC*, 658 F. Supp. 2d at 111 (quoting *Franklin*, 505 U.S. at 799). Because no statute purports to curtail his authority over border-crossing

pipelines or require that he "adhere to [State's] policy decisions," *Franklin*, 505 U.S. at 799, the decision remained presidential.

Finally, the district court stated that "[n]o agency possesses discretion whether to comply with" NEPA or to "shield itself from judicial review … for any action 'by arguing that it was "Presidential."'" Appx133 (quoting *Chu*, 2014 WL 1289444 at *6). But this reasoning simply *assumes* that issuance of a Presidential Permit is agency action subject to NEPA and the APA, and that State therefore should not be allowed to escape the requirements of those statutes. It does not address, much less refute, the reasons set forth above and endorsed by numerous courts that demonstrate that such action is presidential, and therefore not subject to NEPA and the APA in the first place.

Indeed, the district court's reasoning raises significant separation-of-power concerns. If the President had issued the permit himself, neither NEPA nor the APA would apply. *See* 40 C.F.R. § 1508.12 (federal agencies subject to NEPA do not include the President); *Franklin*, 505 U.S. at 800-01. Yet, under the reasoning below, the President cannot delegate that decision to State except by forfeiting the protections from judicial review that Congress afforded his discretionary decisions in the APA. No "express statement" in the APA or NEPA, however, demonstrates that Congress intended to put the President to such a choice. *See Detroit Int'l Bridge*, 189 F. Supp. 3d at 102 (rejecting the "absurd notion that all presidential

actions must be carried out by the President him or herself in order to receive the deference Congress has chosen to give to presidential action" (quoting *Tulare Cty.*, 185 F. Supp. 2d at 28-29)); *cf. Ludecke v. Watkins*, 335 U.S. 160, 165-66 (1948) ("A war power of the President not subject to judicial review is not transmuted into a judicially reviewable action" because the President delegated it to the Attorney General). It is legal error to impose that choice on the President.

2. Even if the APA's cause of action is available, issuance of a Presidential Permit is entirely discretionary and thus unreviewable.

The APA also does not authorize judicial review when, as here, a decision is committed entirely to the discretion of the decision-maker. *See* 5 U.S.C. § 701(a)(2). In addressing a permitting decision under the "national interest" standard applicable here, the D.C. Circuit ruled that courts lack "a standard to review the agency action," because the ultimate determination whether to issue a Presidential Permit "is rife with executive discretion in an area"—*i.e.*, foreign affairs—"that the U.S. Constitution principally vests in the political branches." *Detroit Int'l Bridge*, 883 F.3d at 903-04. This Court employed the same reasoning when it held that State's exercise of the President's authority to approve international fishing regulations was unreviewable. *Jensen*, 512 F.2d at 1191 ("[s]ince presidential action in the field of foreign affairs is committed to

presidential discretion by law it follows that the APA does not apply" (citation omitted)).

Nevertheless, the district court reasoned that (1) NEPA provides the relevant legal standard; (2) State cannot avoid review by invoking "a weak connection to foreign policy"; and (3) *Jensen* is no longer good law, because it "did not analyze the Ninth Circuit's explicit requirements for exemption from judicial review." (Appx134-135, Appx138-140 (citing *ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059 (9th Cir. 2015)).) Each reason is wrong.

Executive Order 13337 requires State to decide whether granting a Presidential Permit "would serve the national interest." E.O. 13337 § 1(g), 69 Fed. Reg. at 25,300. Neither NEPA nor State's environmental regulations provide the standard for this determination. Indeed, "[n]o statute establishes criteria for this determination," and the President or his delegate may take into account any factors they "deem[] germane," "including but not limited to foreign policy; energy security; [and] environmental, cultural, and economic impacts." Appx187. Nor is it true that such a decision has only "a weak connection to foreign policy." Both State's 2015 and 2017 decisions extensively analyze national security considerations (*i.e.*, energy security), climate change-related foreign policy, and relations with Canada. *See* Appx207-215; Appx179-182. Finally, this Court's conclusion that sanctions decisions under "detailed" State Department regulations

are subject to APA review, *ASSE Int'l*, 803 F.3d at 1069, 1071, does not undermine *Jensen*'s conclusion that State's exercise of the President's discretionary foreign affairs powers is unreviewable. *Jensen* remains binding law, and is dispositive here.

B. A Presidential Permit Is Not Subject To Review Under The ESA.

The district court also erred in ruling that plaintiffs could challenge a Presidential Permit under ESA's citizen-suit provision. (Appx147-148 (citing *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472 (9th Cir. 2011)).) The ESA, like the APA, does not expressly authorize suits against the President. *See* 16 U.S.C. § 1540(g)(1)(A) (authorizing suit against "any person, including the United States and any other governmental instrumentality or agency"). Under the rationale of *Franklin*, the ESA lacks the express statement necessary to demonstrate that Congress intended its cause of action to reach presidential action. Nothing in *Kraayenbrink* (which did not involve Presidential action) suggests otherwise.

Nor does it matter that State's regulations recognize that it is subject to the ESA and State complied with ESA requirements. (Appx147-148.) For all of the reasons discussed above, State cannot "concede away" the presidential nature of a task that it performs pursuant to a delegation of the President's inherent constitutional authority.

C. The District Court's Injunction Is Impermissibly Overbroad.

While the foregoing demonstrates that TransCanada is likely to succeed on the merits of the dispositive threshold issues in this action, and thus satisfies the first prong of the stay standard, TransCanada also is likely to succeed on its claim that the injunction is impermissibly overbroad.

First, the district court's authority to enjoin actions by TransCanada "extends only so far as the [agency's] permitting authority." *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1123 (9th Cir. 2005). The Permit here simply authorizes construction, operation, and maintenance of facilities "at the border of the United States and Canada … in Phillips County, Montana." Appx183. No Presidential Permit is needed to build outside this 1.2-mile corridor. Contrary to the district court's apparent view, *see* Appx23, State's belief that it had a *responsibility* to evaluate environmental impacts across the entire length of the Project did not extend its *permitting authority* to areas outside the border-crossing corridor.[1] Thus,

[1] *Save Our Sonoran* drew this same distinction between the responsibility to study environmental impacts and the scope of an agency's permitting authority. *See* 408 F.3d at 1122. The Court concluded that the Corps of Engineers' permitting authority over "navigable" desert washes also reached surrounding private lands that could "not be *segregated* from" those washes. *Id.* at 1225 (emphasis added). Here, by contrast, right-of-way acreage tens or hundreds of miles from Clark County, Montana is, by definition, "segregated" from the limited border-crossing facilities to which State's permitting authority applies.

the district court lacked authority to prohibit construction outside this corridor, in jurisdictions where TransCanada has all necessary state and local approvals.

Second, even if the Court's injunctive authority reached further, its injunction is still overbroad. Because there is no presumption of harm from procedural violations of NEPA or the ESA, *Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1089-91 (9th Cir. 2015), plaintiffs can obtain injunctive relief "only insofar as it prevents irreparable harm caused by defendants' violation of" these statutes. *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 804 F. Supp. 2d 1045, 1054 (E.D. Cal. 2011) (cited with approval in *Cottonwood*, 789 F.3d at 1091).[2] A ban on all construction, however, is not tethered to harms attributable to the statutory violations that the district court (erroneously) found. TransCanada explained below that most of the violations the court found concerned State's alleged failures to update its 2014 analysis of the environmental impacts of the pipeline's *operation*, which does not justify an injunction against its *construction*. *See* ECF No. 248 (case No. 4:17-cv-00031) at 11-12.TransCanada further explained that the court's finding that State failed adequately to study the alternative route in Nebraska and potential cultural impacts

[2] Although *South Yuba* discussed an ESA violation, its reasoning applies to NEPA violations, as the ESA's substantive standards "justify *more* stringent enforcement of its procedural requirements [than NEPA's procedural requirements]." 804 F. Supp. 2d at 1053 (emphasis and alterations in original).

to 1,038 acres of privately-held land do not justify enjoining construction *outside* these areas. *Id.*

In denying a stay below, the district court did not meaningfully address these arguments. Its statement that it could not allow construction of worker camps in areas where it has "ordered [State] to supplement its [environmental] review," Appx25, simply ignores TransCanada's argument that, even if the court could enjoin preconstruction activities outside the border-crossing corridor, there was no basis for enjoining any portion of the Project *outside* Nebraska and the 1,038 acres where State had been ordered to supplement its analysis. And the court's failure to explain why construction of the pipeline itself cannot go forward outside of these areas appears to be based on the mistaken view that TransCanada was seeking only to engage in certain preconstruction activities pending the outcome of its appeal. Appx25. But while, at the hearing before the court, TransCanada focused on its need to commence preconstruction activities, it made clear at the outset and close of its argument that, in doing so, it was not "waiving any entitlement to the argument about [its] right to construct the larger proposal." Appx221; *see also id.* at 261**(**reaffirming, at the end of argument, TransCanada's "desire for the sweeping more comprehensive stay that would address construction as well"); ECF No. 235 (case No. 4:17-cv-00031) at 23-24 ("the injunction should be stayed in its entirety"

and "[i]n all events" must be stayed to allow "preconstruction work pending the appeal").

Nor is there merit to the theory that, if TransCanada begins constructing the pipeline (or even just worker camps), the resulting "bureaucratic momentum" will skew State's analysis of the environmental issues it has yet to resolve. *See* Appx10; Appx27-28. Courts must assume that government officials discharge their duties "in good faith." *See United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926). Indeed, this Court has stated 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). The "bureaucratic momentum" theory, however, rests on precisely this impermissible assumption.

That theory is particularly inappropriate here. There is no basis for assuming that State will skew an environmental analysis in order to protect construction investments that a private company makes at its own risk. Moreover, State must decide whether a Presidential Permit would serve the national interest—a multi-faceted and high-profile judgment in which a desire to protect the sunk costs of a private corporation should play no role, and would, in all events, be overwhelmed by weighty issues of foreign diplomacy, national security, and U.S. economic benefits.

II. THE BALANCE OF HARDSHIPS WEIGH IN FAVOR OF A STAY.

The balance of hardships weighs in favor of a stay of the district court's overbroad injunction. TransCanada, as well as U.S. workers and localities will suffer significant and irreparable harm if the injunction is not stayed. Plaintiffs will not.

Without a stay of the injunction below, TransCanada will lose the entire 2019 construction season. *See* Appx270-271. As a result, TransCanada estimates that it will not (1) generate some 6,600 U.S. construction jobs in 2019; (2) pay over $2 billion in U.S. contractor awards and wages in 2019; (3) pay $272 million for U.S. utility services in 2019; and (4) $189 million for taxes to U.S. State and local governments. Appx270-273; Appx286. In addition, TransCanada would lose earnings of approximately $949 million between March 2021 and March 2022. Appx270-271; Appx286. Even if it earns these revenues back at the end of the 20-year shipper contracts, the net loss would be approximately $708 million, given the net-present value of revenue lost in 2021. Appx270-273; Appx286. These are legally cognizable forms of irreparable harm. *See Alaska Survival v. STB*, 704 F.3d 615, 616 (9th Cir. 2012) ("[f]urther delay of this project will prevent the award of construction contracts, postpone the hiring of construction employees, and significantly increase costs"); *James River Flood Control Ass'n v. Watt*, 680 F.2d

543, 544 (8th Cir. 1982) (per curiam) (lost "opportunity to begin the project [construction] this season" is irreparable injury).

By contrast, plaintiffs will suffer no cognizable injury from preconstruction and construction activities in the hundreds of miles of area unrelated to the district court's findings of NEPA, APA, and ESA violations. As noted, most of those violations concern failures to assess the effects of the pipeline's operation, and thus provide no basis for enjoining its construction. The only areas where the alleged violations involve a failure to assess potential impacts of construction are the alternative route in Nebraska and the 1,038 acres that had not been surveyed for cultural impacts. Those alleged violations do not justify enjoining preconstruction and construction *outside* those areas.

In opposing the stay below, plaintiffs claimed they would suffer irreparable injury because construction of the pipeline or worker camps would cause "physical damage to the soil, air, waterways, habitat, and wildlife along the pipeline's route." *See* ECF No. 247 at 25 (case No. 4:17-cv-00031-BMM). They also claimed injuries to their interest in observing endangered whooping cranes or from the noise and traffic associated with worker camps. *Id.* at 24-25. None of these harms, however, is caused by the violations the district court found.

To the contrary, the district court rejected plaintiffs' claim that State failed adequately to evaluate the potential environmental impacts, or to assess the

impacts on whooping cranes or other protected species, except with respect to some information about oil prices, oil spills, and greenhouse gas emissions that post-dated State's 2014 SEIS. *See* Appx61, Appx103, Appx105. But any potential harms from oil spills and greenhouse gas emissions are harms from operation, not construction, of the Project. Plaintiffs' claims of irreparable harm thus depend on their "bureaucratic momentum" theory. As TransCanada demonstrated above, that theory is both legally invalid and utterly implausible given the "national interest" determination State must make to issue a Presidential Permit.

III. THE PUBLIC INTEREST WEIGHS IN FAVOR OF A STAY.

Finally, the public interest weighs in favor of a stay. State determined that Keystone XL would serve the national interest and was important to national energy security. Appx179 ("Project will meaningfully support U.S. energy security by providing additional infrastructure for the dependable supply of crude oil. Global energy security is a vital part of U.S. national security."). Keystone XL also plays an important role in maintaining strong bilateral relations with Canada. Appx181. Delay of the project would harm these federal interests.

The district court concluded that these benefits were outweighed by "the public's interest in ensuring that [State] conduct a complete environmental review before construction and operation of Keystone." Appx45. Again, however, this reasoning fails to account for the limited nature of the violations the district court

found. State's review of the environmental impacts of pipeline construction *is* complete with respect to those portions of the pipeline that are outside of Nebraska and the unsurveyed 1,038 acres. The public has no interest in delaying the pipeline's national security and foreign relations benefits by delaying construction even in those areas where State's environmental review has not been found deficient and/or those deficiencies pertain to the operation, not the construction, of the Project.

CONCLUSION

For the foregoing reasons, TransCanada requests that the Court grant its motion no later than March 15, 2019 and stay, for the duration of TransCanada's appeal, the district court's permanent injunction either in its entirety, or at least insofar is it prohibits preconstruction activities and actual construction of those portions of Keystone XL pipeline outside Nebraska and the 1,038 acres for which State had not completed its cultural review as of March 23, 2017.

Respectfully submitted,

Date: February 21, 2019

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STATEMENT OF RELATED CASES

Appellants are not aware of any related cases pending in the Ninth Circuit other than the five cases on the caption of this brief that the Court consolidated sua sponte on February 12, 2019.

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CERTIFICATE OF COMPLIANCE

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

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,579 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016 Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2019, I electronically filed the foregoing 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.

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APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

INDIGENOUS ENVIRONMENTAL NETWORK and NORTH COAST RIVER ALLIANCE,

and

NORTHERN PLAINS RESOURCE COUNCIL, et al.,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF STATE, et al.,

Defendants

and

TRANSCANADA KEYSTONE PIPELINE and TRANSCANADA CORPORATION,

Defendant-Intervenors.

CV-17-29-GF-BMM

CV-17-31-GF-BMM

SUPPLEMENTAL ORDER REGARDING MOTION TO STAY

Plaintiffs Indigenous Environmental Network and Northern Plains Resource Council (collectively "Plaintiffs") moved for summary judgment in this matter. (Docs. 139 & 145.) The United States Department of State ("Department") and TransCanada (collectively "Defendants") filed cross motions for summary judgment. (Docs. 170 & 172.)

The Court granted Plaintiffs' motions in part, and Defendants' motions in part, in the Court's Order on Plaintiffs' and Defendants' Motions for Summary Judgment ("Summary Judgment Order"). (Doc. 211.) The Court vacated the Department's Record of Decision ("ROD") issued on March 23, 2017. The Court granted Plaintiffs' request for injunctive relief and remanded the matter to the Department for further consideration consistent with the Summary Judgment Order. *Id.* The Court entered Final Judgment on November 15, 2018. (Doc. 212.)

TransCanada moved the Court pursuant to Rule 59(e) and Rule 60(b) to amend the Court's Summary Judgment Order, and Final Judgment. (Docs. 211 & 212.) TransCanada sought clarification of the Court's Orders to ensure certain preliminary project activities would not be enjoined. (Doc. 215.) The Court granted in part TransCanada's motion to amend. (Doc. 232.) The Court determined that TransCanada could conduct activities as defined in Paragraphs 16-17 of the Ramsay Declaration. (Doc. 216-1 at 6-7.) The Court allowed TransCanada to conduct cultural, biological, civil and other surveys, and to maintain security at project sites, as set forth in Paragraph 18 of the Ramsay Declaration. *Id.* at 7. All remaining preconstruction activities outlined in Paragraph 18 remained enjoined in accordance with the Court's Summary Judgment Order until the Department has complied with its NEPA and APA obligations and the Department has issued a new ROD. (Doc. 211.)

TransCanada filed a Notice of Appeal on December 21, 2018. (Doc. 233.) TransCanada also filed a Motion to Stay the permanent injunction pending its appeal (Doc. 234.) TransCanada asks the Court to allow three off-right-of-way activities to continue (hereafter "off-right-of-way activities"): (1) preparation of off-right-way pipe storage and contractor yards; (2) transportation, receipt, and off-loading of pipe at off-right-of-way storage yards; and (3) preparation of sites for off-right-of-way construction camps. TransCanada argues that each of these activities will involve only private action, will impact only private land, and will fall beyond the scope of any NEPA analysis. TransCanada further argues that it will suffer irreparable harm absent a stay of the off-right-of-way activities. *Id.* at 2. Finally, TransCanada argues that the off-right-of-way activities serve the public interest and will not substantially injure Plaintiffs.

LEGAL STANDARD

The United States Supreme Court has set forth a four-factor test for granting a stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009). A party requesting a stay pending appeal bears the burden of showing that the circumstances justify an

exercise of the court's discretion. *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012).

DISCUSSION

The Court held a hearing on TransCanada's Motion to Stay on January 14, 2019. (Doc. 249.) TransCanada discussed further details regarding the importance of continuing the off-right-of-way activities pending the Department's NEPA review and TransCanada's appeal. TransCanada clarified that it was asking to continue only the three off-right-of-way activities. TransCanada does not contest the Court's decision to enjoin mowing and patrolling the right-of-way to discourage migratory bird nesting.

TransCanada emphasized that the off-right-of-way activities occur solely on private land. TransCanada either owns or leases this private land from private parties. Further, TransCanada asserted that none of the off-right-of-way activities would be subject to the NEPA review process. TransCanada submitted an updated Status Report. (Doc. 246.) The updated Status Report demonstrates that the off-right-of-way activities will not cross or be in proximity to water bodies, will not involve removal of trees, and will not involve the application of pesticides or herbicides. (Doc. 246-1 at 9.) Further, TransCanada asserts that the proposed off-right-of-way activities will occur in areas that already have been surveyed for the presence of protected species and cultural resources. *Id* at 9-10. Finally,

TransCanada alleges that it has obtained all state and local permits needed to perform the activities. *Id.* The Court makes the following determinations in light of the new information presented at the hearing.

I. TransCanada's Likelihood of Success on the Merits of Its Appeal

TransCanada asserts five arguments in support of its likelihood of success on appeal. Plaintiffs oppose each argument. The Court will address each of TransCanada's arguments in turn.

A. The Department's Decision to issue the Permit

TransCanada first argues that the Department's issuance of the cross-border permit should not be subject to review under NEPA or the APA. (Doc. 235 at 11.) TransCanada argues that the Department acted pursuant to an express delegation of the President's inherent authority over foreign affairs. *Id.* TransCanada argues that the Department's issuance of the permit constituted a presidential action, rather than an agency action. TransCanada asserts that judicial review would be inapplicable under these circumstances. *Id.*

The Court considered two factors in determining whether issuance of the permit constituted presidential action: 1) whether the President carried out the final action himself and the manner in which he did so; and 2) whether Congress has curtailed in any way the President's authority to direct the "agency" in making

policy judgments. *Natural Res. Def. Council v. U.S. Dep't of State*, 658 F.Supp.2d 105, 111 (D.C. Cir. 2009).

The President waived any right in his Memorandum to review the Department's decision under Executive Order 13337. The Department's obligation to study the environmental impacts of its decision fundamentally does not stem from the foreign relations power. The Department's own NEPA regulations recognize that the issuance of a Presidential Permit represents a "major Departmental action" subject to Congress's mandates in NEPA. 22 C.F.R. §§ 161.7, 161.7(c)(1). The Department prepared, on its own initiative, an SEIS and published a corresponding ROD/NID in this case. (Doc. 61 at 6.)

The Department took final agency action when it published the ROD/NID for Keystone and issued the accompanying Presidential Permit. The Ninth Circuit has determined that "once an EIS's analysis has been solidified in a ROD, the agency has taken final agency action, reviewable under [APA section] 706(2)(A)." *Or. Nat. Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1118-19 (9th Cir. 2010); *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1088 (9th Cir. 2003). The publication of the ROD/NID led to the Department's issuance of the accompanying Presidential Permit. TransCanada would not be likely to succeed on appeal under this argument.

TransCanada next alleges that NEPA and APA limit the Court's authority to the border-crossing area, rather than the length of the entire project. The Court rejected this argument in its Order on Partial Summary Judgment. (Doc. 202.) The Permit states that Keystone "must be constructed and operated as described in the 2012 and 2017 permit applications." Notice of Issuance of a Presidential Permit, 82 Fed. Reg. 16467-02 (Apr. 4, 2017). The Department was required to "analyze all of the environmental consequences of [the] project." *Save Our Sonoran, Inc.*, 408 F.3d at 1118. The Court possessed authority to enjoin the entire project.

B. Agency Discretion

A strong presumption exists that Congress intends judicial review of administrative action. *ASSE Int'l v. Kerry*, 803 F.3d 1059, 1068 (9th Cir. 2015). Two narrow exceptions apply: (1) when Congress expressly bars review by statute, or (2) where an agency action is "committed to agency discretion by law." *Id.* TransCanada argues that the APA does not apply because a national interest determination remains committed to agency discretion and stands exempt from judicial review. (Doc. 235 at 17.)

Congress commits agency action to agency discretion in those rare instances where Congress draws statutes in such broad terms that no law exists to apply in a given case. 5 U.S.C. § 701(a)(2). Congress's decision to draft a statute in such broad terms leaves the court "with no meaningful standard against which to judge

the agency's exercise of discretion." *Id.* Courts must consider "the language of the statute" and whether judicial review would endanger "the general purposes of the statute." *Cnty. Of Esmeralda v. Dep't of Energy*, 925 F.2d 1216, 1218 (9th Cir. 1991).

Congress has provided a meaningful standard in the form of NEPA against which to judge the Department's conduct. Congress enacted NEPA to "protect the environment by requiring that federal agencies carefully weigh environmental considerations and consider potential alternatives to the proposed action before the government launches any major federal action." *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1131 (9th Cir. 2011). NEPA, as enacted by Congress, its regulations, and any judicial opinions that address similar NEPA claims, have developed these standards more fully. 42 U.S.C.A. § 4332(2)(C); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971).

C. NEPA Supplementation

TransCanada next asserts that no circumstances presented in the administrative record warranted NEPA supplementation. TransCanada argues that nothing in the administrative record required the Department to supplement its NEPA analysis with regard to the following areas: the Mainline Alternative Route ("MAR"); oil markets; greenhouse gas emissions; cultural resources; and oil spills.

1. The MAR

TransCanada argues that no circumstances regarding the change in the route through Nebraska required the Department to provide a supplement to the SEIS with regard to the MAR. TransCanada contends that the Department had completed its decision-making process before the State of Nebraska had approved the MAR rather than TransCanada's preferred route. (Doc. 235 at 20.)

The Court determined in its Order on Partial Summary Judgment (Doc. 202) that the Department wrongly had suggested that information about the MAR postdated the Department's issuance of the Presidential Permit. TransCanada, instead, included the MAR as one of two alternatives in its February 16, 2017, application to the Nebraska PSC. The Department knew before it had issued the permit on March 23, 2017, that the Nebraska PSC could approve the MAR. This contingency obligated the Department to supplement the SEIS to reflect the MAR.

Changed circumstances obligate an agency to prepare a post-decision supplemental EIS when a project has not been fully constructed or completed. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 367-72. The Supreme Court determined that "NEPA does require that agencies take a 'hard look' at the environmental effects of their planned action, even after a proposal has received initial approval." *Id.* at 374.

The Department retained a meaningful opportunity to evaluate the MAR. The MAR differs from the route analyzed in the 2014 SEIS. The MAR crosses five different counties. The MAR crosses different water bodies. The MAR would be longer. Finally, the MAR would require an additional pump station and accompanying power line infrastructure. TransCanada appears unlikely to succeed on the merits of its appeal under this argument.

2. Oil Markets

TransCanada next alleges that ongoing changes in oil markets did not necessitate an updated NEPA analysis. (Doc. 235 at 21.) TransCanada argues that low oil prices not contemplated in the 2014 SEIS do not correlate to significantly different environmental impacts.

The 2014 SEIS analyzed the possibility of moderate fluctuations in oil prices and the possibility of a low oil price scenario. Significant changes in oil prices occurred, however, after the release of the 2014 SEIS. The Department acknowledged in its 2014 SEIS that a significant drop in oil prices materially could change its analysis. The 2014 SEIS conditioned much of its analysis on the price of oil remaining high.

The 2014 SEIS stated that the price of oil needed to fall within the range of $65-$75 per barrel in order for Keystone to break even on the project. The record demonstrates that the price of oil dropped to nearly $38 per barrel shortly after the

release of the 2014 SEIS. Oil prices have remined below the "break-even" numbers established in the 2014 SEIS. This new and relevant information that surfaced between the release of the 2014 SEIS and the 2017 ROD bears upon the Department's analysis. The information has the potential to constitute a material change to the Department's consideration of Keystone's impact on tar sands production.

3. Greenhouse Gas Emissions

TransCanada next argues that it had analyzed sufficiently the cumulative impacts of the project in conjunction with the Alberta Clipper pipeline to excuse the preparation of any updated analysis of cumulative impacts. TransCanada also argues that NEPA's best available science mandate did not require it to use the updated Greenhouse Gas, Regulated Emissions, and Energy Use in Transportation ("GREET") model to analyze greenhouse gas emissions. (Doc. 235 at 25.)

The Department announced in 2013 that it would prepare an EIS for the Alberta Clipper pipeline expansion. The Department issued a permit for the Alberta Clipper expansion in 2017. The Department acknowledged the proposed expansion of the Alberta Clipper in the Keystone 2014 SEIS. The Department failed to analyze, however, the cumulative greenhouse gas emissions impacts of both pipelines. The Department instead viewed Keystone in isolation.

The Department analyzed the cumulative emissions of Keystone and the Alberta Clipper in the Alberta Clipper EIS. DOSKXLDMT0002501. The Alberta Clipper EIS also used the updated GREET model to analyze greenhouse gas emissions. *Id.* The GREET model estimates that greenhouse gas emissions are up to 20% higher than the model used in the 2014 SEIS. *Id.*

NEPA requires that an EIS consider the cumulative impacts of the proposed action. 40 C.F.R. § 1508.7. "Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-Federal) or person undertakes such other actions." *Id*. The cumulative impacts analysis must do more than merely catalogue relevant projects in the area, but rather must give sufficiently detailed analysis about these projects and the differences between them. *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 971 (9th Cir. 2006).

This mandate requires an agency to discuss and analyze in sufficient detail to assist "the decisionmaker in deciding whether, or how, to alter the program to lessen cumulative impacts." *Churchill Cnty v. Norton*, 276 F.3d 1060, 1080 (2001) (*quoting City of Carmel-by-the-Sea v. United States Dep't of Transp.*, 123 F.3d 1142, 1160 (9th Cir. 1997)). Moreover, when several projects that may have cumulative environmental impacts are pending concurrently, NEPA requires that

the environmental consequences should be considered together. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976).

TransCanada argues that the Court's reasoning in its Summary Judgment Order was that "[the Department] was unaware of the cumulative impacts of both projects notwithstanding the fact that it disclosed in the 2017 EIS for the Alberta Clipper the potential cumulative GHG emissions of both pipelines." (Doc. 235 at 25.) TransCanada's argument does not reach the purpose of the required supplement. The Department failed to paint a full picture when it ignored the cumulative impacts of the two pipelines in the 2014 SEIS for Keystone. *See Churchill Cnty*, 276 F.3d at 1072.

The Department's analysis of the greenhouse gas emissions of both pipelines in the later Alberta Clipper EIS does not alleviate the error resulting from its omission in the earlier 2014 SEIS. The error caused the Department to lack full awareness of the environmental consequences of both actions. This error precluded informed decision-making and public participation based on complete information about potential greenhouse gas emissions. *See Ground Zero Ctr. For Non-Violent Action v. United States Dep't of Navy*, 860 F.3d 1244, 1252 (9th Cir. 2017). The updated GREET model used by the Department in the Alberta Clipper SEIS also constituted new and relevant information that required a supplement.

4. Cultural Resources

TransCanada argues that no provision of NEPA required the Department to supplement information regarding over 1,000 acres of unsurveyed land along the pipeline's route. (Doc. 235 at 26.) TransCanada argues that the Department's agreement with other federal agencies and state historic preservation officers satisfied its NEPA obligations.

The record reflects that the Department entered into an agreement with other federal agencies and state historic preservation officers to govern identification of historic properties and consultation regarding potential adverse impacts. DOSKXLDMT0006553-54. The Department also consulted with Indian tribes, federal agencies, and local governments regarding cultural resources. *Id.* The SEIS identified 397 cultural resources that may be affected by the project. *Id.* at 6521. The SEIS states, however, that "[a]s of December 2013, approximately 1,038 acres remained unsurveyed and are the subject of ongoing field studies." DOSKXLDMT0006522.

Consequently, the 2014 SEIS failed to provide a "full and fair discussion of the potential effects of the project to cultural resources." *See, Native Ecosystems Council v. U.S. Forest Service, an agency of U.S. Dept. of Agriculture*, 418 F.3d 953, 965 (9th Cir. 2005). "NEPA ensures that [agencies] will not act on incomplete information, only to regret its decision after it is too late to correct" *Marsh*, 490

U.S. at 371. The agreement with the state, local, and tribal agencies entered by the Department regarding the additional studies does not relieve the Department of its NEPA obligations. The Department must supplement this information. This supplementation further will allow the public to review and comment on the newly surveyed areas as part of the NEPA process.

5. Oil Spills

Major oil pipeline spills have occurred since the publication of the 2014 SEIS and the issuance of the ROD in 2017. TransCanada argues that new oil spill data would not alter the Department's analysis to the point of requiring a supplement. (Doc. 235 at 22.) TransCanada incorrectly argues that the Court needed to find that new spill data indicates that Keystone would impact the environment in a manner not analyzed by the Department.

The Court possesses no duty to analyze the impacts of updated oil spill data on the environment. The Department possessed the duty to analyze the updated oil spill data between 2014 and 2017 that constituted new and relevant information. Without this information, the Department acted upon incomplete data in its analysis of the likelihood of spills. *See Marsh*, 490 U.S. at 371. The Department also acted upon incomplete information when it failed to address the National Academy of Sciences ("NAS") study. The absence of this information from the 2014 SEIS's mitigation measures demonstrates that the Department acted upon

incomplete information in setting forth its mitigation measures. *See Marsh*, 490 U.S. at 371.

D. The Department's Policy Shift

TransCanada next alleges that the Department adequately explained its policy change. TransCanada again asserts that the APA does not authorize review of the ROD because it remains committed to agency discretion. (Doc. 235 at 28.) The Court already has determined that the ROD should be subject to judicial review under the APA. (Doc. 93.) NEPA provides the appropriate standard of review for the Court to follow. Further, TransCanada argues that the Department adequately explained its change in policy. (Doc. 235 at 28.)

An agency possesses authority to give more weight to certain policy considerations than it had in the past. *Org. Vill. of Kake v. U.S. Dept. of Agriculture*, 795 F.3d 956, 968 (9th Cir. 2015). An agency must provide a detailed justification, however, for reversing course and adopting a policy that "rests upon factual findings that contradict those which underlay its prior policy" *Kake*, 795 F.3d at 966 (*quoting FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009)). "Even when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation." *Kake*, 795 F.3d at 968.

The Department's 2015 ROD provided a section titled "Climate Change-Related Foreign Policy Considerations." The 2015 ROD determined that the United States's climate change leadership provided a significant basis for denying the permit. In reaching its decision, the Department recognized science supporting a need to keep global temperature below two degrees Celsius above pre-industrial levels, and scientific evidence that human activity represents a dominant cause of climate change.

After tracking the 2015 ROD nearly word-for-word, the 2017 ROD omitted entirely a parallel "Climate Changed-Related Foreign Policy Considerations" section. The Department's discretion to give more weight to energy security does not excuse it from ignoring the 2015 ROD's factually-based determinations. The Department instead avoided the 2015 ROD's conclusion that 2015 represented a critical time for action on climate change with a single paragraph that simply stated that since 2015, there have been "numerous developments related to global action to address climate change, including announcements of many countries of their plans to do so." DOSKXLDMT0002518. This explanation falls short of a factually based determination, or reasoned explanation, and TransCanada appears unlikely to prevail on appeal. *Kake*, 795 F.3d at 968.

E. FWS's review under the ESA

TransCanada next argues that the Department's 2012 Biological Assessment ("BA") and FWS's 2013 Biological Opinion ("BiOp") and concurrence should not have been set aside for the purpose of considering updated data on oil spills. The Court has determined that TransCanada is not likely to succeed on the merits of its appeal of the Court's requirement that the Department supplement the 2014 SEIS. The Department must supplement information regarding oil spills. This information affects the Department's analysis of potential impacts to listed species.

The Department and FWS must use the "best scientific and commercial data available" in all respects, including the effects of potential oil spills on endangered species. 16 U.S.C. § 1536(a)(2). An agency must reinitiate consultation when "new information" suggests the action may impact listed species "in a manner or to an extent not previously considered." 50 C.F.R. § 402.16(b). The Department's and FWS's prior conclusions regarding the effects of oil spills on listed species proves outdated due to the requirement that the Department supplement the 2014 SEIS. The agencies must account for the supplemental information. The Department must consider the new information regarding oil spills in its supplement to the 2014 SEIS. The Department also must coordinate with FWS in making its determination.

II. Irreparable Injury

TransCanada asserts that it will suffer irreparable injury in the absence of a stay pending its appeal. (Doc. 235 at 31.) TransCanada argues that if the Court's injunction halts its off-right-of-way activities, TransCanada would be forced to lay off a significant portion of its workforce, face tremendous delay costs, miss the 2019 construction season, and lose substantial revenues. (Doc. 248 at 14.) Plaintiffs argue that the financial harms that TransCanada alleges are temporary and self-inflicted. Plaintiffs also contend that TransCanada exaggerates its alleged harms related to the difficulty of retaining skilled workers. (Doc. 247 at 14.)

The Court determined in its Order on TransCanada's Motion to Amend that a limited modification of the scope of the injunction proved necessary. (Doc. 232 at 13.) The Court reasoned that activities related to the NEPA process required an injunction pending the Department's review. *Id.* at 15. The Court further determined that those activities unrelated to NEPA review could continue. *Id.* Finally, the Court determined that the hardship to TransCanada from enjoining activities unrelated to the Department's NEPA review required a limited modification of the injunction. *Id.* at 13.

TransCanada argues that irreparable injury will occur if it is not allowed to proceed with the three proposed off-right-of-way activities. TransCanada alleges

that an injunction of the off-right-of-way activities threatens 700 jobs, the loss of skilled workers, the potential of missing the 2019 construction season, and lost earnings of approximately $949 million. TransCanada asserts that each of these alleged injuries will occur if it remains unable to continue with the off-right-of-way activities during the pendency of its appeal.

TransCanada also has demonstrated that engaging in the off-right-of-way activities unrelated to the NEPA process would not result in the construction of any portion of the pipeline. The transportation of pipe, preparation of pipe storage yards, and preparation of construction camps, all represent activities to be performed at TransCanada's peril during the pendency of its appeal. TransCanada will suffer irreparable injury, however, if its planned construction schedule otherwise proves accurate, but it is further delayed because the off-right-of-way activities could not be completed on time. This factor weighs in favor of TransCanada.

III. Substantial Injury to Other Parties Interested in the Proceeding

The Court also determined in its Order on TransCanada's Motion to Amend, that potential injuries to the Plaintiffs warranted an injunction of certain preconstruction activities. The Court determined that Plaintiffs demonstrated irreparable injury with respect to the actual construction and operation of Keystone in the absence of complete environmental review. (Doc. 232 at 11.) Plaintiffs also

have demonstrated substantial injury in the form of environmental harm and a "biased NEPA process." *Id.* The Court concluded that an injunction of certain preconstruction activities could skew the Department's future analysis and decision-making with regard to Keystone. *See Colorado Wild Inc. v. U.S. Forest Serv.*, 523 F.Supp.2d 1213, 1221 (D. Colo. 2007).

The Ninth Circuit determined in *Save Our Sonaran, Inc. v. Flowers*, 408 F.3d 1113 (9th Cir. 2005), that "when environmental injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Id.* at 1125. The Ninth Circuit examined a district court's injunction of a United States Army Corps of Engineers ("Corps") Section 404 dredge and fill permit for the construction of a gated community. *Id.* at 1118. The plaintiffs sought an injunction based on alleged NEPA and Clean Water Act ("CWA") violations. *Id.*

The controversy involved 31.3-acres of washes that constituted approximately 5 percent of the property. *Id.* The district court determined that the washes on the property presented potential geological impacts to the entire property. *Id.* The Corps evaluated the Section 404 permit application and issued an environmental assessment and finding of no significant impact. *Id.* In its analysis, the Corps examined only the washes, rather than the entire project. *Id.* The district court reasoned that, even though the washes cover only 5 percent of acreage, they

critically impacted the entire parcel. *Id.* The district court enjoined the project pending a hearing on the merits. *Id.*

The Ninth Circuit upheld the district court's injunction on appeal. *Id.* at 1121. The Ninth Circuit reasoned that "the impact of the permit on the environment at large determines the [agency's] NEPA responsibility." *Id.* at 1122. The Ninth Circuit further concluded that "[t]he authority to enjoin development extends only so far as the [agency's] permitting authority." *Id.* at 1123. The district court limited the scope of the injunction, therefore, to stopping the developer from acts that required a Corps permit. *Id.* Further, the district court's determination that the washes remained subject to federal jurisdiction under the CWA and could not be separated from the private lands, authorized the district court to enjoin the entire project. *Id.*

Both parties rely on *Save Our Sonoran* to argue that the third factor weighs in their respective favor. Plaintiffs argue that the Ninth Circuit's affirmation of the injunction of the entire project site requires a similar blanket-injunction of Keystone and all related activities. (Doc. 247 at 26.) TransCanada argues, on the other hand, that the Court's authority extends only to the Department's permitting authority and accompanying NEPA analysis. (Doc. 235 at 30.) TransCanada contends, therefore, that the three proposed off-right-of-way activities fall beyond

the scope of the Department's permitting authority and NEPA review and cannot be enjoined. *Id.*

TransCanada incorrectly argues that the three off-right-of-way activities were beyond the scope of the Department's NEPA review. The 2014 SEIS frequently discussed the impacts of the off-right-of-way activities to the following issues: the potential impacts to natural resources, cultural resources, and greenhouse gas emissions. *See* DOSKXLDMT0007000, 7107, 7340. TransCanada asserts that the off-right-of-way activities would occur on land that TransCanada either owns or leases. TransCanada must obtain all state and local permits to transport pipe, refurbish pipe, construct storage yards, or construct labor camps. TransCanada asserts that it has obtained these necessary permits.

The 2014 SEIS defines Keystone's "action area" as "construction of the pipeline [right-of-way] and land affected by the above ground ancillary facilities (i.e., additional temporary work space areas, pipe stockpile sites, rail sidings, contractor yards, construction camps, pump stations, delivery facilities, and access roads)." DOSKXLDMT0010626. The 2014 SEIS also defines the "Project Area" as "the area of physical disturbance associated with the proposed Project limits; that is, in and along the pipeline right-of-way construction corridor and its ancillary facilities (e.g. access roads, pump stations, and construction camps)." DOSKXLDMT0007268.

TransCanada asserted at the hearing on its motion to stay that all areas where work camps and pipe yards will be constructed have been surveyed. (Doc. 249.) TransCanada's January 7, 2019, status report states that preconstruction activities will not require construction of new private roads. (Doc. 254-1 at 9.) The status report also states that all off-right-of-way areas have been surveyed for protected species and cultural resources. *Id.* at 9-10. The 2014 SEIS explains, however, that additional cultural resource surveys within the Keystone corridor, including "ancillary facilities," remain "ongoing." DOSKXLDMT0007340 (n. 7.) The SEIS defines ancillary facilities to encompass pipe yards and construction camps. *Id.* at 10626. The 2014 SEIS also states that Keystone may affect cultural resources on or near the right-of-way and in the locations of ancillary facilities including access roads and construction camps. DOSKXLDMT0007000.

The 2014 SEIS makes clear that at least a portion of the off-right-of-way activities that TransCanada seeks to perform were to occur on land not yet surveyed for cultural resources. DOSKXLDMT0007340. The contradiction between the information provided in the 2014 SEIS and TransCanada's current assertions demonstrates the reason that the Department must supplement the SEIS with updated information regarding cultural surveys. Neither the 2014 SEIS, nor the administrative record, provide information to the Court or the public that TransCanada has completed cultural resource surveys at all the proposed "ancillary

facilities" that encompass the off-right-of-way areas. TransCanada's bare assertions that these areas have been surveyed for cultural resources since the publication of the 2014 SEIS proves insufficient to allow the off-right-of-way activities to continue in these areas not yet surveyed for cultural resources when the 2014 SEIS was issued in the absence of complete environmental review.

TransCanada attempts to distinguish the Department's permitting authority in this case from the Corps's authority in *Save Our Sonoran*. The washes at issue in *Save Our Sonoran* ran through the entire parcel "the way capillaries run through tissue." *Save Our Sonoran*, 408 F.3d at 1119 (*quoting Save Our Sonoran, Inc. v. Flowers*, 227 F.Supp.2d 1111, 1114 (D. Ariz. 2002)). The geological impact of the washes' connection to the entire project site provided the reason that the district court could completely enjoin the project including private land.

The 2014 SEIS included "ancillary facilities" as part of its "action area" and "project area," and within its scope and review. The required supplemental review, along with the 2014 SEIS's conclusions with regard to impacts at proposed construction camps and storage yards, demonstrates the difficulty in attempting to "segregate[]" the three proposed off-right-of-way activities from Keystone itself. *See Save Our Sonoran*, 408 F.3d at 1123. Allowing TransCanada to begin construction in areas that the Court has ordered the Department to supplement its review would run counter to the need for a such a supplement and undermine the

purpose of NEPA. These areas subject to the supplement include the MAR in Nebraska and those approximately 1,000 acres not yet surveyed for cultural resources along the pipeline route. (Doc. 235 at 26.)

TransCanada further argues that the three proposed off-right-of-way activities do not affect the potential for "bureaucratic momentum" or risk a biased NEPA process. (Doc. 235 at 32.) The Court determined in its Order on TransCanada's Motion to Amend that the risk of "bureaucratic momentum" created by certain preconstruction activities could bias the Department's NEPA analysis. (Doc. 232 at 10.) The concern regarding "bureaucratic momentum" involves the potential of a skewed NEPA analysis if certain preconstruction activities were allowed to proceed during the NEPA review. *See Colorado Wild*, 523 F.Supp.2d at 1221. TransCanada asserts that the three proposed off-right-of-way activities would not impact the Department's supplemental review.

The 2014 SEIS consistently discussed the three proposed off-right-of-way activities. TransCanada would perform these off-right-of-way activities entirely on private land owned or leased by TransCanada. The 2014 SEIS determines, however, that potential impacts that appear to be material to the supplemental review, may occur at the off-right-of-way sites. *See, e.g.*, DOSKXLDMT0010626, 7268.

The private nature of the three proposed off-right-of-way activities lessens the risk of "bureaucratic momentum" as raised by the court in *Colorado Wild*, 523 F.Supp.2d at 1221. The connection between the private activities and the impacts on the Department's required supplement, however, could skew the Department's analysis. The construction camps present a significant activity that could impact the Department's analysis. The 2014 SEIS focuses frequently on the potential impacts posed by the preparation of the construction camps. The 2014 SEIS describes the construction camps as containing at least 80-acres of contractor yards, housing, and administration facilities. DOSKXLDMT0005983. The camps would be constructed using modular units and include infrastructure necessary for complete food service, housing, and personal needs. *Id.* The construction camps would be fully fenced and include guard stations. *Id.* at 7840. The construction camps would also include stores, recreation and fitness facilities, entertainment facilities, dining and laundry facilities, and security units. *Id.* The 2014 SEIS "conservative[ly]" estimates that each camp would house approximately 1,000 residents. *Id.* The pipe yards, on the other hand, involve minimal ground disturbance and are designed for the mere purpose of off-loading pipe. The construction camps' similarities to small towns prove distinguishable from the relatively minor impacts of the pipe storage yards. The significant impacts from the

construction camps risks the potential for a "bureaucratic steamroller" that the Court determined to be present in its Injunction Order. (Doc. 232.)

This factor weighs in favor of Plaintiffs for those areas that had not been surveyed and subject to public review and comment by the time of the 2014 SEIS. These areas include the proposed construction camps, the MAR in Nebraska, and the 1,000 acres of not yet surveyed for cultural resources. (Doc. 235 at 26.) This factor weighs in favor of TransCanada, however, only for those off-right-of-way activities that would take place entirely within areas that had been the subject of completed cultural surveys and public review and comment by the time of the 2014 SEIS.

IV. Public Interest

Finally, TransCanada argues that the public interest warrants a stay of the injunction. (Doc. 235 at 34.) The Court addressed these same concerns in its Order on TransCanada's motion to Amend. The Court determined that Plaintiffs had met their burden regarding the public's interest in ensuring that the Department conduct a complete environmental review before construction and operation of Keystone. (Doc. 232 at 14.) The public possesses an interest in the Department's compliance with NEPA's environmental review requirements and informed decision-making. *See Colorado Wild*, 523 F.Supp.2d at 1222.

The Court permanently has enjoined the actual construction and operation of Keystone. TransCanada has not sought to engage in actual construction or operation pending its appeal. The Court has determined that the off-right-of-way activities that would impact areas not yet surveyed for cultural resources cannot be segregated from the Department's supplemental review obligation. The 2014 SEIS demonstrates that the off-right-of-way activities potentially could impact adversely areas not yet surveyed for cultural resources. DOSKXLDMT0010626, 7268.

TransCanada's assertion that all off-right-of-way areas have since been surveyed has no bearing upon the Department's supplemental NEPA review. At least some of those areas, especially along the MAR in Nebraska, have not been surveyed for cultural resources and made subject to public review and comment by the time of the 2014 SEIS. The public's interest in ensuring compliance with NEPA's requirements and informed decision-making would be threatened by the three proposed off-right-of-way activities in those areas that were not the subject of cultural resource surveys and public review and comment by the time of the 2014 SEIS. This factor weighs in favor of Plaintiffs for those areas not yet surveyed for cultural resources.

CONCLUSION AND ORDER

The Court continues to believe that TransCanada remains unlikely to succeed on the merits of its appeal. TransCanada has shown that it will suffer

potential irreparable injury if it is unable to perform the three proposed off-right-of-way activities. Plaintiffs have shown irreparable injury in the form of the actual construction and operation of Keystone and potential "bureaucratic momentum." The potential injuries to Plaintiffs would be further threatened by the off-right-of-way activities that would occur in areas that had not been surveyed for cultural resources, or were not a part of the 2014 SEIS, including the public review and comment process. The public interest rightfully weighs in favor of a complete NEPA review. The preparation of storage yards and construction camps in areas not yet surveyed for cultural resources when the Department issued the 2014 SEIS have the potential to impact adversely the public's interest in an informed NEPA process.

Accordingly, TransCanada's Motion to Stay the application of the permanent injunction with respect to its right to engage in the three proposed off-right-of-way activities (Doc. 234) is **GRANTED, IN PART, AND DENIED, IN PART**.

The Court emphasizes that the partial stay of its injunction contemplated by this Order applies only to those off-right-of-way activities, limited to transportation of pipe and preparation of pipe storage and container yards, that would occur only on those areas that had been surveyed for cultural resources and had been subjected to the public review and comment process when the Department issued the 2014

SEIS. TransCanada may continue to perform these limited off-right-of-way activities that will be conducted by private parties, take place on private land, and only on those lands for which TransCanada has obtained permits from state and local governments, if necessary, to engage in these activities:

1) Preparation of off-right-of-way pipe storage and container yards; and
2) Transportation, receipt, and off-loading of pipe at these off-right-of-way storage and container yards.

The following activity shall remain enjoined:

1) Preparation of sites for off-right-of-way construction camps.

The remainder of the Court's Summary Judgment Order (Doc. 211), Final Judgment (Doc. 212), and Supplemental Order Regarding Permanent Injunction (Doc. 232), shall remain in full force and effect.

DATED this 15th day of February, 2019

Brian Morris
United States District Court Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

INDIGENOUS ENVIRONMENTAL NETWORK and NORTH COAST RIVER ALLIANCE,

and

NORTHERN PLAINS RESOURCE COUNCIL, et al.,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF STATE, et al.,

Defendants

and

TRANSCANADA KEYSTONE PIPELINE and TRANSCANADA CORPORATION,

Defendant-Intervenors.

CV-17-29-GF-BMM

CV-17-31-GF-BMM

SUPPLEMENTAL ORDER REGARDING PERMANENT INJUNCTION

Plaintiffs Indigenous Environmental Network and Northern Plains Resource Council (collectively "Plaintiffs") moved for summary judgment in this matter. (Docs. 139 & 145.) The United States Department of State ("Department") and

TransCanada (collectively "Defendants") filed cross motions for summary judgment. (Docs. 170 & 172.)

The Court granted Plaintiffs' motions in part, and Defendants' motions in part, in the Court's Order on Plaintiffs' and Defendants' Motions for Summary Judgment ("Summary Judgment Order"). (Doc. 211.) The Court vacated the Department's Record of Decision ("ROD") issued on March 23, 2017. The Court granted Plaintiffs' request for injunctive relief and remanded the matter to the Department for further consideration consistent with the Summary Judgment Order. *Id.* The Court entered Final Judgment was November 15, 2018. (Doc. 212.)

TransCanada moves the Court pursuant to Rule 59(e) and Rule 60(b) to amend the Court's Summary Judgment Order, and Final Judgment. (Docs. 211 & 212.) TransCanada seeks clarification of the Court's Orders to ensure certain preliminary project activities will not be enjoined. (Doc. 215.) Further, TransCanada asks the Court to evaluate the four factors required for issuance of a permanent injunction and narrowly tailor relief to address Plaintiffs' purported injury. *Id.* at 10. Plaintiffs oppose TransCanada's Motion. (Doc. 229.)

The Court held a status conference on November 28, 2018. (Doc. 222.) TransCanada set forth the activities that it seeks to continue in Paragraphs 16-18 of its expert declaration (hereafter "Ramsay Declaration"). (Doc. 216-1). The Court determined that Defendants could move forward with activities set forth in

Paragraphs 16-17 of the Ramsay Declaration. (Doc. 216-1.) The Court withheld ruling on the motion with regard to Paragraph 18 of the Ramsay Declaration until after Plaintiffs had submitted their responses to the motion. (Doc. 222.)

Plaintiffs filed their responses to the motion on December 5, 2018. Plaintiff Northern Plains Resource Council does not oppose conducting cultural, biological, civil and other surveys. Plaintiff Northern Plains Resource Council opposes the remainder of activities set forth in Paragraph 18 of the Ramsay Declaration. (Doc. 229 at 10-11.) Plaintiff Indigenous Environmental Network also does not oppose conducting cultural, biological, civil and other surveys. Plaintiff Indigenous Environmental Network further does not oppose maintain security at project sites. Plaintiff Indigenous Environmental Network opposes the remainder of activities set forth in Paragraph 18 of the Ramsay Declaration. (Doc. 229 at 8-9.)

LEGAL STANDARD

Rule 59(e) allows a party to "alter or amend a judgment" by filing a motion within 28 days after entry of judgment. A court may alter or amend the judgment to address newly discovered evidence, correct clear error, prevent manifest injustice, or account for an intervening change in controlling law. *Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001). District courts possess broad discretion to evaluate Rule 59(e) motions. *McDowell v. Calderon*, 197 F.3d 1253,

1256 (9th Cir. 1999). Further, Rule 60(b) allows a party to seek relief from final judgment for any reason justifying relief.

DISCUSSION

The Court's Summary Judgment Order enjoined Defendants from "engaging in any activity in furtherance of the construction or operation of Keystone and associated facilities until the Department has completed a supplement to the 2014 SEIS that complies with the requirements of NEPA and the APA." (Doc. 211 at 54.) TransCanada requests that the Court amend the judgment to clarify that TransCanada may engage in preliminary project activities. TransCanada claims that the Court improperly issued a broad permanent injunction without analyzing the four requisite factors under *Monsanto Co. v Geerston Seed Farms*, 561 U.S. 139 (2010). TransCanada asserts that the language of the Court's Summary Judgment Order could be construed as enjoining certain preparatory activities and that the Court should tailor relief to address Plaintiffs' purported injury. (Doc. 216 at 10.)

TransCanada asks that the Court exclude preparatory activities defined in Paragraph 18 of the Ramsay Declaration. (Doc. 216-1.) Paragraph 18 sets forth activities including the following: cultural, biological, civil and other surveys; preparation of off-right-of-way pipe storage and contractor yards; transportation, receipt and off-loading of pipe at off-right-of-way storage yards; preparation of

sites for off-right-of-way worker camps; and mowing and patrolling areas of the right-of-way to discourage migratory bird nesting. The activities also include maintaining security at project sites to ensure public safety and maintaining environmental protections. *Id.* at 6-7. Plaintiffs do not argue that cultural, biological, civil and other surveys should be enjoined. Plaintiff Indigenous Environmental Network further does not contest maintain security at project sites. Plaintiffs argue the remainder of the proposed activities (hereafter "preconstruction activities") set forth in Paragraph 18 should be enjoined.

Before a permanent injunction may issue, a plaintiff must demonstrate that "(1) it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Monsanto*, 561 U.S. at 156-57.

I. Irreparable Injury

Defendants assert that allowing the preconstruction activities set forth in Paragraph 18 will not cause irreparable harm to Plaintiffs. Plaintiffs argue that irreparable harm will occur in the form of environmental harm, and a "biased NEPA process." (Doc. 229 at 19.) Plaintiffs argue that allowing the Paragraph 18 preconstruction activities to proceed would perpetuate "bureaucratic momentum"

that would discourage other federal agencies from rejecting the project or altering its route to account for revised environmental review. *Id.* at 19-20.

The district court in *Colorado Wild Inc. v. U.S. Forest Serv.*, 523 F.Supp.2d 1213 (D. Colo. 2007), discussed the "biased NEPA process" theory. A private company applied to the Forest Service for rights-of-way across Forest Service land for access to the company's privately-owned land. *Id.* at 1217. The Forest Service determined that the proposal required the preparation of an EIS. *Id.* The Forest Service selected one of the alternatives that allowed construction activity on Forest Service roads. *Id.* at 1218.

The district court issued a temporary restraining order that prevented the Forest Service from authorizing construction on the roads or related activities. *Id.* at 1219. The district court later granted a preliminary injunction to halt the construction activity. The district court reasoned that the injury threatened did not involve merely ground-breaking disturbance. The district court recognized also the risk that the "bureaucratic momentum" created by the activities would bias the agencies NEPA analysis. *Id.* at 1220. This concern prompted the district court to curtail any further construction. *Id.*

The Fourth Circuit also analyzed the proper scope of an injunction related to an EIS in *Nat'l Audubon Soc'y v. Dept. of Navy*, 422 F.3d 174 (4th Cir. 2005). The Fourth Circuit agreed that the Department of Navy ("Navy") had had failed to

comply with NEPA in its decision to construct a landing field in North Carolina. *Id.* at 180-81. The Fourth Circuit continued its review, however, to include an analysis of the scope of the injunction ordered by the district court. The district court had issued a sweeping injunction that prohibited the Navy "from taking *any* further activity associated with the planning, development, or construction" of an air field without first complying with its obligations under NEPA. *Id.* at 202.

The Navy asserted five areas of activities that should not have been enjoined. Navy first sought to conduct a site-specific wildlife assessment. *Id.* at 204. The studies would take over a year to complete and admittedly would go beyond the requirements of NEPA to include more intensive studies of the Navy's preferred site. *Id.* The Navy next sought to undertake activities preliminary to land acquisition. These activities would include property surveys and appraisals, title searches, relocation surveys and hazardous material surveys. *Id.* The Navy next sought to purchase land from willing sellers. These purchases would include existing purchase agreements that had been held in abeyance and some new agreements. *Id.* The fourth area of activity involved architectural and engineering work necessary for the planning and design of the air field. *Id.* Finally, the Navy requested permission to apply for permits that would be necessary before breaking ground on the project. *Id.*

The Fourth Circuit narrowed the injunction on appeal. The Fourth Circuit concluded that neither the site-specific activities, nor a "bureaucratic steamroller" would irreparably harm the plaintiffs. *Id.* at 205. The Fourth Circuit reasoned that the five activities identified by Navy "do not include cutting even a single blade of grass in preparation for construction." *Id.* at 207. The activities approved in *Nat'l Audubon Soc'y* sound similar to the activities in Paragraphs 16 and 17 of the Ramsay Declaration and previously authorized by this Court. (Doc. 222.) For example, Paragraph 16 discusses "detailed project engineering and conducting the extensive planning and related office work." (Doc. 216-1 at 6.) Paragraph 16 also includes "submitting reports and other administrative actions required to maintain compliance with valid state and local permits." None of these activities fall within the scope of the Court's previous Summary Judgment Order. (Doc. 211.)

The same reasoning applies to the activities proposed in Paragraph 17 (Doc. 216-1 at 6-7.) TransCanada seeks to "engag[e]" with external parties to pursue shipping contracts, pursue needed permits, "interfac[e]" with landowners and acquiring necessary land rights, "acquir[e]" pipe and materials, "inspect[] and refurbish[]" work camp modules and pipe, "engag[e]" with communities and various governmental entities, and "hir[e]" project staff and contractors. *Id.* These non-construction activities comport with the activities authorized by the Fourth

Circuit in *Nat'l Audubon Soc'y*, 422 F.3d at 205-06, and previously approved by this Court. (Doc. 222.)

This same reasoning applies to efforts identified by TransCanada in Paragraph 18 to conduct "cultural, biological, civil and other surveys." (Doc. 216-1 at 7.) The Fourth Circuit approved efforts to undertake site specific wildlife assessments that went beyond the requirements of NEPA to include more intensive studies of the Navy's preferred site. *Nat'l Audubon Soc'y*, 422 F.3d at 204. TransCanada may proceed with these type of preconstruction surveys. Nothing in the Court's original order on Summary Judgment (Doc. 211) or this Order, limits the ability of TransCanada to engage in "design, planning, and permit application[.]"

The remaining preconstruction activities proposed by TransCanada in Paragraph 18 generally differ, however, from those authorized by the Fourth Circuit in *Nat'l Audubon Soc'y*. The remaining activities contemplated by TransCanada in Paragraph 18 of the Ramsay Declaration include activities that go beyond "design, planning, and permit application[.]" *Nat'l Audubon Soc'y*, 422 F.3d at 206. The remaining activities proposed in Paragraph 18 include the preparation of pipe storage and contractor yards. (Doc. 216-1 at 7.) TransCanada also seeks to transport and store pipe near rights-of-way. *Id.* The work also would include the preparation of sites for the construction of worker camps and the

mowing and patrolling rights-of-way to discourage migratory bird nesting, and efforts to maintain security at project sites. *Id.* These proposed preconstruction activities, with the exception of maintaining a security presence, go beyond simply "integrating the NEPA process with other planning." *Nat'l Audubon Soc'y*, 422 F.3d at 206; 40 C.F.R. § 1501.2.

The preconstruction activities proposed in Paragraph 18 prove more analogous to those enjoined in *Colorado Wild*. The irreparable injury threatened by the Paragraph 18 preconstruction activities go beyond merely the ground-disturbing injuries alleged by Plaintiffs. These preconstruction activities raise the risk of the "bureaucratic momentum" recognized by the district court in *Colorado Wild*. TransCanada's proposed preconstruction activities could skew the Department's future analysis and decision-making regarding the project. *Colorado Wild*, 523 F.Supp.2d at 1221. As recognized by the Fourth Circuit in *Nat'l Audubon Soc'y*, CEQ regulations require that "no action concerning the proposal shall be taken which would: (1) [h]ave an adverse environmental impact; or (2) [l]imit the choice of reasonable alternatives" until an agency issues a record of decision. *Nat'l Audubon Soc'y*, 422 F.3d at 201 (quoting 40 C.F.R. § 1506.1(a)). No valid ROD has been issued here as the Court's Summary Judgment Order specifically vacated the ROD issued by the Department. (Doc. 211 at 54.)

Moreover, the Fourth Circuit premised its decision to narrow the scope of the injunction, in part, on the restriction in 40 C.F.R. § 1506.1(d). This subsection expressly provides that Section 1506.1(a) "does not preclude development by applicants of plans or designs or performance of other work necessary to support an application for Federal, State or local permits or assistance" while NEPA work is in progress. *Nat'l Audubon Soc'y*, 422 F.3d at 201. The activities proposed by TransCanada in Paragraph 18, with the exceptions of the surveys and maintaining a security presence, fall outside of "plans or designs or performance of other work" necessary to support permit applications protected by Section 1506.1(d).

II. Remedies Available at Law

"Environmental injury, by its nature, can seldom be adequately remedied by money damages." *Amoco Prod. Co. v. Vill. Of Gambell*, 480 U.S. 531, 545 (1987). Both parties assert that this element is not at issue in this case. The Court need not assess the adequacy of other remedies available at law under the second prong.

III. Balance of Hardships

Under the third prong, the Court must assess the "balance of hardships between the plaintiff and defendant." *Monsanto*, 561 U.S. at 157. The balance of hardships between the parties favors the Plaintiffs with regard to construction and operation of Keystone. Plaintiffs have demonstrated irreparable injury with respect to actual construction and operation of Keystone. *Monsanto*, 561 U.S. at 157.

TransCanada argues that hardship would occur if the Court were to halt Paragraph 18 activities. TransCanada cites jobs related to preconstruction activities, the potential of missing the 2019 construction season, and financial injury. TransCanada argues that preconstruction activities represent almost 700 American jobs. TransCanada further argues that delay in the project construction would result in lost earnings of approximately $949 million. Finally, TransCanada argues that delay in the construction schedule will impact contracts it has with third parties. (Doc. 216-1.)

Plaintiffs point to the temporary and self-inflicted nature of TransCanada's hardships. Plaintiffs argue further that environmental concerns outweigh TransCanada's alleged economic harms. The Ninth Circuit long has determined that "when environmental injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Save Our Sonaran, Inc. v. Flowers*, 408 F.3d 1113, 1125 (9th Cir. 2005); *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2001) (economic harm if injunction issued does not outweigh potential irreparable damage to environment); *Northern Alaska Envtl. Ctr. V. Hodel*, 803 F.2d 466, 471 (9th Cir. 1986) (more than pecuniary harm must be shown to outweigh environmental harm).

Environmental concerns with respect to the NEPA process outweigh TransCanada's pecuniary interest. Paragraph 16-17 activities, and Paragraph 18 survey activities required to supplement the EIS process, related tasks, and security efforts, will not be affected by the injunction. Other tasks related to Paragraph 18 activities, however, will be affected during the NEPA review process. This factor weighs in favor of a limited modification of the scope of the injunction.

IV. Public Interest

Fourth, TransCanada argues that a broad injunction would upset the public interest. "The public interest analysis involves weighing the importance of preserving the environment, following the rule of law, and avoiding environmental damage to the public against the economic interests of [Defendants]" *Mont. Envtl. Info Ctr. v. U.S. Office of Surface Mining*, 2017 WL 5047901, at *5 (D. Mont. Nov. 3, 2017). TransCanada argues that the Department's ROD and National Interest Determination ("NID") support the public's interest in the pipeline. (Doc. 216 at 12.)

TransCanada argues that the ROD/NID concluded that Keystone would support energy security, maintain relations with Canada, provide jobs, and boost the economy. The Court must balance economic interests of the Defendants, however, against potential environmental damage to the public. *See Mont. Envtl. Info Ctr.*, 2017 WL 5047901, at *5. NEPA relies on public disclosure of

information about potential environmental impacts to assure that the "most intelligent, optimally beneficial decision will ultimately be made." *Or. Nat. Desert Ass'n v. Bureau of Land Mgmt*., 625 F.3d 1092, 1099-100 (9th Cir. 2010).

Plaintiffs have met their burden with regard to the public's interest in ensuring that the Department conduct a complete environmental review before construction and operation of Keystone. *Monsanto*, 561 U.S. at 157. The public possesses an interest in the Department's compliance with NEPA's environmental review requirements and informed decision-making. *See Colorado Wild*, 523 F.Supp.2d at 1222.

CONCLUSION

The four-factor *Monsanto* test warrants an injunction. Plaintiffs have demonstrated that irreparable harm will result from the construction and operation of Keystone before full environmental review has been conducted, consistent with the Court's Summary Judgment Order. (Doc. 211.) Plaintiffs also have demonstrated that irreparably injury could occur if the following Paragraph 18 activities occurred:

(1) Preparation of off-right-of-way pipe storage and contractor yards;

(2) Transportation, receipt and off-loading of pipe at off-right-of-way storage yards;

(3) Preparation of sites for off-right-of-way worker camps; and

(4) Mowing and patrolling areas of the right-of-way to discourage migratory bird nesting.

Plaintiffs do not contend that the following Paragraph 18 activities should be enjoined, and the Court determines that they shall be permitted:

(1) Cultural, biological, civil and other surveys; and

(2) Maintaining security at sites.

ORDER

IT IS ORDERED Defendants may conduct activities as defined in Paragraphs 16-17 of the Ramsay Declaration. (Doc. 216-1 at 6-7.) Further, Defendants may conduct cultural, biological, civil and other surveys, and may maintain security at project sites, as set forth in Paragraph 18 of the Ramsay Declaration. *Id.* at 7. All remaining preconstruction activities outlined in Paragraph 18 shall continue to be enjoined in accordance with the Court's Summary Judgment Order until the Department has complied with its NEPA and APA obligations and the Department has issued a new ROD. (Doc. 211.)

TransCanada's Motion to Amend (Doc. 215) is **GRANTED IN PART**. The injunction is narrowed in accordance with this Order. The remainder of the Court's

Summary Judgment Order (Doc. 211) and Final Judgment (Doc. 212), shall remain in full force and effect.

DATED this 7th day of December, 2018

Brian Morris
United States District Court Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
GREAT FALLS DIVISION

INDIGENOUS ENVIRONMENTAL NETWORK and NORTH COAST RIVER ALLIANCE,

and

NORTHERN PLAINS RESOURCE COUNCIL, et al.,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF STATE, et al.,

Defendants

and

TRANSCANADA KEYSTONE PIPELINE and TRANSCANADA CORPORATION,

Defendant-Intervenors.

Case No. CV 17-29-GF-BMM
CV 17-31-GF-BMM

JUDGMENT IN A CIVIL CASE

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came before the Court for bench trial, hearing, or determination on the record. A decision has been rendered.

IT IS ORDERED AND ADJUDGED;

Judgment is hereby entered in accordance with the Court's November 15, 2018, and November 8, 2018, Orders, Documents 218 & 219, respectively.

Dated this 15th day of November, 2018.

TYLER P. GILMAN, CLERK

By: /s/ Traci Orthman
Traci Orthman, Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

INDIGENOUS ENVIRONMENTAL NETWORK and NORTH COAST RIVER ALLIANCE,

and

NORTHERN PLAINS RESOURCE COUNCIL, et al.,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF STATE, et al.,

Defendants

and

TRANSCANADA KEYSTONE PIPELINE and TRANSCANADA CORPORATION,

Defendant-Intervenors.

CV-17-29-GF-BMM

CV-17-31-GF-BMM

ORDER

Plaintiffs Indigenous Environmental Network and Northern Plains Resource Council (collectively "Plaintiffs") moved for summary judgment in this matter. (Docs. 139 & 145.) The United States Department of State ("Department") and

TransCanada (collectively "Defendants") filed cross motions for summary judgment. (Docs. 170 & 172.)

The Court granted Plaintiffs' motions in part, and Defendants' motions in part in the Court's Order on summary judgment (Doc. 218.) The Court vacated the Department's ROD issued on March 23, 2017. Finally, Plaintiff's request for injunctive relief was granted and the matter was remanded to the Department for further consideration consistent with the Order. (Doc. 218.)

The Order resolved all claims pending before the Court with the exception of Claim 2. Claim 2 relates to the need for TransCanada to obtain a right-of-way across Bureau of Land Management ("BLM") land. Claim 2 appears not yet ripe. The parties filed motions for summary judgment on February 2, 2018, pursuant to the Court's scheduling order. Both Plaintiffs failed to brief the claim related to the BLM right-of-way.

Claim 2 shall be dismissed without prejudice. Plaintiffs remain free to re-file a new cause of action based upon the BLM rights-of-way when those claims become ripe for review. Accordingly, the Court deems it appropriate to enter Final Judgment in this matter.

IT IS HEREBY ORDERED that:

(1) Plaintiffs' Claim 2 related to BLM rights-of-way are **DISMISSED** without prejudice;

(2) It is further Ordered that the Clerk shall enter Final Judgment in this matter.

DATED this 15th day of November, 2018

Brian Morris
United States District Court Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

INDIGENOUS ENVIRONMENTAL NETWORK and NORTH COAST RIVER ALLIANCE,

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Defendant-Intervenors.

CV-17-29-GF-BMM

CV-17-31-GF-BMM

ORDER

Plaintiffs Indigenous Environmental Network and Northern Plains Resource Council (collectively "Plaintiffs") bring this action against the United States Department of State ("the Department") and various other governmental agencies and agents in their official capacities. Plaintiffs allege that the Department violated

the Administrative Procedure Act ("APA"), the National Environmental Policy Act ("NEPA"), and the Endangered Species Act ("ESA") when it published its Record of Decision ("ROD") and National Interest Determination ("NID") and issued the accompanying Presidential Permit to allow defendant-intervenor TransCanada Keystone Pipeline, LP ("TransCanada") to construct a cross-border oil pipeline known as Keystone XL ("Keystone"). Plaintiffs have moved for summary judgment. (Docs. 139 & 145.) The Department and TransCanada (collectively "Defendants") have filed cross motions for summary judgment. (Docs. 170 & 172.)

BACKGROUND

The Court detailed the background of this case in its Order regarding the Department's and TransCanada's Motion to Dismiss for Lack of Jurisdiction. (Doc. 99.) The Court will only recite those facts that have arisen since its Partial Order on Summary Judgment Regarding NEPA Compliance. ("Partial Order") (Doc. 210.)

The Court directed the Department, in its Partial Order, to supplement the 2014 final supplemental EIS ("2014 SEIS") to consider the Mainline Alternative route as approved by the Nebraska Public Service Commission. (Doc. 210 at 12.) The Court declined, however, to vacate the Presidential Permit. The Court instead ordered the Department to file a proposed schedule to supplement the 2014 SEIS in

a manner allowing appropriate review before TransCanada's planned construction activities. *Id.*

The Department published the Notice of Intent to Prepare a SEIS in the Federal Register on September 17, 2018. 83 Fed. Reg. 46,989 (Sept. 17, 2018). The Department published the Notice of Availability of the Draft SEIS in the Federal Register on September 24, 2018. 83 Fed. Reg. 48,358 (Sept. 24, 2018). The Court will address each remaining issue in turn.

LEGAL STANDARD

A court should grant summary judgment where the movant demonstrates that no genuine dispute exists "as to any material fact" and the movant is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment remains appropriate for resolving a challenge to a federal agency's actions when review will be based primarily on the administrative record. *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 778 (9th Cir. 2006).

The APA standard of review governs Plaintiffs' claims. *See W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 481 (9th Cir. 2011); *Bennett v. Spear*, 520 U.S. 154, 174 (1997). The APA instructs a reviewing court to "hold unlawful and set aside" agency action deemed "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A rational connection must exist between the facts found and the conclusions made in support

of the agency's action. *Kraayenbrink*, 632 F.3d at 481. The Court reviews the Department's compliance with NEPA and the ESA under the arbitrary and capricious standard pursuant to the APA. *See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1194 (9th Cir. 2008).

DISCUSSION

I. Did the Department Violate NEPA when it Approved Keystone?

Plaintiffs first allege that the Department violated NEPA when it approved Keystone. (Doc. 140 at 20.) NEPA serves as the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA requires federal agencies to prepare a "detailed statement" for any "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The agency's detailed statement is known as an environmental impact statement ("EIS"), and must describe the environmental impacts of the proposed action. 42 U.S.C. § 4332(2)(C)(i), (ii).

The EIS must include a "full and fair discussion" of the effects of the proposed action, including those on the "affected region, the affected interests, and the locality." 40 C.F.R. §§ 1502.1, 1508.27(a). An agency also may be required to perform a supplemental analysis "if significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its

impacts" arise during the NEPA review. 40 C.F.R. § 1502.9(c)(1)(ii). The Court must ensure that the agency has taken a "hard look" at the environmental consequences of its decision. *Churchill Cnty. v. Norton*, 276 F.3d 1060, 1072 (9th Cir. 2001).

A. Purpose and Need Statement

Plaintiffs challenge the reasonableness of the Department's purpose and need statement. (Doc. 146 at 22.) Plaintiffs allege that the Department violated NEPA when it focused the purpose and need narrowly on TransCanada's private interests and improperly restricted the scope of the 2014 SEIS. *Id.*

NEPA requires agencies to "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. Courts afford agencies "considerable discretion to define the purpose and need of a project." *Westlands Water Dist. v. U.S. Dept. of Interior*, 376 F.3d 853, 866 (9th Cir. 2004). NEPA permits an agency to consider the needs and goals of the parties involved in the application. 40 C.F.R. § 1508.18(b)(4). The agency may consider the context of the action proposed, as well as the objectives of the private applicant. *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1085 (9th Cir. 2013). A purpose and need statement will fail, however, if it unreasonably narrows the alternatives in a manner that preordains the

outcome. *Id.* at 1085. The Court's duty requires it to review the purpose and need statement for reasonableness. *Westlands Water Dist.*, 376 F.3d at 866.

The purpose and need statement reasonably defines both TransCanada's and the Department's purposes. For TransCanada, "the primary purpose of [Keystone] is to provide the infrastructure to transport Western Canadian Sedimentary Basin ("WCSB") crude oil from the Canadian border, to existing pipeline facilities near Steele City, Nebraska, for onward delivery to Cushing, Oklahoma, and the Texas Gulf Coast area." DOSKXLDMT0005756. Most of the crude oil ultimately would be delivered to refineries in the Gulf Coast area. *Id.* TransCanada maintains contractual obligations to transport approximately 555,000 barrels per day ("bpd") of WCSB crude oil to the Gulf Coast area. *Id.* Keystone would serve to fulfill TransCanada's need to meet contractual demand, compete with other transportation options, and to provide refiners a reliable supply of light crude oil from the WCSB and the Bakken. *Id.* at 5757.

The Department's purpose stems from the President's authority to require permits for transboundary projects. Executive Order 13,337 delegates to the Secretary of State ("Secretary") the authority to receive applications for cross-border permits. 69 Fed. Reg. 25,299 (April 30, 2004). As part of this delegation, the Secretary must determine if issuance of a permit would serve the national interest. *Id.* at 25,300.

The Department's purpose, therefore, stems from Keystone's crossing of the international border between the United States and Canada. This crossing requires a cross-border permit. DOSKXLDMT0005757. The Department must put forth a ROD approving or denying TransCanada's cross-border permit application. *Id.* The Department needed to consider Keystone's application and whether it would serve the national interest. *Id.* The Department reached a national interest determination based on its evaluation of the Keystone's potential environmental, cultural, economic, and other impacts. *Id.*

No error exists in the Department's purpose and need statement. The Department possesses broad discretion to define the purpose of its actions. The Department may consider private interests as part of its purpose and need. *See Alaska Survival*, 705 F.3d at 1085. The Department reasonably stated that it sought to determine whether approval of the permit would serve the national interest. DOSKXLDMT0005757. The Department's purpose and need statement further proves reasonable when it considered both TransCanada's private interests and the Department's own requirements for issuing cross-border permits.

B. Adequacy of Alternatives

Plaintiffs next allege that the Department violated NEPA by failing to consider a reasonable range of alternatives in approving Keystone. (Doc. 146 at

24-25.) Plaintiffs allege that the Department unreasonably dismissed alternatives that did not satisfy TransCanada's purpose. Plaintiffs further contend that the Department failed to consider feasible, environmentally beneficial alternatives. *Id.*

1. Dismissal of Alternatives

Plaintiffs allege that the Department only analyzed alternatives that satisfied TransCanada's private needs. *Id.* at 23-24. NEPA requires that an agency "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14. An agency's consideration of alternatives is dictated by the "nature and scope of the proposed action." *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1538 (9th Cir. 1997). An agency need not analyze alternatives that do not meet the agency's purpose and need. *League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1071 (9th Cir. 2012). However, "[t]he existence of reasonable but unexamined alternatives renders an EIS inadequate." *Ctr. for Biological Diversity v. U.S. Dept. of Interior*, 623 F.3d 633, 643 (9th Cir. 2010) (quoting *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1065 (9th Cir. 1998)).

The Department adequately examined proposed alternatives and reasonably excluded those that did not meet the Project's purpose and need. The factors that the Secretary deemed relevant to the national interest included the following: "foreign policy; energy security; environmental, cultural, and economic impacts; and compliance with applicable law and policy." DOSKXLDMT0002493. The 2014 SEIS articulated and analyzed the proposed Project and the alternatives. The 2014 SEIS also provided a separate section that detailed the alternatives considered, but excluded from further consideration. *Id.* at 6082. The Department set forth reasonable explanations for why each excluded alternative did not meet the private needs of TransCanada. Further, the Department explained why it excluded the alternatives due to national interest factors including environmental and cultural resources, or increased spill risk. The Department's analysis of both the private interest of TransCanada and the Department's national interest considerations (i.e. environmental and cultural impacts) proves reasonable in its dismissal of alternatives.

2. Range of Alternatives

Plaintiffs next argue that the Department failed to analyze a reasonable range of alternatives because it did not consider more environmentally beneficial alternatives. (Doc. 146 at 24.) The alternatives requirement "is the heart of the environmental impact statement." 40 C.F.R. § 1502.14. An agency must

"[r]igorously explore and objectively evaluate all reasonable alternatives," including the "alternative of no action." 40 C.F.R. § 1502.14(c). The range of alternatives "must be bounded by some notion of feasibility." *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 551-52 (1978). The Court limits its review of the sufficiency of alternatives to whether the agency considered alternatives "necessary to permit a reasoned choice." *Cal. v. Block*, 690 F.2d 753, 767 (9th Cir. 1982).

The Department set forth four alternatives, including a no action alternative. DOSKXLDMT0005946. Each alternative chosen, including the no action alternative, comports with the Project's underlying purpose and need, as they address both the private interests of TransCanada and the Department's national interest. The 2014 SEIS's comparison of the chosen alternatives also provides the Department with a reasoned choice. *See Block*, 690 F.2d at 767. Accordingly, the range of alternatives analyzed by the Department proves reasonable.

3. No Action Alternative

Plaintiffs next allege that the Department failed to establish a true no action alternative. (Doc. 140 at 26.) NEPA requires a "full and fair discussion" of direct, indirect, and cumulative effects of the proposed action. 40 C.F.R. §§ 1502.1, 1502.16(a), (b), (h), 1508.25(c). NEPA also requires that "all reasonable

alternatives" to the proposed action, including no action be addressed. 40 C.F.R. § 1502.14(a), (d). Part of the no action alternative includes consideration of the "predictable actions of others." 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981).

The Department's no action alternative articulates four scenarios that would occur in the absence of the pipeline. The Status Quo Baseline scenario represents the first alternative. "Under the Status Quo Baseline, the proposed Project would not be built." DOSKXLDMT0006050. Accordingly, the 2014 SEIS concludes that the environmental conditions would remain the same under this scenario. *Id.* The Department also analyzed three intermodal options including a "Rail/Pipeline Scenario," "Rail/Tanker Scenario," and a "Rail direct to the Gulf Coast Scenario." *Id.* at 6061-81. The Department purported to analyze these scenarios as illustrations of the likely potential impacts associated with transport of crude oil in the absence of Keystone. *Id.* at 61.

Plaintiffs correctly note that NEPA obligates agencies to provide only a single no action alternative. *See* 40 C.F.R. § 1502.14(d). More importantly, however, the Court must consider whether providing more than one alternative proves arbitrary and capricious. Plaintiffs rely on *Conservation Nw. v. Rey*, 674 F.Supp.2d 1232 (W.D. Wash. 2009), in which parties challenged a forest management plan as part of the protracted litigation involving the spotted owl. The Forest Service analyzed two no action alternatives that represented its attempt to

reconcile the latest iteration of the forest management plan with the effects of recent litigation. *Id.* at 1246-47. The district court determined that having two no-action alternatives in the environmental analysis proved irrational when only one baseline could exist. *Id.* at 1247. The district court determined that NEPA required the Forest Service "to provide a single, comprehensive no-action alternative that accurately represented the status quo at the time of the 2007 Final Supplement." *Id.*

By contrast, Defendants argue that nothing in NEPA prohibits analysis of multiple no action scenarios. Defendants cite *Mont. Wilderness Ass'n v. McAllister* 658 F.Supp.2d 1249, 1264 (D. Mont. 2009); aff'd, 666 F.3d 549 (9th Cir. 2011); 460 Fed. App'x 667 (9th Cir. 2011), where parties challenged the Forest Service's revised travel management plan for the Gallatin National Forest. The Forest Service evaluated two alternatives as the "no action alternatives." *McAllister*, 658 F.Supp.2d at 1264. Alternative 1 considered "off road motorized vehicle as it was prior to 2001" when an off-highway vehicle ban had been approved. *Id.* Alternative 2 contemplated "the possibility that use generally will continue on road and trails being used" at the time of the proposed travel plan amendment. *Id.* The district court determined that each of the "no action alternatives" reasonably reflected the exemptions, discretion, and latitude in the Forest Service's current management policies. *Id.*

The Ninth Circuit agreed that having two no-action alternatives emphasized the validity of the Forest Service's alternatives analysis. 460 Fed. App'x at 671. The Ninth Circuit reasoned that the Forest Service had "constructed *two* no action alternatives" due to uncertainty as to how it ultimately would implement the ban on off-highway travel. *Id.* (emphasis in original). The Ninth Circuit deemed nothing unreasonable about the Forest Service's formulation of these no-action alternatives under those circumstances. *Id.* The same reasoning applies to the alternatives articulated by the Department. Uncertainty regarding what would happen in the absence of Keystone supported the discussion of three no action alternatives in the 2014 SEIS.

C. Keystone's Impact on Tar Sands Production

1. The Department's "Market Analysis"

Plaintiffs suggest that the "market analysis" section of the EIS improperly supports a conclusion that the same level of tar sands production would be inevitable regardless of whether the Department approved Keystone. Plaintiffs argue that this unsubstantiated assumption led to an arbitrary conclusion that Keystone would have no impact on the world's climate. (Doc. 140 at 20.) NEPA's "full and fair discussion" requirement directs an agency to look at a Project's "direct" and "indirect" effects. 40 C.F.R. § 1508.8(a)-(b). Indirect effects include

those "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b).

Defendants argue, and the Court agrees, that the 2014 SEIS contained a full and fair discussion of the market demand for oil. (Doc. 173 at 31.) The 2014 SEIS set forth 140 pages of modeling why Keystone would not affect significantly the rate of extraction of oil from Canadian oil sands. *Id.* at 36 (citing DOSKXLDMT0005760-5908). The 2014 SEIS determined that the pipeline would not affect significantly oil extraction in Canada. As a result of this determination, the 2014 SEIS reasoned that the emissions associated with transporting 830,000 bpd of tar sands crude oil (Keystone's capacity), would occur regardless of the pipeline's existence. To reach this conclusion, the 2014 SEIS analyzed numerous factors, including the price of oil, transportation costs, and supply and demand for oil. DOSKXLDMT0005760.

The WCSB produced 1.8 million bpd of crude oil when the Department issued the 2014 SEIS. The 2014 SEIS estimated that production would increase to at least 5 million bpd by 2030. *Id.* at 5789. The 2014 SEIS further concluded that increased transportation capacity of oil from Canada by other pipelines and rail transportation would meet demand. *Id.* at 5803. The 2014 SEIS reasoned that existing pipeline capacity stood at 3.3 million bpd in 2014. The 2014 SEIS also concluded that rail capacity supported 700,000 bpd, and estimated that rail capacity

would increase to 1.1 million bpd by the end of 2014. *Id.* at 5804. Defendants argue that rail transportation would fill any void in crude oil transportation in the absence of construction of expanded pipeline capacity. (Doc. 173 at 35.)

The Court must limit its review to determining whether the 2014 SEIS took a "hard look" at the effects of Keystone on oil markets. *See Norton*, 276 F.3d at 1072. The Department met this "hard look" requirement in its market analysis and its conclusion that Keystone would not impact the rate of tar sands extraction. The Department provided sufficient analysis that went beyond mere assumptions of the rate of oil sands extraction rates in 2014. The Court finds no error in the Department's 2014 analysis of the rate of tar sands extraction and its impact on climate change.

2. New Information Since 2014

Plaintiffs argue, however, that significant new information has come forth since 2014 regarding oil markets, rail transportation, and greenhouse gas emissions that requires a supplement of the Project's impacts. (Doc. 140 at 35.) NEPA imposes a continuing duty on federal agencies to supplement new and relevant information. *Price Rd. Neighborhood Ass'n v. U.S. Dep't of Transp.*, 113 F.3d 1505, 1508-09 (9th Cir. 1997). NEPA requires a supplemental EIS if an "agency makes substantial changes in the proposed action that are relevant to environmental

concerns; or there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(i)-(ii). An agency is not required, however, to "supplement an EIS every time new information comes to light after the EIS is finalized." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373 (1989). A supplement proves necessary "if the new information [presented] is sufficient to show the remaining action will 'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered[.]" *Id.* at 374 (quoting 42 U.S.C. § 4332(2)(C)).

a. Change in Oil Markets

Plaintiffs first argue that the Department failed to consider a decrease in oil prices in the 2014 SEIS. (Doc. 140 at 27.) The 2014 SEIS analyzed the possibility of moderate fluctuations in oil prices and the possibility of a low oil price scenario. The 2014 SEIS failed to address, however, the significant changes in oil prices that have occurred since 2014. This lack of analysis fails to satisfy NEPA's hard look requirement. The 2014 SEIS stated that "pipeline constraints are unlikely to impact production given expected supply-demand scenarios, prices, and supply costs. Over the long term, lower-than-expected oil prices could affect the outlook for oil sand production[.]" DOSKXLDMT0005895. The Department acknowledges that a

significant drop in oil prices materially could change the analysis. The 2014 SEIS conditioned much of its analysis, however, on the price of oil remaining high.

The record demonstrates the need to supplement. The 2014 SEIS stated the price of crude oil would range from $100 per barrel to $140 per barrel over twenty years. *Id.* at 5864. The 2014 SEIS predicts the price of oil needed to fall within the range of $65-$75 per barrel in order for Keystone to break even. *Id.* at 5767. The 2014 SEIS concedes that Keystone would be affected by supply costs if the oil prices fell within or below that range. *Id.*

The United States Energy Information Administration predicts that the price of oil likely will remain below $100 for decades. *Id.* at 1849. The record shows further that a dramatic drop in oil prices occurred soon after publication of the 2014 SEIS that lowered the price to nearly $38 per barrel. The Department suggests that the current price of oil stands at roughly $60 per barrel. (Doc. 173 at 49.) This drop constitutes more than a mere fluctuation in oil prices.

Plaintiffs also present evidence that the Environmental Protection Agency called upon the Department to revisit the EIS's conclusions after the 2015 oil prices dropped. (Doc. 140 at 36 (citing DOSKXLDMT0000973-74).) Oil prices have remained below the "break-even" numbers established in the 2014 SEIS. This new and relevant information bears upon the Department's earlier analysis in the

2014 SEIS. The Court makes no suggestion of whether this information should alter the Department's analysis. Such an analysis proves material, however, to the Department's consideration of Keystone's impact on tar sands production.

b. Transportation of Crude Oil by Rail

Plaintiffs next argue that the 2014 SEIS incorrectly concluded that significant amounts of crude oil would be transported by rail in the absence of Keystone. (Doc. 140 at 37.) Plaintiffs assert that the 2014 SEIS wrongly predicted the amount of tar sands that would be shipped by rail, and that new federal regulations requiring updated train safety measures require a supplement. Defendants contend that only immaterial changes in crude by rail have occurred since 2014. (Doc. 173 at 77.) The 2014 SEIS predicts that loading capacity would increase from 700,000 bpd to 1.1 million bpd. DOSKXLDMT0005805. The ROD estimates that current rail loading capacity will exceed 1,075,000 bpd. *Id.* at 2504. These numbers do not rise to the level of a material discrepancy in capacity.

Plaintiffs argue that tar sands crude oil has not been moving by rail at a significant rate. (Doc. 140 at 37.) The rate of transportation fails to present a material issue that would require a supplement. The capacity to transport the amount predicted in the 2014 SEIS represents the critical issue. Plaintiffs have the burden of showing that transportation capacity materially differs from its capacity

in 2014. Plaintiffs have presented no evidence of a significant difference between current capacity and the 2014 SEIS projections.

c. Greenhouse Gas Emissions

Plaintiffs next allege that the Department violated NEPA by failing to evaluate the cumulative climate impacts of Keystone in combination with other pipelines. (Doc. 140 at 27-28.) Plaintiffs argue that the 2014 SEIS viewed Keystone in isolation. Plaintiffs allege that this isolated view failed to account for the expansion of the Alberta Clipper pipeline from 450,000 bpd to 880,000 bpd, and failed to use updated emissions modeling. (Doc. 140 at 29.)

The Department announced in 2013 that it would prepare an EIS for the Alberta Clipper pipeline expansion. The Department issued a permit for the Alberta Clipper expansion in 2017. When Keystone was proposed, Plaintiffs urged the Department to evaluate the cumulative climate impacts of Keystone and the Alberta Clipper expansion in the Keystone 2014 SEIS. The Department acknowledged the proposed expansion of the Alberta Clipper in the Keystone 2014 SEIS. DOSKXLDMT0005805. The Department failed, however, to analyze the cumulative greenhouse gas emissions impacts of both pipelines. The Department instead limited its analysis of emissions to the capacity of Keystone alone.

The Department analyzed the cumulative emissions of Keystone and the Alberta Clipper in the Alberta Clipper EIS. The Alberta Clipper EIS also used the updated Greenhouse Gas, Regulated Emissions, and Energy Use in Transportation ("GREET") model to analyze greenhouse gas emissions. *Id.* at 2501. The GREET model results in estimates of greenhouse gas emissions that are up to 20% higher than the model used in the 2014 SEIS. Plaintiffs argue that the development of the Alberta Clipper expansion, and the new GREET model constitute new and relevant information that warrants supplement. (Doc. 140 at 42.)

NEPA requires that an EIS consider the cumulative impacts of the proposed action. 40 C.F.R. § 1508.7. "Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-Federal) or person undertakes such other actions." *Id*. The cumulative impacts analysis must do more than merely catalogue relevant projects in the area.

Cumulative impacts instead must give sufficiently detailed analysis about these projects and the differences between them. *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 971 (9th Cir. 2006). This provision requires an agency to discuss and analyze in sufficient detail to assist "the decisionmaker in deciding whether, or how, to alter the program to lessen cumulative impacts." *Churchill*

Cnty., 276 F.3d at 1080 (quoting *City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1160 (9th Cir. 1997)). Further, the environmental consequences must be considered together when several projects that may have cumulative environmental impacts are pending concurrently. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976).

Defendants failed to analyze cumulative climate impacts along with the pending Alberta Clipper expansion. The Court considers the Department's analysis of Keystone in the Alberta Clipper EIS as a cumulative action. *See* 40 C.F.R. § 1508.7. The Department similarly should have analyzed the Alberta Clipper pipeline's emissions in the Keystone SEIS. The Department argues that the Keystone SEIS obtained a full picture of the pipeline's climate change impacts. (Doc. 173 at 43.) The Department also admits, however, that the 2014 SEIS failed to analyze greenhouse gas emissions associated with the Alberta Clipper. (Doc. 173 at 50-51.) The Department thus failed to paint a full picture of emissions for these connected actions, and, therefore, ignored its duty to take a "hard look." *See Norton*, 276 F.3d at 1072.

The Department argues that the cumulative analysis in the Alberta Clipper EIS obviated the need for it to conduct a separate cumulative analysis for Keystone. The Department equates this omission to harmless error. In determining whether a NEPA violation proves harmless, a court considers "whether the error

'materially impeded NEPA's goals – that is, whether the error caused the agency not to be fully aware of the environmental consequences of the proposed action, thereby precluding informed decisionmaking and public participation, or otherwise materially affected the substance of the agency's decision.'" *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of Navy*, 860 F.3d 1244, 1252 (9th Cir. 2017) (quoting *Idaho Wool Growers Ass'n v. Vilsack*, 816 F.3d 1095, 1104 (9th Cir. 2016)).

The Keystone SEIS indicated that greenhouse gas emissions associated with the pipeline would range annually from 1.3 to 27.4 $MMTCO_2e$. The Alberta Clipper EIS determined that combined greenhouse gas emissions associated with both pipelines would range annually from 2.1 to 49.9 $MMTCO_2e$. A difference of this magnitude cannot be dismissed simply as harmless error. The error left out significant information from the climate analysis in the Department's possession. The Department should have considered the cumulative impacts of both projects. The Court recognizes the Department's decision to issue the permit regarding the Alberta Clipper expansion. The Court cannot assume without reasoned analysis, however, that the Department would reach the same conclusion for the Keystone permit. The Department must supplement this analysis to include the same information. Further, the Department must supplement the environmental analysis

to include the same updated GREET model analysis used in the Alberta Clipper EIS.

D. Impacts in Canada

Plaintiffs next argue that the Department violated NEPA by failing to consider sufficiently potential environmental impacts in Canada. (Doc. 146 at 28.) The 2014 SEIS explains that Keystone would transport heavy crude oil 1,204 miles from its existing facilities in Hardisty, Alberta, Canada to Steele City, Nebraska. In total, the Project would consist of approximately 327 miles of pipeline in Canada, and 875 miles in the United States. DOSKXLDMT0005752. The 2014 SEIS analyzed the pipeline's impacts along the 875 miles from the Canadian border to Steele City.

The 2014 SEIS contained no comprehensive analysis of the impacts in Canada. The 2014 SEIS provided a section detailing "extraterritorial concerns" that explained the Canadian government's independent environmental review. *Id.* at 7358. The Department included information of potential impacts in Canada "as a matter of policy." *Id.* Defendants argue that the language of NEPA does not expressly extend NEPA's applications outside of the territorial United States. (Doc. 173 at 55.) Defendants also urge that the 2014 SEIS's incorporation of the

Canadian government's analysis of the impacts within Canada fulfills its obligations under NEPA. *Id.* at 60.

Plaintiffs rely on *Backcountry Against Dumps v. Chu*, 215 F.Supp.3d 966 (S.D. Cal. 2015), to support NEPA's extraterritorial application. The district court in *Backcountry* examined the validity of a Department of Energy ("DOE") cross-border permit to connect a transmission line across the United States – Mexico border. *Id.* at 972. The transmission line would run approximately 1.65 miles in total, including a 0.65 mile stretch in the United States. *Id.* The terminus of the project was to be a planned wind turbine facility in Mexico. *Id.* The court considered (1) whether the extraterritorial effects of the proposed transmission line must be considered, and (2) whether the effects of the wind project itself in both Mexico and the United States must be considered. *Id.* at 980.

The district court determined that Congress intended NEPA to apply extraterritorially. *Id.* The district court in a subsequent order regarding remedies recognized, however, that the government of Mexico had conducted significant environmental review of that portion of the project within Mexico. *Backcountry Against Dumps v. Perry,* 2017 WL 3712487, at *3 (S.D. Cal. Aug. 29, 2017). The district court determined that DOE could attach and incorporate by reference any environmental documents prepared by the government of Mexico to satisfy its NEPA obligations. *Id.*

The Canadian National Energy Board ("CNEB") provided substantial environmental review of those portions of Keystone within Canada. The 2014 SEIS detailed that review. DOSKXLDMT0007358-86. CNEB conducted analyses, identified issues, held hearings, and issued findings. *Id.* The CNEB identified potential adverse environmental effects, including wildlife habitat, groundwater impacts, and greenhouse gas emissions. *Id.* at 7362-63. The CNEB further provided mitigation measures. *Id.* The CNEB review process also involved participation by impacted Tribal Nations. *Id.* at 7379.

CNEB's involvement in Keystone, its environmental review within Canada, and the incorporation of that review into the 2014 SEIS proves material. NEPA procedures ensure that the agency makes environmental information available to the public. 40 C.F.R. § 1500.1(b). The 2014 SEIS's incorporation of the Canadian government's environmental review sufficiently informed officials and citizens of impacts in Canada before the Department made a decision and took action on Keystone. *See Id.*

E. Other Environmental Impacts

Plaintiffs allege three additional areas where the Department failed to provide a "full and fair discussion." These areas include Keystone's impacts to cultural resources, the adequacy of comment responses, and oil spills.

1. Cultural Resources

NEPA requires agencies to analyze impacts to cultural resources. 40 C.F.R. §§ 1502.16(g), 1508.8. Plaintiffs argue that Keystone poses risks of direct damage to cultural resources within the Project area. (Doc. 146 at 36.) Plaintiffs contend that the social, cultural, and health impacts run the length of Keystone, and that over 1,000 acres remain unsurveyed for potential cultural resources. *Id.*

The record reflects that the Department entered into an agreement with other federal agencies and state historic preservation officers. DOSKXLDMT0006553-54. This agreement governs identification of historic properties and consultation regarding potential adverse impacts. *Id*. The Department also consulted with Indian tribes, federal agencies, and local governments regarding cultural resources. *Id.*

The 2014 SEIS identified 397 cultural resources that may be affected by the Project. *Id.* at 6521. The 2014 SEIS states, however, that "[a]s of December 2013, approximately 1,038 acres remained unsurveyed and are the subject of ongoing field studies." *Id.* at 6522. The Department offered no supplemental information on the unsurveyed acres before it issued the 2017 permit. The Department describes the surveys as "ongoing." (Doc. 173 at 68.) The Department contends, therefore, that it will work to identify cultural resources and mitigate harm to them throughout the process. This explanation proves outdated.

Neither party has provided information regarding whether the Department, any other federal agency, state historic officer, or local government surveyed the remaining 1,038 acres between 2014 and 2017. The 2014 SEIS fails to provide a "full and fair discussion of the potential effects of the project to cultural resources" in the absence of further information on the 1,038 unsurveyed acres. *See Native Ecosystems Council v. U.S. Forest Serv., an Agency of U.S. Dept. of Agric.*, 418 F.3d 953, 965 (9th Cir. 2005). "NEPA ensures that [agencies] will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh*, 490 U.S. at 371. The Department appears to have jumped the gun when it issued the ROD in 2017 and acted on incomplete information regarding potential cultural resources along the 1,038 acres of unsurveyed route. The Department must supplement the information on the unsurveyed acres to the 2014 SEIS's cultural resources analysis, in order to comply with its obligations under NEPA. *See* 40 C.F.R. §§ 1502.16(g), 1508.8.

2. Comments

Plaintiffs next argue that Defendants failed to respond adequately to public comments that it received on the Draft 2014 SEIS. (Doc. 146 at 44.) NEPA requires a federal agency to solicit public comments on draft environmental impact statements and consider comments both individually and collectively. 40 C.F.R. § 1504(a). The affected agency possesses the following options to respond to those

comments: modifying alternatives; developing and evaluating alternatives not previously given serious consideration; supplementing, improving, or modifying its analyses; making factual corrections; or, explaining why the comments do not warrant further agency response. 40 C.F.R. § 1504(a)(1)-(5). The degree that the comments bear "on the environmental effects of the proposed action" shapes the scope of an agency's responsibility to respond to comments. *Block*, 690 F.2d at 773.

The 2014 SEIS adequately addressed the comments. The 2014 SEIS first organized comments into themes based on subject matter. The 2014 SEIS dedicated a significant portion to responding to the categories and opposing viewpoints. DOSKXLDMT0007723. The Department was under no duty to set forth full length views of its disagreements. *See Block*, 690 F.2d at 773. The Department did not violate NEPA in its comments analysis.

3. Oil Spills

Plaintiffs next allege that the Department failed to consider new information regarding oil spills. Plaintiffs contend that numerous oil pipeline spills have occurred since the 2014 SEIS. (Doc. 140 at 39.) Plaintiffs argue that these new spills indicate a higher likelihood of spills from Keystone than the Department had anticipated in 2014. *Id.* Plaintiffs also argue that new studies showing a greater

difficulty in cleaning up spills warrant a supplement. *Id.* at 40. Defendants note that the 2014 SEIS discussed twelve leaks from Keystone I that occurred in its first year of operation. (Doc. 173 at 78.) Defendants further contend that the mitigation measures provided in the 2014 SEIS adequately address any concern raised by the new studies. (Doc. 171 at 81.)

The 2014 SEIS predicts no more than 1.1 spills from Keystone every ten years. DOSKXLDMT0012067-68. The 2014 SEIS relies on Pipeline and Hazardous Material Safety Administration ("PHMSA") data from 2002 to 2012 to reach its conclusions. *Id.* at 11317-19. During this period, PHMSA's data indicated that there were 1,692 spill or leak incidents nationwide. *Id.* at 11319. Plaintiffs cite eight major spills that have occurred between 2014 and 2017, including a major spill on Keystone I. *Id.* at 1239. Plaintiffs argue that the Department should have considered this more recent information in its 2017 permitting decision. (Doc. 140 at 39.) Plaintiffs argue further that the Department failed to analyze a new study regarding the difficulty of cleaning up tar sands crude oil spills. (Doc. 140 at 40.)

The ROD acknowledges that "several new studies related to cleanup of diluted bitumen have been published." DOSKXLDMT0002506. The ROD cites a study by the National Academy of Sciences ("NAS") that Plaintiffs argue should have been evaluated in the 2014 SEIS. (Doc. 140 at 40.) NAS conducted the study at the direction of Congress. Specifically, Congress asked NAS to address

"whether the transport of diluted bitumen in pipelines has potential environmental consequences that are sufficiently different from those of commonly transported crude oils to warrant changes in regulations governing spill response planning, preparedness, and cleanup." *Id.* at 1379. The study found that diluted bitumen presents more challenges for cleanup response than other types of oil moved by pipeline. *Id.* at 1391. The study also determined that responders need more training and better communication to address these spills adequately. *Id.*

The major spills that occurred between 2014 and 2017 qualify as significant. The Department would have evaluated the spills in the 2014 SEIS had the information been available. Further, the risk of spills likely would affect Keystone's potential impact on other areas of the ROD's analysis, including risks to water and wildlife. These new spills and the information provided by them warrant an update.

The ROD similarly fails to show how the 2014 SEIS adequately addressed the NAS study regarding tar sands oil. The ROD merely asserts that Keystone has agreed to consult with local emergency responders and update its mitigation response plans as new information becomes available. This conclusory statement fails to meet NEPA's "hard look" requirement. The absence of this information from the 2014 SEIS's mitigation measures demonstrates that the agency acted

upon incomplete information in setting forth its mitigation measures. *Marsh*, 490 U.S. at 371. The Department must supplement this information.

Plaintiffs also argue that the Department failed to analyze sufficiently potential impacts of Keystone's spills and leaks to water resources. The Court's determination that the Department must supplement information regarding spills allows the Department to address how the updated information on spills will impact water resources.

F. The Department's Change in Course Between 2015 and 2017

An agency must provide a detailed justification for reversing course and adopting a policy that "rests upon factual findings that contradict those which underlay its prior policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Agency action qualifies as "arbitrary and capricious if the agency has . . . offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Org. Vill. of Kake v. U.S. Dept. of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

1. Compliance with the APA standard for a policy change

The United States Supreme Court established a four part test in *Fox* to determine whether a policy change complies with the APA: (1) the agency displays "awareness that it is changing position;" (2) the agency shows that "the new policy is permissible under the statute;" (3) the agency "believes" the new policy is better; and (4) the agency provides "good reasons" for the new policy. *Fox*, 556 U.S. at 515-16; *See also Kake*, 795 F.3d at 966. The new policy must include "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy," if the new policy rests upon factual findings that contradict those underlying its prior policy. *Id.*

The Ninth Circuit examined in *Kake* whether the United States Department of Agriculture ("USDA") properly reversed course after having declined to exempt the Tongass National Forest in Alaska from the "Roadless Rule" in a 2001 ROD. *Kake*, 795 F.3d at 967. In 2003, "[on] precisely the same record," USDA concluded that the "social and economic hardship to Southeast Alaska outweigh[ed] the potential long-term ecological benefits of the Roadless Rule" *Id.* (citing 68 Fed. Reg. 75,136, 75,141 (Dec. 30, 2003) (internal citations omitted)). The Ninth Circuit determined that the USDA had satisfied the first three elements of *Fox*: (1) USDA was aware it was changing course; (2) USDA determined that the new policy was permissible under the statutes; and (3) USDA believed the new

policy was better. *Kake*, 795 F.3d at 967. USDA failed on the fourth element, however, when it provided no "good reason" for adopting the new policy. *Id.*

Here, as in *Kake*, the central issue involves whether the 2017 ROD rests on factual findings that contradict those in the 2015 ROD. And if the 2017 ROD's factual findings contradict the 2015 ROD, the Court must analyze whether the 2017 ROD contains a "reasoned explanation." *Id.* at 967.

2. The Department's Conclusions on Climate Change

The Department denied the permit in its 2015 ROD. The Department relied heavily on the United States's role in climate leadership. DOSKXLDMT0001188. The Department issued a new ROD in 2017. The new ROD noted that "there have been numerous developments related to global action to address climate change, including announcements by many countries of their plans to do so" since the 2015 ROD. *Id.* at 2518. Moreover, the new ROD suggested that "a decision to approve [the] proposed Project would support U.S. priorities relating to energy security, economic development, and infrastructure." *Id.* The Department argues that this about-face constitutes a mere policy shift, and that on its own, cannot be found arbitrary and capricious. (Doc. 173 at 88.)

The Department possesses the authority to give more weight to energy security in 2017 than it had in 2015. *See Kake*, 795 F.3d at 968. *Kake* and *State*

Farm make clear, however, that "even when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation." *Id.* The Department did not merely make a policy shift in its stance on the United States's role on climate change. It simultaneously ignored the 2015 ROD's Section 6.3 titled "Climate Change-Related Foreign Policy Considerations." DOSKXLDMT0001182.

Section 6.3 of the 2015 ROD determined that the United States's climate change leadership provided a significant basis for denying the permit. The Department acknowledged science supporting a need to keep global temperature below two degrees Celsius above pre-industrial levels *Id.* at 1182-83. The Department further recognized the scientific evidence that human activity represents a dominant cause of climate change. *Id.* The Department cited trans-boundary impacts including storm surges and intense droughts. *Id.* And finally, the Department accepted the United States's impact as the world's largest economy and second-largest greenhouse gas emitter. *Id.*

The 2017 ROD initially tracked the 2015 ROD nearly word-for-word. The 2017 ROD, without explanation or acknowledgment, omitted entirely a parallel section discussing "Climate Change-Related Foreign Policy Considerations." The 2017 ROD ignores the 2015 ROD's conclusion that 2015 represented a critical time for action on climate change. The 2017 ROD avoids this conclusion with a

single paragraph. The 2017 ROD simply states that since 2015, there have been "numerous developments related to global action to address climate change, including announcements by many countries of their plans to do so." *Id.* at 2518. Once again, this conclusory statement falls short of a factually based determination, let alone a reasoned explanation, for the course reversal. "An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate." *Fox*, 556 U.S. at 573.

The Department's 2017 conclusory analysis that climate-related impacts from Keystone subsequently would prove inconsequential and its corresponding reliance on this conclusion as a centerpiece of its policy change required the Department to provide a "reasoned explanation." *See Kake*, 795 F.3d 968. The Department instead simply discarded prior factual findings related to climate change to support its course reversal.

II. Did the Department and FWS Violate the ESA and APA in Approving Keystone?

A. The ESA

Section 7(a)(2) requires agencies, in consultation with the expert wildlife agency (here, the U.S. Fish and Wildlife Service ("FWS")), to ensure "that any action authorized, funded, or carried out by [an] agency . . . is not likely to

jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat[.]" 16 U.S.C. § 1536(a)(2), (4). To "jeopardize" means to "reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02.

The agencies must initiate formal consultation if the actions may adversely affect listed species. 50 C.F.R. § 402.14. Formal consultation requires a detailed inquiry known as a Biological Opinion ("BiOp"). *Id.* The BiOp analyzes whether the action likely would cause jeopardy to listed species. 16 U.S.C. § 1536(b)(3)(A). The agencies must use "the best scientific and commercial data available" to reach their conclusions. 16 U.S.C. § 1533(b)(1)(A). The best available data requirement prohibits an agency from "disregarding available scientific evidence that is in some way better than the evidence [it] relies on." *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1080 (9th Cir. 2006) (quoting *Sw. Ctr. For Biological Diversity v. Babbit*, 215 F.3d 58, 60 (D.C. Cir. 2000)). FWS "cannot ignore available biological information." *Id.* (quoting *Conner v. Burford*, 848 F.3d 1441, 1454 (9th Cir. 1988)).

B. Factual Background

The Department entered into formal consultation in 2012 with FWS under ESA Section 7. The Department issued its Biological Assessment ("BA") in December of 2012. The Department identified thirteen federally listed threatened or endangered species in the proposed Project area. DOSKXLDMT0002510. The FWS issued a BiOp to the Department in May 2013 regarding seven of the thirteen species. *Id.* The species discussed included the American burying beetle, endangered black-footed ferret, interior least tern, whooping crane, pallid sturgeon, piping plover, and western prairie fringed orchid. *Id.*

Since 2013, FWS has listed as threatened the northern long-eared bat and the rufa red knot. FWS identified the American burying beetle as the only listed species likely to be affected adversely by Keystone after it was proposed again in 2017. *Id.* FWS issued a concurrence to the 2013 BiOp. FWS concluded that consultation did not need to be reinitiated. *Id.* The Nebraska PSC approved the Mainline Alternative Route ("MAR") in Nebraska, however, on November 20, 2017. Accordingly, the Department reopened consultation with FWS on January 31, 2018, regarding the MAR. (Doc. 179 at □ 3.)

Plaintiffs argue that the Department violated the ESA and APA when it approved Keystone. Plaintiffs allege that the Department failed to use the best available science to assess harm to whooping cranes, interior least terns, and piping plovers. Plaintiffs allege that the Department failed to address oil spills and

extraterritorial impacts. Plaintiffs allege finally that the Department failed to analyze reasonably impacts to the black-footed ferret, rufa red knot, northern long-eared bat, and western prairie fringed orchid.

C. Whooping Crane

The whooping crane is a migrating bird that occurs only in North America. FWS000000000663. FWS listed the whooping crane as endangered on March 11, 1967. FWS estimated the total wild population in 2006 to be 338 birds. *Id.* Studies show that the whooping crane population must reach at least 1,000 individuals to be genetically viable. *Id.*

The whooping crane migrates throughout much of Keystone's proposed area. *Id.* The BA identifies power lines associated with Keystone as collision hazards to whooping cranes. *Id.* at 670. The BA determined, however, that Keystone's commitment to follow recommended conservation measures would avoid and minimize disturbance of migrating whooping cranes. *Id.* at 674. The BA ultimately concluded that the Project was not likely to adversely affect the whooping crane. *Id.*

Plaintiffs argue that FWS's consideration of the impacts on the whooping crane failed to satisfy the "best available science" standard of ESA Section 7. Plaintiffs argue that neither the BA, nor FWS's concurrence analyzed the best

available science, including telemetry data. *Id.* at 56. Defendants argue that the telemetry data does not impact the adequacy of the agencies' conclusions. (Doc. 173 at 92.)

1. The Telemetry Data Does Not Undermine the Agencies' Analysis

The Department relied on historical sightings data to make its determinations regarding the whooping crane. Historical sightings data includes over fifty years of observations compiled by FWS regarding whooping crane migration. (Doc. 153-1 at 31.) This data shows the boundaries of the whooping crane migration corridor and recurring stop-over locations. Both parties agree that historical sightings data represents the best available science. *Id.* The parties disagree, however, as to whether use of telemetry data would alter the Department's analysis. Plaintiffs argue that the 2014 SEIS underestimated the risk of collisions with power lines without the use of telemetry data. (Doc. 140 at 59.)

The United States Geological Survey ("USGS") maintains telemetry data through the Whooping Crane Tracking Partnership's ("WCTP") Telemetry Project. (Doc. 118 at 7.) The Telemetry Project collects telemetry data from radio-tagged cranes. *Id.* The WCTP captures whooping cranes and attaches a transmitter to their leg. This transmission sends a signal received by satellite in a frequency of every six hours. *Id.* The telemetry data comes from 20% of the whooping crane

population that was radio-tagged. *Id.* at 8. The Telemetry Project seeks to document whooping crane movement within their migratory corridor and to gather behavioral data. *Id.*

Defendants' expert asserts that the use of telemetry data has numerous limitations and flaws. Defendants' expert states, for example, that the WCTP collected telemetry data over a short span of time (2010-2014), whereas the historic sightings date back as far as the 1950s. (Doc. 128-4 at 18.) Defendants' expert also opines that the telemetry data points may represent the same individual bird traveling within a small area on one stopover. *Id.* Further, telemetry data does not account for altitude, so it may not distinguish between birds flying at lower altitudes in migration, or at elevations where altitude was inconclusive. *Id.*

Importantly, Plaintiffs' expert does not explain how the telemetry data undermines the historical sightings data used by the Department. Plaintiffs' expert instead "observed that several of the historical [FWS] sightings . . . were at the same locations as recent telemetry data records. In fact the telemetry data only identified a few locations . . . that were not identified using the historical data." (Doc. 118 at 16.) Plaintiffs' expert concludes that the telemetry data confirms site fidelity observed in historical sighting data. *Id.* at 16.

"The determination of what constitutes the best scientific data available belongs to the agency's special expertise." *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014) (internal quotations omitted). Accordingly, an agency possesses discretion to determine the best available science. Further, both parties' experts conclude that telemetry data confirms, rather than undermines sightings data. At best, the telemetry data provides additional information regarding how recent specific areas are used by whooping cranes. (Doc. 118 at 15.) Plaintiffs fail to show how this information would change the agencies' analysis. The agencies' failure to consider the telemetry data in their analysis does not provide a sufficient basis to conclude that the agencies acted arbitrarily and capriciously.

2. The Conservation Measures Are Reasonable

Plaintiffs also argue that the conservation measures set forth in the BA are insufficient. (Doc. 140 at 64-65.) Plaintiffs question the ability of FWS to implement the measures, and their effectiveness. *Id.* The conservation measures, however, include avoiding designated critical habitat, applying a five-mile buffer to high-use areas, and burying power lines within one mile of suitable migration habitat. FWS000000000674. Conservation measures also include marking new lines and installing bird flight diverters. *Id.* Site-specific consultations with electric utilities are also required to minimize impacts to whooping cranes. *Id.* at 769.

These measures were adequately evaluated and explained by FWS. Plaintiffs have not provided a sufficient basis for the Court to divert from the expertise FWS possesses to recommend and implement conservation measures. *See Jewell*, 747 F.3d at 602.

D. Interior Least Tern and Piping Plover

Plaintiffs argue that FWS failed to analyze adequately impacts to endangered interior least terns and threatened piping plovers from increased raptor predation attributable to the Project. (Doc. 140 at 70.) The BA concludes that power line routes associated with Keystone likely would attract raptors. FWS000000000660. The BA proposes the use of perch deterrents to be installed in coordination with FWS. *Id.* at 2069-70. The BA determines that "[p]rotection measures could be implemented by electrical service providers to minimize raptor perching in accordance with the Avian Power Line Interaction Committee ("APLIC"), Suggested Practices for Avian Protection on Power Lines (APLIC 1996)." *Id.* at 654. Plaintiffs argue that a 2006 edition of the APLIC contradicted BA's conclusion. The 2006 edition recognizes that perch discouragers intend "to move birds from an unsafe location to a safe location and do not prevent perching." (Doc. 143-1 at 36.) The 2006 APLIC further determines that the use of perch deterrents is not recommended to prevent predation. *Id.*

The raptor predation protection measures that reference the 1996 guidance address dangers to black-footed ferrets, rather than dangers to terns or plovers. FWS000000000654. The use of this guidance would not apply to Plaintiffs' arguments regarding terns and plovers. The 2006 guidance does not disavow the use of perch deterrents. (Doc. 143-1 at 17.) The guidance simply cautions that perch deterrents do not prevent perching, but are intended to manage where birds perch. *Id.* In the end, the guidance suggests that electric utilities and agencies work together to identify predation risk to sensitive species. *Id.* Finally, the BA discusses other conservation measures, including pre-construction surveys and rerouting of power lines. These steps and other measures should be coordinated with FWS. FWS000000000719. These proposed conservation measures prove reasonable under the circumstances.

E. Oil Spills

Plaintiffs next argue that the Department and FWS failed to consider properly the potential impacts of pipeline spills on listed species. (Doc. 146 at 52.) Plaintiffs argue that the agencies failed to account for potential spill risk to listed species other than the American burying beetle. *Id.* at 55. The Department must supplement new and relevant information regarding the risk of spills. The 2014 SEIS, the BA, and the BiOp relied on outdated information regarding potential oil spills and the agencies must account for the supplemental information. The

Department and FWS must use the "best scientific and commercial data available" in all respects, including the effects of potential oil spills on endangered species. 16 U.S.C. § 1536(a)(2). Section 7 requires consultation with FWS to ensure the proposed action is "not likely to jeopardize the continued existence of any endangered species . . . " 16 U.S.C. § 1536(a)(2). The Department must consider the new information regarding oil spills in the 2014 SEIS with respect to potential effects on listed species. The Department must also coordinate with FWS in making its determination.

F. Extraterritorial Impacts

Plaintiffs argue that the Department failed to initiate consultation with regard to listed species, including potential impacts to Whooping Cranes in Canada. (Doc. 146 at 56.) The "action area" determines the geographic scope of ESA consultation. The ESA defines the "action area" as "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." 50 C.F.R. § 402.02. The determination of an action area requires an agency to apply scientific methodology. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 902 (9th Cir. 2002).

The action area as defined by FWS stretches from the border of the United States with Canada to Steele City, Nebraska. FWS000000002085. Plaintiffs

contend that consultation should have occurred along the entire Project, including within Alberta, Canada. Plaintiffs provide no authority that directs the ESA's application outside of the United States. Plaintiffs instead cite the ESA's statutory language requiring agencies to consider direct and indirect impacts to species in "all areas to be affected." 50 C.F.R. § 402.02.

No evidence in the record indicates that Congress intended agencies to engage in ESA consultation related to permitting decisions made in another country. To the contrary, the ESA limits required consultation to "affected States." 16 U.S.C. § 1536(a)(2). Absent contrary intent, legislation of Congress applies only within the territorial jurisdiction of the United States. *Morrison v. Natl. Australia Bank Ltd.*, 561 U.S. 247, 255 (2010). Plaintiffs have failed to indicate any contrary intent that the statutory language of Section 7 should apply outside of the United States.

The Court notes that the government of Canada separately requires environmental review of Keystone's impacts. CNEB conducted an environmental review of Keystone's Alberta, Canada section that includes evaluation of listed species, mitigation plans, and protections. This evaluation includes impacts to the endangered whooping crane. The Court finds no support in the record to apply Section 7 in Canada. The Court will defer to the government of Canada's environmental review of Keystone's impacts within its own jurisdiction.

G. Remainder of Species

Plaintiffs argue that the Department and FWS failed to analyze impacts to the black-footed ferret, rufa red knot, northern long-eared bat, and western prairie fringed orchid. (Doc. 146 at 51-63.) The Court will analyze each species in turn.

1. Black-Footed Ferret

Plaintiffs assert that the agencies inadequately analyzed impacts to the black-footed ferret. (Doc. 146 at 57-58.) The parties do not dispute that the proposed Project would pass through no known black-footed ferret habitat. Plaintiffs' argument instead relies on Keystone's crossing of prairie dog towns, as prairie dogs represent a potential ferret population recovery habitat. (Doc. 146 at 58.)

FWS determined that no wild populations of black-footed ferrets exist along the proposed route of the Project. FWS000000000651. The primary species population have been captured and provide the basis for an ongoing breeding program operated by FWS. *Id.* Several reintroduced populations occur outside of the Project area in Montana, South Dakota, and Kansas. *Id.* at 652.

The black-footed ferret depends on prairie dogs, both for food and habitat. *Id.* As a result, the FWS surveyed the proposed route in Montana, South Dakota, and Nebraska, for prairie dog towns as potential black-footed ferret habitat. *Id.* The

survey identified no impacts in Montana. *Id.* at 653. The survey identified eight prairie dog towns found along the proposed route in South Dakota and Nebraska. *Id.* FWS recommended no mitigation measures or additional consultation under the ESA as the black-footed ferrets associated with these towns have been designated as non-essential experimental populations. *Id.*

Potential Project impact to prairie dog towns requires no mitigation or additional consultation regarding black-footed ferrets. FWS releases experimental populations at its discretion. FWS must determine whether the population "is essential to the continued existence of an endangered or a threatened species." 16 U.S.C. § 1539(j)(2)(B). FWS's determination that the experimental black-footed ferret populations are not essential to the continued existence of the species allows FWS to treat these populations as a species proposed to be listed. 16 U.S.C. § 2539(j)(2)(C)(i). Section 7 requires consultation for listed species only when an action likely would jeopardize that listed species. 16 U.S.C. § 1536(a)(2), (4). FWS correctly determined that no consultation and mitigation were required for the non-essential experimental black-footed ferret populations potentially associated with the prairie dog towns. FWS000000000653.

2. Rufa Red Knot & Northern Long-Eared Bat

Plaintiffs next argue that the Department failed to analyze impacts to the rufa red knot and the northern long-eared bat. (Doc. 146 at 59-60.) FWS listed the rufa red knot in December of 2014 and the northern long-eared bat in April of 2015. The 2012 BA, the 2013 BiOp, and the 2014 SEIS did not discuss these yet-to-be listed species. The Department reinitiated consultation in July 2015, however, regarding the rufa red knot, and in 2017 regarding the northern long-eared bat. The Department has satisfied Section 7's consultation requirements through this re-initiation of consultation for recently listed species.

Plaintiffs provide no additional data or studies upon which the Department should have relied to reach its conclusion that the Project is "not likely to adversely affect" the rufa red knot. Plaintiffs also argue that the Department's analysis of potential threats to the northern long-eared bat proved inadequate because the Department failed to identify conservation measures associated with construction impacts. *Id.* at 60. The listing decision determined, however, that no habitation limitations constrain the northern long-eared bat. 81 Fed. Reg. 1,900, 1,903 (Jan. 14, 2016). Moreover, development actions have shown no negative impacts to northern long-eared bat populations. *Id.*

FWS's listing decision focused primarily on white-nose syndrome ("WNS") as the main threat to the northern long-eared bat. *Id.* at 1901. FWS identifies WNS within zones. FWS maps evidence of WNS within a county as a positive detection

for the entire county. *Id.* at 1902. FWS adds a 150-mile buffer to the county line as part of the zone. *Id.*

The Department's 2017 consultation determined that portions of the proposed Project encompassed WNS zones. FWS0000000002742. The Department identified two conservation measures to address WNS in its 2017 BA. *Id.* at 2742. The first measure includes a commitment by TransCanada to refrain from removing any trees within 0.25-mile buffer around known WNS zones. *Id.* The second measure requires TransCanada to avoid cutting or destroying any other trees within a 150-foot radius of known maternity roost trees. *Id.* at 2742-43. The Court finds no error in these proposed conservation measures or FWS's concurrence that the Project is "not likely to adversely affect" the bat. *Id.* at 2749.

3. Western Prairie Fringed Orchid

Plaintiffs argue that the Department failed to provide adequate conservation measures to the western prairie fringed orchid. (Doc. 146 at 60.) Plaintiffs argue that the conservation measures rely solely on efforts by TransCanada's employees to avoid the plant. *Id.* at 61. Plaintiffs further allege that these proposed measures fail to address the risk of invasive species and herbicide use. *Id.* The 2014 SEIS conservation measures propose a complete habitat suitability survey before construction. FWS00000002065. Plaintiffs have presented no proposed method of

conservation superior to a complete survey that could detect the plant early in its growth cycle. The conservation measures also adequately address the risk of invasive species. TransCanada has developed a weed and vegetation monitoring plan to prevent the spread of invasive species. DOSKXLDMT0001020-21. The conservation measures further require habitat restoration and revegetation. FWS000000002066. The Department's "not likely to adversely affect" conclusion regarding the orchid proves reasonable under the circumstances.

CONCLUSION AND REMEDIES

Plaintiffs have asked the Court to issue an injunction that would require the Department to comply fully with NEPA, the ESA, and the APA. Plaintiffs have asked the Court to enjoin and set aside the Department's cross-border permit and ROD. Plaintiffs also have requested an injunction to set aside the BA, BiOp and FWS concurrence. Finally, Plaintiffs have requested that the Court prohibit activity in furtherance of construction or operation of Keystone and associated facilities.

An agency action is deemed invalid when not promulgated in compliance with the APA. *Kake*, 795 F.3d at 970. Upon remand, a court should provide the agency with specific instructions to address its errors. *Alliance for the Wild Rockies v. Zinke*, 265 F.Supp.3d 1161, 1181 (D. Mont. 2017). The Court provides the following instructions.

Claim 1: The Department's "purpose and need" statement in the 2014 SEIS did not violate NEPA. The Department's range of alternatives analyzed in the 2014 SEIS did not violate NEPA. 40 C.F.R. §§ 1502.1, 1502.13, 1502.14. Further, the Department did not violate NEPA when it set forth its no-action alternative in the 2014 SEIS. Similarly, the Department did not violate NEPA in its analysis of transportation of crude oil by rail in the 2014 SEIS. The Department's response to public comments on the draft 2014 SEIS comported with its obligations under NEPA. And finally, the Department's incorporation of the CNEB's analysis of impacts in Canada satisfied NEPA.

The Department's analysis of the following issues fell short of a "hard look" and requires a supplement to the 2014 SEIS in order to comply with its obligations under NEPA:

- The effects of current oil prices on the viability of Keystone (Section I (C)(2)(a));
- The cumulative effects of greenhouse gas emissions from the Alberta Clipper expansion and Keystone (Section I (C)(2)(c));
- A survey of potential cultural resources contained in the 1,038 acres not addressed in the 2014 SEIS (Section I (E)(1)); and
- An updated modeling of potential oil spills and recommended mitigation measures (Section I (E)(3)).

These omissions require a remand with instructions to the Department to satisfy its obligations under NEPA to take a "hard look" at the issues through a supplement to the 2014 SEIS.

Claim 2: Plaintiffs' second group of claims relate to the need for TransCanada to obtain a right of way across BLM-owned land. The parties' current motions for summary judgment do not address these claims. The Court defers ruling on these claims until the parties have submitted motions and supporting briefs.

Claim 3: NEPA and the APA require a detailed justification for reversing course and adopting a policy that "rests upon factual findings that contradict those which underlay its prior policy." *Fox*, 556 U.S. at 515. The Department must give "a reasoned explanation for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Kake*, 795 F.3d at 996. The Court previously determined in its Order denying Defendants' Motion to Dismiss (Doc. 99) that it possessed jurisdiction to review the ROD as a final agency action under NEPA and the APA. *Id.* at 8-9. The Department failed to comply with NEPA and the APA when it disregarded prior factual findings related to climate change and reversed course. The Court vacates the 2017 ROD and remands with instructions to provide a reasoned explanation for the 2017 ROD's change in course. *Kake*, 795 F.3d at 996.

Claims 4 and 5: Section 7(a)(2) of the ESA requires that an agency ensure its actions are not likely to jeopardize the continued existence of endangered or threatened species, and are not likely to destroy or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2). The agency must rely on the best available science and commercial data available in reaching its conclusions. 16 U.S.C. § 1533(b)(1)(A). The Department did not violate the ESA when it did not use the telemetry data to assess potential harm to whooping cranes. The Department did not violate the ESA when it put forth mitigation measures related to the western prairie fringed orchid. The Department did not violate the ESA in its analysis of the black-footed ferret, the rufa red knot, the northern long-eared bat or terns and plovers. Further, the Department did not violate the ESA when it did not apply Section 7 in Canada.

The Department's 2012 BA, and FWS's 2013 BiOp and concurrence shall be set aside and remanded to the Department with instructions to consider potential adverse impacts to endangered species from oil spills associated with Keystone in light of the updated data on oil spills and leaks. The Court declines at this time to require the Department to re-initiate formal consultation with FWS pending the outcome of FWS's updated analysis of the oil spill data.

ORDER

(1) Plaintiffs' Motions for Summary Judgment (Docs. 139 & 145) are GRANTED IN PART and DENIED IN PART in accordance with the above Order;

(2) Defendants' Cross–Motions for Summary Judgment (Docs. 170 & 172) are GRANTED IN PART and DENIED IN PART;

(3) It is further ordered that the Department's ROD issued on March 23, 2017, is VACATED.

(4) Plaintiffs' request for injunctive relief is GRANTED. The Court enjoins Federal Defendants and TransCanada from engaging in any activity in furtherance of the construction or operation of Keystone and associated facilities until the Department has completed a supplement to the 2014 SEIS that complies with the requirements of NEPA and the APA.

(5) This matter is REMANDED to the Department for further consideration consistent with this order.

DATED this 8th day of November, 2018.

Brian Morris
United States District Court Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

INDIGENOUS ENVIRONMENTAL NETWORK and NORTH COAST RIVER ALLIANCE,

and

NORTHERN PLAINS RESOURCE COUNCIL, et al.,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF STATE, et al.,

Defendants

and

TRANSCANADA KEYSTONE PIPELINE and TRANSCANADA CORPORATION,

Defendant-Intervenors.

CV-17-29-GF-BMM

CV-17-31-GF-BMM

PARTIAL ORDER ON SUMMARY JUDGMENT REGARDING NEPA COMPLIANCE

Plaintiffs Indigenous Environmental Network and Northern Plains Resource Council (collectively "Plaintiffs") bring this action against the United States

Department of State and various other governmental agencies and agents in their official capacities ("Federal Defendants"). Plaintiffs allege that the State Department violated the Administrative Procedure Act ("APA"), the National Environmental Policy Act ("NEPA"), and the Endangered Species Act ("ESA") when it published its Record of Decision ("ROD") and National Interest Determination ("NID") and issued the accompanying Presidential Permit to allow defendant-intervenor TransCanada Keystone Pipeline, LP ("TransCanada") to construct a cross-border oil pipeline known as Keystone XL ("Keystone"). Plaintiffs have moved for summary judgment. (Docs. 139 & 145.) Federal Defendants and TransCanada have filed cross motions for summary judgment. (Docs. 172 & 170.) The Court held a hearing on these motions on May 24, 2018. (Doc. 194.) The Court is prepared to rule on a portion of Plaintiffs's motion for summary judgment. The Court will rule on the remaining issues in a forthcoming Order.

BACKGROUND

The Court detailed the background of this case in its Order regarding Federal Defendant's and TransCanada's Motion to Dismiss for Lack of Jurisdiction. (Doc. 99.) The Court will only recite those facts that have arisen since its Order regarding jurisdiction.

The Nebraska Public Service Commission ("PSC") denied TransCanada's application for its preferred route on November 20, 2017. (Doc. 104-1.) The Nebraska PSC instead approved the "Mainline Alternative" route. *Id.* The Mainline Alternative route goes through five different counties and crosses several different water bodies than the original preferred route. *Id.* The Mainline Alternative route also would be longer. This added length requires an additional pump station and accompanying power line infrastructure. *Id.*

After the Nebraska PSC announced its decision, Plaintiffs notified Federal Defendants that they needed to reinitiate ESA Section 7(a)(2) consultation on the Mainline Alternative route to assess the potential effects of the new route on endangered and threatened species. (Doc. 141-1.) Plaintiffs also requested that Federal Defendants prepare a supplemental EIS. *Id.* Federal Defendants have taken steps to reinitiate ESA Section 7(a)(2) consultation with the appropriate agencies, including FWS. Federal Defendants have not committed, however, to supplementing the EIS. *Id.*

LEGAL STANDARD

A court should grant summary judgment where the movant demonstrates that no genuine dispute exists "as to any material fact" and the movant is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment remains appropriate for resolving a challenge to a federal agency's actions when review

will be based primarily on the administrative record. *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 778 (9th Cir. 2006).

The APA's standard of review governs Plaintiffs's claims. *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 481, 496 (9th Cir. 2011); *Bennett v. Spear*, 520 U.S. 154, 174 (1997). The APA instructs a reviewing court to "hold unlawful and set aside" agency action deemed "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A rational connection must exist between the facts found and the conclusions made in support of the agency's action. *Kraayenbrink*, 632 F.3d at 481.

DISCUSSION

I. Federal Defendants did not properly analyze Keystone's environmental impacts considering Federal Defendants did not know Keystone's final route through Nebraska.

Plaintiffs argue that the agencies could not properly analyze Keystone's environmental impacts without knowing its route through Nebraska. (Doc. 140 at 17.) NEPA serves as the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA requires all federal agencies to prepare a "detailed statement" for any "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

This detailed statement, known as an environmental impact statement ("EIS"), must describe the environmental impacts of the proposed action. 42

U.S.C. § 4332(2)(C)(i), (ii). The EIS must include a "full and fair discussion" of the effects of the proposed action, including those on the "affected region, the affected interests, and the locality." 40 C.F.R. §§ 1502.1, 1508.27(a). Further, for a "site-specific action, significance would usually depend upon the effects in the locale . . ." *Id.*, § 1508.27(a). The agency must finally consider the "unique characteristics of the geographic area" when determining the significance of an action. *Id.*, § 1508.27(b)(2). An agency also may be required to perform a supplemental analysis "if significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" arise during the NEPA review. 40 C.F.R. § 1502.9(c)(1)(ii).

Plaintiffs further argue that Federal Defendants must address the Mainline Alternative route pursuant to its NEPA obligations as it proves to be a "connected action" to the proposed action. (Doc. 146 at 48.); 40 C.F.R. § 1508.25(a)(1). A federal agency must consider connected actions together in a single EIS. *Id.* NEPA defines connected actions as any of the following: those actions that "automatically trigger other actions which may require environmental impact statements;" those actions that "cannot or will not proceed unless other actions are taken;" or those actions are interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1). In determining whether two actions are connected for the purposes of NEPA, a court must examine whether the

two actions have "independent utility" or whether it would be "irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken." *Daly v. Volpe*, 514 F.2d 1106, 1110 (9th Cir. 1975); *Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985) (overruled on other grounds by *Cottonwood Environmental Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1088-92 (9th Cir. 2015).

The Ninth Circuit in *Thomas* considered whether a road and a timber sale were sufficiently related to require combined treatment in a single EIS that covered the cumulative effects of each. *Thomas*, 753 F.2d at 757. The Forest Service argued that it remained proper for it to consider separately the effects of the road and the timber sale. *Id.* The Ninth Circuit recognized that administrative agencies must be given considerable discretion in defining the scope of an EIS. The Ninth Circuit further noted, however, that situations exist in which an agency must be required to consider several related actions in a single EIS. *Id.* The failure to consider several related actions in a single EIS would allow a project to be divided into multiple actions, "each of which individually has an insignificant environmental impact, but which collectively have a substantial impact." *Id.* at 758. The road construction and the contemplated timbers sales were inextricably intertwined as evidenced by the timber sales not being able to proceed without the

road and the road not being built, but for the contemplated timber sales. *Id.* The road and the timber sales qualified as connected actions. *Id.*

Federal Defendants argue that the Nebraska PSC did not approve Mainline Alternative route until after the issuance of the Presidential Permit. (Doc. 173 at 31.) This decision from the Nebraska PSC proved beyond the control of Federal Defendants and TransCanada. *Id.* Federal Defendants argue that NEPA imposes no obligation on the Federal Defendants to prepare a supplemental analysis to address the Mainline Alternative route when the EIS remained complete. (Doc. 185 at 15.)

Federal Defendants further argue that the language of the Presidential Permit "clearly limits the State Department's ongoing oversight to circumstances where there is a 'substantial change in the United States facilities,' which are defined to include only the 1.2 mile border segment." *Id.* Federal Defendants finally contend that any NEPA process that the State Department has begun in connection with the Mainline Alternative route simply supports the Bureau of Land Management's right-of-way decision. *Id.*

TransCanada argues that the State Department possesses no obligation under NEPA to review the impacts of the Nebraska PSC's decision as there remains no "ongoing major federal action" for the agency to take. *Id.* TransCanada contends that the State Department had completed its federal action when it made its national interest determination and issued the Presidential Permit. TransCanada

relies heavily on *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1095 (9th Cir. 2013), for the proposition that no ongoing major federal action exists that could require supplementation once an agency action proves complete.

In *Salazar*, a mining company decided to resume mining operations after a seventeen-year hiatus. *Id.* at 1088. Plaintiffs argued that BLM needed to perform a supplemental EIS as the original EIS had become stale and outdated. The Ninth Circuit determined that the major federal action at question, the approval of the operation, remained complete when the BLM approved the project. *Id.* at 1095. No ongoing major federal action existed to require NEPA supplementation. *Id.*

As an initial matter, it appears to the Court that Federal Defendants wrongly suggest that information about the Mainline Alternative route postdated the State Department's issuance of the Presidential Permit. In fact, TransCanada included the Mainline Alternative route as one of two alternatives in its February 16, 2017, application to the Nebraska PSC. (Doc. 104-1 at 12, 58-59.) The State Department knew, therefore, before it issued the Presidential Permit on March 23, 2017, that the Nebraska PSC potentially could approve the Mainline Alternative route. This contingency likely imposed an obligation on the Federal Defendants to supplement the EIS to reflect the Mainline Alternative route.

Regardless of this contingency, Federal Defendants now possess the obligation to supplement the EIS. The State Department retains discretion to

review any changes to the project that might arise after the issuance of the Presidential Permit. Federal Defendants argument that the Presidential Permit applies only to the segment of the pipeline at the border proves unpersuasive as the Presidential Permit states that that Keystone "must be constructed and operated as described in the 2012 and 2017 permit applications, the 2014 EIS . . . " Notice of Issuance of a Presidential Permit, 82 Fed. Reg. 16467-02 (Apr. 4, 2017).

The Court further determined in an earlier Order that the State Department remained obligated to comply with NEPA as it took final agency action when it published the ROD/NID for Keystone. The Court viewed the State Department's preparation of the NEPA analysis associated with Keystone as recognition of its legal obligations. (Doc. 99 at 14.) The Court specifically rejected TransCanada's contention that the Federal Defendants conducted the NEPA analysis for Keystone "as an act of grace." *Id.*

The Supreme Court has recognized an agency's obligation to prepare a post-decision supplemental EIS when a project has not been fully constructed or completed. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 367-72. The Supreme Court determined that "NEPA does require that agencies take a 'hard look' at the environmental effects of their planned action, even after a proposal has received initial approval." *Id.* at 374. *Marsh* stands in contrast to *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 72 (2004) ("SUWA"). The Supreme Court in

SUWA determined that the approval of a land use plan constituted a major federal action that required an EIS. *Id.* The major federal action remained complete, however, when the plan was approved. *Id.*

The Ninth Circuit addressed the distinction between *Marsh* and *SUWA* in *Cold Mountain v. Garber*, 375 F.3d 884 (9th Cir. 2004). The Forest Service issued a special use permit to the Montana Department of Livestock to operate a bison capture facility. Environmental groups alleged that the special use permit violated NEPA as new information emerged after the Forest Service had issued the special use permit. *Id.* at 891-92. The Ninth Circuit determined that the Forest Service possessed no ongoing oversight or involvement of the special use permit after its issuance. *Id.* at 894. There existed no ongoing major federal action. *Id.*

This case proves more akin to *Marsh*. Federal Defendants still retain a meaningful opportunity to evaluate the Mainline Alternative route. The Mainline Alternative route differs from the route analyzed in the EIS. The Mainline Alternative route crosses five different counties. The Mainline Alternative route crosses different water bodies. The Mainline Alternative route would be longer. The Mainline Alternative route would require an additional pump station and accompanying power line infrastructure. Federal Defendants cannot escape their responsibility under NEPA to evaluate the Mainline Alternative route. Federal Defendants first argued that it was too early to evaluate the Mainline Alternative

route before the approval of the Presidential Permit. They now argue that it remains too late to evaluate the Mainline Alternative route. NEPA requires a hard look. *Marsh*, 490 U.S. at 367-72.

The Court further agrees that Federal Defendants must address the Mainline Alternative route as it proves to be a "connected action" to the proposed action. Similar to *Thomas*, the Mainline Alternative route represents an interdependent part of the larger action of Keystone. *Thomas*, 753 F.2d at 759. The entire pipeline remains interrelated and requires one EIS to understand the functioning of the entire unit. Unlike *Salzar*, ongoing federal agency action remains. *Salazar*, 706 F.3d at 1095.

Federal Defendants have yet to analyze the Mainline Alternative route. Federal Defendants possess the obligation to analyze new information relevant to the environmental impacts of its decision. Other courts have recognized this obligation. *See Sierra Club v. Bosworth*, 465 F. Supp. 2d 931, 939 (N.D. Cal. 2006). In *Bosworth*, the court required a post-decision supplemental EIS for a timber harvesting project where the project had not been completed. *Id.* Federal Defendants' failure to supplement the 2014 EIS likewise violates its obligations under NEPA. *Thomas*, 753 F.2d at 759; *Bosworth*, 465 F. Supp. 2d at 939.

Plaintiffs further argue that Federal Defendants possessed the obligation to analyze Keystone under the ESA. (Doc. 140 at 17.) The ESA requires agencies to

analyze the site-specific impacts of proposed actions. Under Section 7 of the ESA, all federal "action agencies" must, "in consultation with" the Fish Wildlife and Service, "insure" that the actions that they fund, authorize, or undertake are "not likely to jeopardize the continued existence of any endangered species or threatened species" or "result in the destruction or adverse modification" of critical habitat. 16 U.S.C. § 1536(a)(2). The ESA requires agencies to evaluate which species or critical habitats are present in the "action area," which includes "all areas to be affected directly or indirectly by the Federal action." 50 C.F.R. §§ 402.02, 402.12(a). The Court will address the ESA argument in a future Order.

CONCLUSION AND ORDER

1. Accordingly, IT IS ORDERED that Federal Defendants must supplement the 2014 final supplemental EIS to consider the Mainline Alternative route as approved by the Nebraska PSC.
2. The Court declines to vacate the Presidential Permit at this time. TransCanada has represented to the Court that construction of the pipeline will not begin until the second quarter of 2019. The Court directs Federal Defendants to file a proposed schedule to supplement the EIS in a manner that allows appropriate review before TransCanada's planned construction activities.

3. The Court will consider further remedies if circumstances change that do not allow review of the supplemental EIS before TransCanada's planned construction activities.

DATED this 15th day of August, 2018.

Brian Morris
United States District Court Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

INDIGENOUS ENVIRONMENTAL NETWORK and NORTH COAST RIVER ALLIANCE,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF STATE, et al.,

Defendants,

and

TRANSCANDA CORPORATION, et al.,

Intervenor-Defendants

CV-17-29-GF-BMM

ORDER

Plaintiffs Indigenous Environmental Network ("IEN") and North Coast River Alliance ("NCRA") (collectively "Plaintiffs") bring this action against the United States Department of State and various other governmental agencies and agents in their official capacities ("Federal Defendants"). Plaintiffs allege that the State Department violated the Administrative Procedure Act ("APA"), National Environmental Policy Act ("NEPA"), and Endangered Species Act ("ESA") when it published its Record of Decision ("ROD") and National Interest Determination ("NID") and issued the accompanying Presidential Permit to allow defendant-

intervenor TransCanada Keystone Pipeline, LP ("TransCanada") to construct a cross-border oil pipeline. Federal Defendants and TransCanada move to dismiss this action for lack of jurisdiction.

BACKGROUND

Under Secretary Thomas A. Shannon published a ROD/NID on March 23, 2017, to recommend that the State Department approve a Presidential Permit to TransCanada to construct, connect, operate, and maintain an 875-mile long pipeline. (Doc. 61 at 6.) Executive Order 13337 delegates to the State Department the President's authority to issue a permit for the construction of an oil pipeline across the border of the United States if it finds that issuance of the permit to the applicant "would serve the national interest." Issuance of Permits, Exec. Order No. 13337, 69 Fed. Reg. 25299 (2004). The State Department issued the accompanying Presidential Permit on April 4, 2017. Notice of Issuance of a Presidential Permit, 82 Fed. Reg. 16467-02 (Apr. 4, 2017).

TransCanada is a limited Delaware partnership owned by the affiliates of TransCanada Corporation of Canada. TransCanada proposed the Keystone XL Pipeline as an expansion to its existing Keystone Pipeline System in 2008. (Doc. 49 at 11.) The proposed Keystone XL Pipeline would transport up to 830,000 barrels per day of crude oil from Alberta, Canada and the Bakken shale formation in Montana to existing pipeline facilities near Steele City, Nebraska. *Id.* The

proposed Keystone XL Pipeline crossing of the United States-Canada border requires TransCanada to obtain a Presidential Permit as part of the overall construction and operation of the entire facility. *Id.* at 12.

TransCanada first applied for a Presidential Permit in September of 2008. *Id.* at 11. Congress mandates that all federal agencies prepare a detailed environmental analysis of all "major federal actions." 42 U.S.C. § 4332(2)(C). The environmental analysis constitutes an "action-forcing device" that ensures NEPA's goals "are infused into the ongoing programs and actions" of the federal government. 40 C.F.R. § 1502.1. The State Department recognized that the issuance of a Presidential Permit would constitute a "major Federal action" and retained the role as the lead agency. Notice of Intent to Prepare an EIS, 74 Fed. Reg. 5019-02 (Jan. 28, 2009). As a result, the State Department undertook the duty to provide an analysis of the Keystone XL Pipeline under NEPA. *Id.* The State Department issued a draft environmental impact statement ("EIS") in April 2010, supplemented the EIS in April 2011, and issued a final EIS in August 2011. (Doc. 49 at 13.)

Congress passed the Temporary Payroll Cut Continuation Act of 2011, which directed the State Department to render a final decision on TransCanada's application within sixty days. *Id.* The State Department denied TransCanada's application for a cross-border permit in early 2012. The State Department explained that the arbitrary sixty-day deadline failed to provide sufficient time to

complete its consideration of Keystone XL Pipeline's potential environmental impacts. *Id.*

TransCanada submitted a new application to the State Department for a Presidential Permit for the proposed pipeline on May 4, 2012. *Id.* at 14. The State Department again recognized its duty as lead agency and reviewed this new application for potential environmental effects. (Doc. 44-1 at 12). This review included input from the public and from federal, state, and tribal entities. *Id.* The State Department issued a final Biological Assessment ("BA") to the Fish, Wildlife and Service ("FWS") on December 21, 2012. FWS published its Biological Opinion ("BiOp") and concurrence statement regarding the proposed pipeline on May 15, 2013. (Doc. 61 at 13.) The State Department released its Final Supplemental Environmental Impact Statement ("FSEIS") in January 2014. (Doc. 44-1 at 12.)

Secretary of State John Kerry denied TransCanada's application on November 6, 2015. (Doc. 61 at 14.) Secretary Kerry determined that issuing a Presidential Permit for the pipeline would not serve the national interest as required by Executive Order 13337. *Id.* Secretary Kerry's denial did not end the matter.

President Trump issued a Presidential Memorandum Regarding Construction of the Keystone XL Pipeline ("Memorandum") on January 24, 2017.

Construction of the Keystone XL Pipeline, 82 Fed. Reg. 8663, 8664 (Jan. 24, 2017). The Memorandum invited TransCanada to reapply. *Id.* The President delegated to the State Department his authority to issue the Presidential Permit within sixty days. *Id.* The Memorandum further stated that the State Department should consider, to the maximum extent permitted by law, the FSEIS released in January 2014 to satisfy all applicable NEPA requirements, and any other provision of law that would require executive department consultation or review, including the consultation or review required under ESA section 7(a). *Id.*

The State Department received a renewed application from TransCanada on January 26, 2017. (Doc. 61 at 14.) Under Secretary Shannon relied on the 2014 FSEIS and FWS's 2013 BiOp in determining whether the issuance of the Presidential Permit would serve the national interest. Under Secretary Shannon published the ROD/NID on March 23, 2017. (Doc. 44-1 at 13.) The State Department did not supplement or revise either the 2014 FSEIS or the 2013 BiOp in any manner. The State Department issued the accompanying Presidential Permit on April 4, 2017.

Plaintiffs challenge the State Department's publication of the ROD/NID and its decision to issue the accompanying Presidential Permit. (Doc. 61 at 11.) Plaintiffs first seek for Federal Defendants to withdraw their FSEIS and Keystone XL Pipeline approvals, including the ROD/NID and Presidential Permit, until

Federal Defendants have complied with NEPA. Plaintiffs next seek for Federal Defendants to withdraw their BA and BiOp until Federal Defendants have complied with the ESA and APA. Plaintiffs further seek a declaration that Federal Defendants violated the aforementioned acts and permanent injunctive relief that would prevent Federal Defendants and TransCanada from initiating any activities in furtherance of the Keystone XL Pipeline. (Doc. 61 at 51-52.)

DISCUSSION

Federal Defendants and TransCanada move to dismiss Plaintiffs' Complaint pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure. A challenge to a court's jurisdiction to hear a claim may be brought either as a facial attack on the sufficiency of the pleadings, or as a factual attack that contests the complaint's allegations. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). Federal Defendants question whether Plaintiffs have presented a cause of action. The Rule 12(b)(6) standard applies. *Leite*, 749 F.3d at 1121.

I. NEPA Claims Against the Federal Defendants

Federal Defendants and TransCanada argue that the following jurisdictional defects require the Court to dismiss Plaintiff's alleged NEPA violations: (1) the issuance of a Presidential Permit constitutes presidential action that a court may not review under the APA; (2) even if the issuance of the Presidential Permit could be deemed an agency action, it represents an action committed to agency discretion

by law thereby shielding it from judicial review under the APA; and (3) Plaintiffs lack the ability to redress their alleged injuries.

A. Agency Action

NEPA provides no private right of action. *Nuclear Info. & Res. Serv. v. Nuclear Regulatory Comm'n,* 457 F.3d 941, 950 (9th Cir. 2006). This Court possesses jurisdiction to review alleged NEPA violations under the provisions of the APA under 28 U.S.C. § 1331. The APA waives the government's sovereign immunity and provides a private cause of action. 5 U.S.C. §§ 701-706. The APA provides for judicial review where a party suffers a "legal wrong because of agency action" or is "adversely aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702.

1. Actions of the State Department

TransCanada first applied for a Presidential Permit in 2008. The State Department recognized that issuance of the Presidential Permit would "constitute a major Federal action that may have a significant impact upon the environment within the meaning of the NEPA." Notice of Intent to Prepare an EIS, 74 Fed. Reg. at 5019-02. The State Department concluded that an EIS was necessary to address reasonably foreseeable impacts from the proposed action and alternatives. *Id.*

TransCanada reapplied in 2012. The State Department again recognized the need to "evaluate the potential environmental impacts of the proposed project

consistent with NEPA and the State Department's regulations." Application for Presidential Permit, 77 Fed. Reg. 27533-02 (May 10, 2012). The State Department in February 2017 acknowledged that TransCanada had applied for the third time for a Presidential Permit. Notice of Receipt of TransCanada's Re-Application, 82 Fed. Reg. 10429-01 (Feb. 10, 2017). The State Department announced that it would conduct a review of TransCanada's third application in accordance with the Presidential Memorandum and any other applicable requirements. *Id.* The State Department further announced that it would seek no further public comment on the national interest determination because it already had taken public comment in February of 2014. *Id.*

The Federal Register notices indicate that the State Department originally acknowledged that the issuance of the Presidential Permit would constitute a "major Federal action." Notice of Intent to Prepare an EIS, 74 Fed. Reg. at 5019-02. The State Department also originally acknowledged its duty to prepare an EIS to address reasonably foreseeable impacts from the proposed action. *Id.* The logical conclusion to be drawn is that the State Department intended for the publication of the ROD/NID and the issuance of the accompanying Presidential Permit to be reviewable as final agency action. Federal Defendants now attempt to recast the State Department's original decision to comply with NEPA, as required for a major Federal action, into a policy choice, or "act of grace," to avoid judicial review.

Federal Defendants and TransCanada argue the State Department acted pursuant to the President's inherent authority under the Constitution and the law of the United States when it published the ROD/NID and when it issued the accompanying Presidential Permit. In particular, Federal Defendants contend that Under Secretary Shannon considered the Keystone application in conjunction with Executive Order 13337, and the Memorandum.

The Court considers the Under Secretary's publication of the ROD/NID "final" in the sense that it: 1) "mark[s] the consummation of the agency's decision-making process;" and 2) constitutes an action "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Under Secretary Shannon's publication of the ROD/NID consummated the State Department's review of the Presidential Permit Application. The Under Secretary's publication of the ROD/NID represents the type of action from which legal consequences will flow. *Id.* The publication of the ROD/NID prompted the issuance of the accompanying Presidential Permit that enabled TransCanada to begin construction of the pipeline.

2. Actions of the President

Federal Defendants and TransCanada argue that the Supreme Court has made it clear out of respect for the separation of powers, however, that a party cannot challenge a President's actions under the APA. *Franklin v. Massachusetts*,

505 U.S. 788, 800-01 (1992). The Court considers two factors in determining whether an action taken by an agency or official constitutes presidential action: 1) whether the President carries out the final action himself and the manner in which he does so; and 2) whether Congress has curtailed in any way the President's authority to direct the "agency" in making policy judgments. *Natural Res. Def. Council v. U.S. Dep't of State*, 658 F.Supp.2d 105, 111 (D.C. Cir. 2009).

The President waived any right in his Memorandum to review the State Department's decision under Executive Order 13337. The State Department's obligation to study the environmental impacts of its decision fundamentally does not stem from the foreign relations power. The State Department's own NEPA regulations recognize that the issuance of a Presidential Permit represents a "major Departmental action" subject to Congress's mandates in NEPA. 22 C.F.R. §§ 161.7, 161.7(c)(1). The State Department, on its own initiative, prepared a FSEIS and published a subsequent ROD/NID in this case.

Federal Defendants contend that the State Department's NEPA regulations require no NEPA analysis. They point out that the State Department's NEPA regulations predate Executive Order 13337. President George W. Bush issued Executive Order 133337 to expedite the processing of permits for cross-border pipelines. Nothing in Executive Order 13337 abrogates the State Department's NEPA regulations. Moreover, the President conceded in his Memorandum that the

State Department should consider the FSEIS as part of its obligation to satisfy all applicable requirements of NEPA. Construction of the Keystone XL Pipeline, 82 Fed. Reg. at 8663.

3. Case Analysis

Federal courts have divided on the question of whether Executive Order 13337 renders any decision on a cross-border project "Presidential action" that stands beyond judicial review. The Court analyzes these decisions at some length.

a. President's Retention of Authority

Federal Defendants rely heavily on three district court decisions. These courts determined that the issuance of a Presidential Permit by a federal agency pursuant to an Executive Order constitutes Presidential action immune from judicial review under the APA. *Natural Res. Def. Council*, 658 F.Supp.2d 105; *Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F.Supp.2d 1071 (D.S.D 2009); and *White Earth Nation v. Kerry*, 2015 WL 8483278 (D. Minn. 2015). Both *NRDC* and *Sisseton-Wahpeton* attribute significance to the language in Executive Order 13337 that provides for the President to make the "final decision." *White Earth Nation* relied, in turn, on the "overwhelming authority" found in *NRDC* and *Sisseston-Wahpeton* to support its conclusion that the State Department's actions qualify as Presidential in nature. *White Earth Nation*, 2015 WL 8483278 at *7.

NRDC noted that the President's decision to retain ultimate authority to settle any interagency dispute "signals the President's belief" that the issuance of presidential permits ultimately constitutes a presidential action. *Natural Res. Def. Council*, 658 F.Supp.2d at 111. *Sisseton-Wahpeton* likewise determined that Executive Order 13337 explicitly states that the President retains the authority to issue a final decision on whether to issue the Presidential Permit. *Sisseton-Wahpeton*, 659 F.Supp.2d at 1081. The President remains the final actor in determining the issuance of the Presidential Permit. *Id.* President Trump specifically waived, in his Memorandum, any authority that he retained to make the final decision regarding the issuance of the Presidential Permit. This distinction proves persuasive.

b. Agency Action on Application

The district court in *Sierra Club v. Clinton*, 689 F.Supp.2d 1147 (D. Minn. 2010), declined to follow *NRDC* and *Sisseton-Wahpeton*. *Sierra Club* disagreed with the reasoning of *NRDC* and *Sisseton-Wahpeton* "insofar as they hold that any action taken by the State Department pursuant to an executive order" escapes judicial review. *Sierra Club*, 689 F.Supp.2d at 1157 n. 3. The court expressed particular skepticism at the notion of shielding from judicial review under the APA "the preparation of an EIS for a major federal action." *Id.*

The plaintiffs in *Sierra Club* alleged that federal defendants violated NEPA and the APA by issuing a Presidential Permit to build and operate an oil pipeline from Alberta, Canada to Superior, Wisconsin. *Id.* at 1151. The State Department determined that issuing the pipeline permit would constitute a "major federal action" under NEPA. *Id.* at 1157. The State Department considered itself the lead agency on the project and exercised its discretion to prepare and issue the FEIS under NEPA. *Id.* Deputy Secretary of State James Steinberg published the State Department's ROD and issued the Presidential Permit. *Id.* at 1152. Federal defendants argued that the State Department's "presidential actions" insulated the decision from judicial review. *Id.* at 1155.

The mere fact that the pipeline crossed the international border did not insulate the State Department's analysis of the environmental impacts of the pipeline project from judicial review under the APA. *Id.* at 1157. The State Department recognized that the pipeline constituted a "major federal action" and acted accordingly in issuing the FEIS. *Id.* The pipeline's crossing of the international border failed to convert the State Department's actions into presidential action. *Id.*

Protect Our Communities Found. v. Chu, 2014 WL 1289444 at *6 (S.D. Cal. 2014), agreed with the reasoning in *Sierra Club*. The federal defendants in *Chu* sought to dismiss a complaint arising from the issuance of a presidential permit for

a cross-border electric transmission line. *Id.* at 2. The Department of Energy ("DOE") prepared an EIS after having received the application. *Id.* The federal defendants argued that the DOE had acted pursuant to Presidential authority in issuing the permit. The DOE suggested that an executive order constituted an express delegation of executive authority that insulated DOE's acts from judicial review. *Id.* at 5.

The court rejected the idea that an agency could shield itself from judicial review under the APA for any action "by arguing that it was 'Presidential,' no matter how far removed from the decision the President actually was." *Id.* at 6. Congress designed NEPA to "promote environmentally sensitive decision-making without proscribing substantive standards." *Id.* at 5. No agency possesses discretion whether to comply with procedural requirements such as NEPA. The relevant information provided by a NEPA analysis needs to be available to the public and the people who play a role in the decision-making process. This process includes the President. *Id.* The DOE based the issuance of its Presidential Permit on its own EIS. The court possessed authority to review this agency action to ensure compliance with NEPA. *Id.*

The reasoning of *Sierra Club* and *Chu* applies here. The State Department took final agency action when it published the ROD/NID for the Keystone XL Pipeline and issued the accompanying Presidential Permit. The Ninth Circuit has

determined that "once an EIS's analysis has been solidified in a ROD, the agency has taken final agency action, reviewable under [APA section] 706(2)(A)." *Or. Nat. Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1118-19 (9th Cir. 2010); *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1088 (9th Cir. 2003). The publication of the ROD/NID led to the State Department's issuance of the accompanying Presidential Permit.

B. Agency Discretion by Law

A strong presumption exists that Congress intends judicial review of administrative action. *ASSE Int'l v. Kerry*, 803 F.3d 1059, 1068 (9th Cir. 2015). Two narrow exceptions apply: (1) when Congress expressly bars review by statute, or (2) where an agency action is "committed to agency discretion by law." *Id.* Federal Defendants and TransCanada argue that the second exception applies as they contend that Congress committed the State Department's decision to issue the Presidential Permit "to agency discretion by law."

1. NEPA Provides Standard

Congress commits agency action to agency discretion in those rare instances where Congress draws statutes in such broad terms that no law exists to apply in a given case. 5 U.S.C. § 701(a)(2). Congress's decision to draft a statute in such broad terms leaves the court "with no meaningful standard against which to judge the agency's exercise of discretion." *Id.* Courts must consider "the language of the

statute" and whether judicial review would endanger "the general purposes of the statute." *Cnty. Of Esmeralda v. Dep't of Energy*, 925 F.2d 1216, 1218 (9th Cir. 1991).

Congress has provided a meaningful standard in the form of NEPA against which to judge the State Department's conduct. Congress enacted NEPA to "protect the environment by requiring that federal agencies carefully weigh environmental considerations and consider potential alternatives to the proposed action before the government launches any major federal action." *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1131 (9th Cir. 2011). NEPA, as enacted by Congress, its regulations, and any judicial opinions that address similar NEPA claims, have developed these standards more fully. 42 U.S.C.A. § 4332(2)(C); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971).

The Ninth Circuit has made clear that the State Department cannot avoid judicial review simply by invoking its consideration of "foreign policy" or "security" factors. *Kerry*, 803 F.3d at 1069. The State Department in *Kerry* sought to avoid judicial review of its own regulations in the State Department's administration of a visa exchange program. *Id.* The Ninth Circuit concluded that it could consider the State Department's compliance without infringing on the State Department's prerogative to create the program, or related national-security

concerns. *Id.* The Ninth Circuit emphasized that a weak connection to foreign policy fails to commit an agency action to the agency's discretion. *Id.*

2. Foreign Policy Implications

Federal Defendants maintain that *No Oilport! v. Carter*, 520 F. Supp. 344 (W.D. Wash. 1981), and *Jensen v. Nat'l Marine Fisheries Service*, 512 F.2d 1189, 1191 (9th Cir. 1975), illustrate the lack of any meaningful standard for this Court to apply. A closer look at these decisions explains the courts' reluctance to review the President's actions. Plaintiffs' claims do not raise similar concerns.

Congress enacted the Public Utility Regulatory Policies Act ("PURPA") to "expedite action on federal permits required for the construction of a west-to-east crude oil transportation system." *No Oilport!*, 520 F. Supp. at 344. To achieve this goal, Congress mandated expedited judicial review, established a sixty-day statute of limitations, and prohibited the issuance of preliminary injunctive relief. *Id.* citing 43 U.S.C. § 2011(b) and (c). The pipeline at issue would run from the North Slope of Alaska to Minnesota.

PURPA directed that certain agency heads, including the Secretary of Interior, were to make recommendations to the President and establish an expedited schedule for review of applications of parties who sought to obtain the benefit of PURPA. *Id.* The President selected the west-to-east pipeline route based on his determination that the prevailing project proposal would be "in the national

interest." *No Oilport!* 520 F.Supp. at 350. The court deemed the President's national interest determination to fall "beyond the competency of the judiciary to review." *Id.* citing *Chicago & Southern Airlines v. Waterman Steamship Corp.*, 333 U.S. 103 (1948) (reasoning that Presidential approval of the decision of the Civil Aeronautics Board ("CAB") regarding certificate for overseas air transportation constituted political decisions beyond the competency of the courts to adjudicate); *Braniff Airways, Inc. v. C.A.B.*, 581 F.2d 846 (D.C. Cir. 1978) (determining that federal court lacked authority to review decision of the CAB awarding an airline authority to operate between Chicago, Illinois and Montreal, Canada).

Tellingly, the court cited to decisions of the Supreme Court in *Chicago & Southern Airlines*, 333 U.S. at 104, and the D.C. Circuit in *Braniff Airways*, 581 F.2d at 848, in which the President selected among competing airlines the preferred provider of particular international routes. The CAB selected airlines to service particular routes under the highly regulated system in place at that time. *Id.* The President had to approve the CAB's choice in each case due to the overseas nature of the routes to be serviced. *Id.* The President's need to consider particular foreign policy factors left these decisions beyond the competency of the courts to review. *Id.* at 852.

The court in *No Oilport!* evaluated whether the Secretary of Interior and the President adequately had complied with the procedural requirements of PURPA. *No Oilport!*, 520 F.Supp. at 352. It deemed only the President's decision regarding the choice of the route to be "unreviewable." *Id.* The court showed no hesitation in evaluating the compliance of the Secretary of the Interior and the President with the procedural requirements of NEPA. In fact, the court examined in detail the four volume EIS and whether it satisfied the various scoping, notice, and review requirements, as well as alternatives. *Id.* at 352-59.

Plaintiffs here challenge, in large part, Federal Defendants' compliance with the procedural requirements of NEPA. Unlike PURPA, Congress has passed no law to expedite review of proposed pipelines like the Keystone XL Pipeline. 43 U.S.C. § 2011(b)-(c). Congress has not established a truncated statute of limitations or prohibited a court from granting preliminary injunctive relief. *Id.* And Congress has not delegated to the President the decision as to the route of any pipeline. *Id.* Congress has enacted NEPA to ensure a full analysis of potential environmental impacts of pipeline projects such as the Keystone XL Pipeline. The State Department's own regulations require compliance with NEPA for projects of this type. 22 C.F.R. §§ 161.3, 161.5.

Plaintiffs in *Jensen* challenged under the APA the legality of a specific halibut fishing regulation adopted by the International Pacific Halibut Commission

("Commission"). *Jensen*, 512 F.2d at 1190. A 1953 Treaty between the United States and Canada to preserve the halibut fish population of the Northern Pacific Ocean and Bering Sea created the Commission. *Jensen*, 512 F.2d at 1190. The Senate ratified the Treaty on July 27, 1953. Preservation of Halibut Fishery of Northern Pacific Ocean and Bering Sea, Mar. 2, 1953, 5 U.S.T. 5.

The Treaty granted the Commission the authority to enact fishing regulations with the approval of the President and the Governor General of Canada. *Jensen*, 512 F.2d at 1196. The President expressly delegated to the State Department his authority under the Treaty to approve halibut fishing regulations proposed by the Commission. The nature of the regulation arising from an international Treaty with Canada implicated the field of foreign affairs committed to presidential discretion by law. *Id.* at 1190.

The regulation at issue prohibited fisherman from keeping halibut that they caught incidentally in their nets to other fish that the fishermen intended to catch. *Id.* The Commission's scientific staff had recommended that the fishermen be permitted to keep a certain percentage of halibut taken. The Commission disagreed with the scientific staff and enacted the regulation that allowed the fisherman to keep no halibut. *Id.*

The Secretary of State's adoption of the Commission's fishing regulations qualified as actions of the President. *Id.* at 1191. The law commits presidential

action in the field of foreign affairs to presidential discretion. *Id. Jensen* expressly assumed that the action of the Secretary of State in adopting the regulation qualified as presidential in nature. More specifically, the court reasoned that the APA placed the decision whether to adopt the regulation beyond judicial review as agency action "committed to agency discretion by law." *Id.* citing 5 U.S.C. § 701.

Chu specifically distinguished *Jensen* based on the fact that the Treaty created the Commission and delegated to the Commission the authority to enact fishing regulations subject to the approval of the President and the Governor General of Canada. *Chu*, 2014 WL 1289444 at 8. *Jensen* did not analyze the Ninth Circuit's explicit requirements for exemption from judicial review. *See ASSE Int'l v. Kerry*, 803 F.3d at 1068. Plaintiffs do not challenge the Secretary of State's approval of a regulation enacted by an international Commission. Plaintiffs seek, by contrast, to enforce the State Department's compliance with its own regulations. *Jensen* and its reasoning provide limited guidance in determining whether to commit the State Department's decision to publish the ROD/NID and issue the accompanying Presidential Permit to agency discretion by law.

3. State Department's Regulations Require NEPA Review

Section § 701(a)(2) of the APA prohibits judicial review of an administrative agency's decision if Congress enacted the statute in question in a way that the court would have no meaningful standard against which to judge the agency's

exercise of discretion. 5 U.S.C. § 701(a)(2); *Heckler v. Chaney*, 470 U.S. 821, 822 (1985). No statute prohibits review here. The APA embodies the basic presumption of judicial review to "a person suffering legal wrong because of agency action." 5 U.S.C. § 702. In the absence of a statute, the Court deems it appropriate to look to the State Department's own regulations to determine whether judicial review would endanger the general purposes of the regulations.

The State Department's regulations require a NEPA review for actions of this type. 22 C.F.R. §§ 161.3, 161.5. NEPA serves to require proper environmental considerations before the government takes action. *Id.* The State Department acknowledged the need for NEPA review throughout TransCanada's previous applications. Federal Defendants and TransCanada have failed at this stage to meet their burden to demonstrate that Congress has committed to agency discretion by law the State Department's decision to publish the ROD/NID and issue the accompanying Presidential Permit. *See Kerry*, 803 F.3d at 1068-69.

C. Redressability of Injuries

Federal Defendants next argue that an order by this Court to enjoin the Presidential Permit unconstitutionally would infringe on the President's authority. Plaintiffs must demonstrate that their alleged injury likely would be redressed by a favorable decision. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). A

relaxed redressability standard applies as Plaintiffs have alleged procedural injuries under NEPA. *Sierra Club*, 689 F.Supp.2d. at 1150.

Plaintiffs allege procedural injuries under NEPA similar to those alleged in *Sierra Club*. *Id.* at 1151. The Ninth Circuit has determined that a remedy "procedural in nature" would redress a procedural NEPA injury. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 860 (9th Cir. 2005). Plaintiffs' alleged procedural injuries could be redressed through the procedural remedy of adequate environmental review under NEPA. *Id.*

II. ESA and APA Claim Against FWS

Federal Defendants argue that the Court should dismiss for lack of standing the alleged ESA and APA violations committed by FWS in preparing the BiOp. TransCanada asserts that Plaintiffs' second claim for relief should be dismissed for failure to state a claim pursuant to Rule 12(b)(6).

A. Standing

Federal Defendants argue that Plaintiffs lack standing because their Complaint contains only vague allegations regarding adverse environmental and cultural impacts, as well as land and water resources being affected by the Keystone XL Pipeline. Federal Defendants also argue that Plaintiffs' failure to allege an interest in any ESA-listed species defeats causation or redressability. Federal Defendants contend that this failure prevents Plaintiffs from identifying a

causal link between the BiOp's alleged infirmities and any injury to Plaintiffs' members.

Plaintiffs must demonstrate an injury-in-fact that is fairly traceable to the challenged action and that is likely to be redressesed by a favorable court decision in order to establish standing. *Summers*, 555 U.S. at 493. To show injury-in-fact, a plaintiff must show "an invasion of a legally protected interest" that is both "concrete and particularized." *Lujan v. Defs of Wildlife*, 504 U.S. 555, 560 (1992). The relevant showing "is not injury to the environment, but injury to the plaintiff." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

Plaintiffs' First Amended Complaint describes their interests in the wildlife and wildlife habitat. (Doc 61.) As noted by the Supreme Court in *Lujan*, the "desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for the purpose of standing." *Lujan*, 504 U.S. at 562-63. Plaintiffs allege that the Keystone XL Pipeline would affect a host of species, including the endangered black-footed ferret, northern swift fox, whooping crane, interior least tern, pallid sturgeon, American burying beetle, threatened piping plover, northern long-eared bat and western prairie fringed orchid, among other. Plaintiffs allege that its members highly value all of these

species, have studied and observed them in the wild, and will continue to do so in the future. These alleged harms constitute injuries-in-fact. *Id.*

Plaintiffs have met the redressability requirement for the ESA and APA claims. A plaintiff asserting a procedural violation under Section 7 of the ESA needs to show only that the relief requested could protect the plaintiff's concrete interest in the species. *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1226 (9th Cir. 2008). Plaintiffs' request that FWS engage in a formal consultation that includes a complete and non-arbitrary analysis of the Keystone XL Pipeline's alleged threat to the potentially affected species. This formal consultation could protect the Plaintiffs' concrete interests and thereby redress Plaintiffs' claim. *Id.*

B. Failure to State a Claim

TransCanada contends that the imprecise and generalized nature of Plaintiffs' allegations supports denial of Plaintiffs' second claim for relief. Fed. Rule of Civ. Pro. 8 requires "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 41, 47 (1957). The complaint needs to plead only "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. TransCanada

further contends that Plaintiffs have failed to identify the actual conduct alleged to violate the ESA with sufficient specificity to meet the Rule 12(b)(6) standard.

Plaintiffs' First Amended Complaint describes their interest in the affected wildlife and their habitat. Plaintiffs allege that the State Department's BA for FWS contained deficiencies and that FWS failed to identify these deficiencies. For example, Plaintiffs contend that the BA failed to analyze adequately the potential effects of the Keystone XL Pipeline on protected species. Plaintiffs further allege that the BA did not provide adequate mitigation methods of the Keystone XL Pipeline's threats to these species. FWS used the BA to prepare the BiOp. Plaintiffs assert that based on the BA's alleged deficiencies, FWS's BiOp also failed to analyze Keystone Pipeline XL's risks to endangered and threatened species. Plaintiffs further argue that the BiOp's reliance on the flawed BA caused FWS to presume the efficacy of unproven mitigation measures, inappropriately to defer analysis of connected actions such as power lines, and completely fail to analyze risks to the endangered northern swift fox. These alleged violations by FWS may be enforced under the APA. 5 U.S.C. §§ 701-706. Plaintiffs have alleged sufficient facts to state a claim for relief under Rule 12(b)(6).

III. ESA and APA Claim Against Federal Defendants

Federal Defendants and TransCanada argue that Plaintiffs' alleged violations of the ESA and APA in their third claim for relief should be dismissed. Federal

Defendants cite two deficiencies: (1) no waiver of sovereign immunity for the ESA citizen-suit claim; and (2) Plaintiffs lack of standing to bring the ESA citizen suit-claim.

A. Waiver of Sovereign Immunity

The ESA mandates that each federal agency shall insure, in consultation with and with the assistance of the Secretary, that any action authorized, funded, or carried out by such agency will not "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2). The consultation process generally involves preparation by the federal agency of a BA, followed by a preparation of a BiOp, and accompanying incidental take statement by the consulting agency. 16 U.S.C. § 1536; *Bennett*, 520 U.S. at 157-58. Plaintiffs ground this claim under the ESA citizen-suit provision.

The ESA citizen-suit provision offers the only jurisdictional basis for Plaintiffs' third claim for relief. The citizen-suit provision represents "a waiver of sovereign immunity." *South Yuba River Citizens League v. Nat'l Marine Fisheries Service*, 629 F.Supp.2d 1123, 1130 (E.D. Cal. 2009). The ESA's waiver of sovereign immunity permits a citizen to bring suit to enjoin "any person including the United States and any other governmental instrumentality or agency" alleged to be violating the ESA. 16 U.S.C. § 1540(g)(1)(A). The citizen-suit provision

provides private parties with a vehicle to "enforce the substantive provisions of the ESA against" government agencies. *Bennett*, 520 U.S. at 173.

Federal Defendants and TransCanada argue that this waiver of sovereign immunity excludes the President. Federal Defendants again argue that the State Department's publication of the ROD/NID and its issuance of the accompanying Presidential Permit qualify as presidential action. They do not. They represent agency actions by the State Department. The State Department recognizes in its own regulations that it sits as a federal agency subject to the consultation requirements of Section 7 of the ESA for "any Departmental action that may have effects in the United States on listed species or their habitat." 22 C.F.R. § 161.11(a). These regulations provide no exclusion for Presidential Permits.

Federal Defendants contrast the citizen-suit provision's specification of parties subject to suit to the APA's definition of "agency" addressed by the Supreme Court in *Franklin*. *Franklin*, 505 U.S. at 800-01. *Franklin* acknowledged that the APA's definition of agency did not explicitly include or exclude the President. *Id.* This textual silence shielded the President from the provisions of the APA. *Id.*

Federal Defendants misplace reliance on *Franklin* and its definition of agency under the APA. The Ninth Circuit distinguished the ESA citizen-suit provision from the APA in *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472,

495-97 (9th Cir. 2011). The ESA does not look to the APA to define who remains subject to suit. *Id.* The ESA turns, by default, to the APA solely for its standard of review due to the lack of an internal standard in the ESA. *Id.*

The State Department forthrightly accepted its ESA duties when it issued a BA of the Keystone XL Pipeline in December 2012. The State Department also consulted with FWS in order for FWS to prepare its BiOp. FWS prepared and issued the BiOp in May 2013. TransCanada at the oral argument dismissed these activities as "acts of grace." The Court disagrees. The State Department, or any other federal agency, rarely undertakes voluntarily needless activities as acts of grace to our citizens.

The State Department coupled its review obligations under the ESA with its decision to issue the Presidential Permit. Under Secretary Shannon stated in issuing the accompanying Presidential Permit that he "considered the environmental effects of the proposed action consistent with . . . Section 7 of the Endangered Species Act of 1973." Notice of Issuance of a Presidential Permit, 82 Fed. Reg. at 16467-02. The State Department's publication of the ROD/NID and its issuance of the accompanying Presidential Permit qualify as agency actions subject to review by this Court under the ESA citizen-suit provision. 16 U.S.C.A. § 1540(g)(1)(A).

TransCanada further argues that Congress specifically refers to the President in some ESA citizen-suit provisions, including the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). The Court's application of the canon of statutory interpretation, TransCanada suggests, should lead to a determination that Congress's lack of reference to the President in the ESA citizen-suit provision indicates an intentional omission. TransCanada ignores the reason for the specific mention of the President in the CERCLA citizen-suit provision. The President administers the CERCLA statute and warrants specific mention. *See* 42 U.S.C. § 9659(a)(2). The President plays no similar administrative role under the ESA. *See* 16 U.S.C. § 1540(g)(1)(A).

B. Standing

Federal Defendants and TransCanada argue that Plaintiffs lack standing to bring the ESA citizen-suit claim because Plaintiffs fail to allege a sufficient concrete interest in listed species that will be harmed. To have standing, Plaintiffs must establish (1) injury-in-fact; (2) plausible connection between defendants' conduct and plaintiffs' injury; and (3) redressability. Injuries may be redressed under the ESA where a ruling would ensure that "protections accorded by the ESA would then come back into operation." *Defs of Wildlife v. U.S. Envt'l Prot. Agency*, 420 F.3d 946, 957 (9th Cir. 2005).

1. Injury-In-Fact

Plaintiffs' allegations establish injury-in-fact under Rule 8. The First Amended Complaint alleges that Plaintiffs' members inhabit the states through which TransCanada proposes to build the Keystone XL Pipeline. (Doc. 61 at 10.) Plaintiffs allege that its members highly value and have studied the ESA-protected species whose habitat the Keystone XL Pipeline threatens. *Id.* These ESA protected species include the "endangered black-footed ferret, northern swift fox, whooping crane, interior least tern, pallid sturgeon, and American burying beetle, and the threatened piping plover, northern long-eared bat and western prairie fringed orchid, among others." *Id.* at 39-40. Plaintiffs allege that the pipeline will spill an average of 1.9 times annually, for a total of 34,000 gallons of oil each year, to the detriment of these ESA-protected species. *Id.* at 45.

2. Causal Connection

Plaintiffs' allegations likewise show a plausible causal connection between Federal Defendants' conduct and Plaintiffs' injury. To survive a motion to dismiss for lack of constitutional standing, Plaintiffs must establish a "more than attenuated" line of causation between Federal Defendants' action and the alleged harm. *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011). Plaintiffs' allegations establish an affirmative duty for the federal agencies to consult and detail the manner in which Federal Defendants have failed to perform their

consultation duties under the ESA. Plaintiffs' allegations further catalogue how Federal Defendants have violated the ESA and how each violation harms each specific species.

3. Redressability

Finally, Plaintiffs present redressable claims. A ruling that would ensure "protections accorded by the ESA would then come back into operation" would redress injuries under the ESA. *Defs of Wildlife*, 420 F.3d at 957. As determined above, the State Department's publication of the ROD/NID and its issuance of the accompanying Presidential Permit constitute agency action. Plaintiffs' injuries would be redressed if the State Department were to set aside the Presidential Permit and engage in a more thorough analysis of the Keystone XL Pipeline's impacts on the protected species and the protected habitat to ensure compliance with the ESA. 50 C.F.R. § 402.14(a)-(b).

CONCLUSION

Accordingly, it is **HEREBY ORDERED** that Federal Defendants' Motion to Dismiss (Doc. 44) and Supplemental Motion to Dismiss (Doc. 70) are **DENIED**.

It is **FURTHER ORDERED** that TransCanada's Motion to Dismiss (Doc. 48) and Supplemental Motion to Dismiss (Doc. 68) are **DENIED**.

DATED this 22nd day of November, 2017.

Brian Morris
United States District Court Judge

APPENDIX H

DEPARTMENT OF STATE
RECORD OF DECISION AND NATIONAL INTEREST DETERMINATION

TransCanada Keystone Pipeline, L.P. Application for Presidential Permit, Keystone XL Pipeline

Contents:

1.0 Summary

On May 4, 2012, TransCanada Keystone Pipeline, L.P. (Keystone) submitted an application to the U.S. Department of State (Department) for a Presidential permit that would authorize construction, connection, operation, and maintenance of pipeline facilities at the U.S.-Canada border in Phillips County, Montana, to import crude oil from Canada into the United States. The proposed project, called Keystone XL (the proposed Project), would consist of approximately 1,204 miles of new, 36-inch-diameter pipeline extending from Hardisty, Alberta, to Steele City, Nebraska. The proposed Project would have the capacity to deliver up to 830,000 barrels per day (bpd) of crude oil. It would predominantly transport crude oil from the Western Canadian Sedimentary Basin (WCSB), but, subject to commercial demand, would also transport quantities of crude oil from Montana and North Dakota via a proposed pipeline and associated facilities known as the Bakken Marketlink Project. If issued, the permit would authorize operations at the border segment, which is from the international border near Morgan, Montana, to the first mainline shut-off valve within the United States located approximately 1.2 miles from the international border.

On November 6, 2015, Secretary of State Kerry determined under Executive Order 13337 that issuing a Presidential permit to Keystone for the proposed Keystone XL pipeline's border facilities would not serve the national interest, and denied the permit application (2015 Decision). On January 24, 2017, President Trump issued a Presidential Memorandum Regarding Construction of the Keystone XL Pipeline (Presidential Memorandum) which, *inter alia*, invited Keystone "to re-submit its application to the Department of State for a Presidential permit for the construction and operation of the Keystone XL Pipeline..." On January 24, 2017, President Trump also issued an Executive Order on Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects in which he set forth the general policy of the Executive Branch "to streamline and expedite, in a manner consistent with law, environmental reviews and approvals for all infrastructure projects, especially projects that are a high priority for the Nation," and cited pipelines as an example of such high priority projects.

On January 26, 2017, the Department received a re-submitted application from Keystone for the proposed Project. The re-submitted application includes minor route alterations due to agreements with local property owners for specific right-of-ways and easement access, but remains entirely within the areas previously surveyed by the Department in the 2014 Supplemental Environmental Impact Statement (EIS).

Keystone is a limited partnership organized under Delaware law with a primary business address in Houston, Texas. Its affiliate, TC Oil Pipeline Operations Inc. would operate the proposed Project. TC Oil Pipeline Operations Inc. is a limited company organized under the laws of Canada with its headquarters located in Calgary, Alberta, Canada. Both Keystone and TC Oil Pipeline Operations Inc. are owned by affiliates of TransCanada Corporation, a Canadian company with stock publicly traded on the Toronto and New York stock exchanges.

Executive Order 13337 (April 30, 2004) delegates to the Secretary of State the President's authority to receive applications for permits for the construction, connection, operation, or maintenance of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels (except for natural gas) at the borders of the United States and to issue or deny such Presidential permits upon a national interest determination. The determination is Presidential action, made through the exercise of Presidentially delegated authorities, and therefore the requirements of the National Environmental Policy Act of 1969 (NEPA), the National Historic Preservation Act of 1966 (NHPA), the Endangered Species Act of 1973 (ESA), the Administrative Procedure Act (APA), and other similar laws and regulations that do not apply to Presidential actions are also inapplicable here. Nevertheless, the Department's review of the Presidential permit application for the proposed Project has, as a matter of policy, been conducted in a manner consistent with NEPA. A Final Supplemental EIS was released on January 31, 2014 as noted above. In the Supplemental EIS, the Department evaluated the potential construction and operational impacts of the proposed Project and alternatives that may occur without the proposed Project on a wide range of environmental and cultural resources. Similarly, as a matter of policy, the Department conducted reviews of the proposed Project consistent with Section 106 of the NHPA, as amended, and with Section 7 of the ESA. The Department solicited public comment and conducted a broad range of consultations with state, local, tribal, and foreign governments and other federal agencies as it considered Keystone's application.

Acting on behalf of the President under delegated authorities in accordance with Executive Order 13337 and the Presidential Memorandum, the Under Secretary of State for Political Affairs has determined that issuing a Presidential permit to Keystone to construct, connect, operate, and maintain at the border of the United States pipeline facilities for the import of crude oil from Canada to the United States as described in the Presidential permit application for the proposed Project would serve the national interest. Accordingly, the request for a Presidential permit is approved.

2.0 Legal Authority

The President of the United States has authority to require permits for transboundary infrastructure projects based upon his Constitutional powers. In Executive Order 13337, acting pursuant to the Constitution and laws of the United States, including Section 301 of Title 3 of the United States Code, the President delegated to the Secretary of State the authority to receive applications and make determinations regarding approval or denial of a Presidential permit for certain types of border facilities, including those for cross-border petroleum pipelines, based on the Secretary's finding as to whether issuance of a permit would serve the national interest. Because the proposed Project seeks to build new petroleum facilities that cross the international border, the authority to make a determination for the issuance of a Presidential permit for the border facilities is within the scope of authority delegated to the Secretary of State by the President. The functions assigned to the Secretary have been further delegated within the Department including to the Deputy Secretary of State, the Under Secretary of State for Political Affairs, and the Under Secretary of State for Economic Growth, Energy, and the Environment.

(Department of State Delegations of Authority No. 245-1, 118-2).

As noted above, when reviewing an application for a Presidential permit, the Secretary or his delegate is required by the Executive Order to determine if issuance of the permit would serve the national interest. The determination is made pursuant to the President's Constitutional authority. No statute establishes criteria for this determination. The President or his delegate may take into account factors he or she deems germane to the national interest. With regard to the proposed Project, the Under Secretary of State for Political Affairs has considered a range of factors, including but not limited to foreign policy; energy security; environmental, cultural, and economic impacts; and compliance with applicable law and policy. The determination is Presidential action, made through the exercise of Presidentially delegated authorities, and therefore the requirements of NEPA, the ESA, the NHPA, the APA, and other similar laws and regulations that do not apply to Presidential actions are also inapplicable here. Nevertheless, as a matter of policy and in order to inform the Under Secretary's determination regarding the national interest, the Department has reviewed the potential impacts of the action on the environment and cultural resources in a manner consistent, where appropriate, with these statutes. The purpose of preparing an environmental impact statement and undertaking the other statutory processes noted above was to produce a comprehensive review to inform decisionmakers and the relevant Executive Branch agencies about the potential environmental impacts of the proposed Project.

In accordance with the Presidential Memorandum, the agency notification and fifteen-day delay requirements of sections 1(g), 1(h) and 1(i) of Executive Order 13337 have been waived with respect to this re-submitted application.

3.0 Agency and Tribal Involvement and Public Comment

The Department conducted extensive public outreach and consultation during several stages of its consideration of Keystone's Presidential permit application in order to solicit input on issues to be considered. The Department also conducted government-to-government consultation with Indian tribes regarding historic properties in a manner consistent with the NHPA, and consulted with relevant agencies consistent with the ESA and other statutes as appropriate. Finally, the Department sought views of other federal agencies as required by Executive Order 13337. The public notice, outreach, and consultation efforts during consideration of Keystone's application are further detailed below. The Department has taken all comments and relevant information into account in making the national interest determination.

3.1 Public Notice: Upon receipt of Keystone's application in 2012, the Department published in the Federal Register a Notice of Receipt of the Keystone XL Pipeline Application (77 FR 27533, May 10, 2012). At that time, the Department also established a website that it updated with information and significant documents throughout its review of the Presidential permit application (*see* https://keystonepipeline-xl.state.gov/). In February 2017, the Department also published in the Federal Register a Notice of Receipt of TransCanada Keystone Pipeline, L.P.'s Re-Application for a Presidential

Permit to Construct, Connect, Operate, and Maintain Pipeline Facilities on the Border of the United States and Canada (82 FR 10429, Feb. 10, 2017).

3.2 Public Comment Periods: There has been significant opportunity for public comment on this project. On June 15, 2012, the Department published a notice in the Federal Register informing the public that it intended to prepare a Supplemental EIS (77 FR 36032). The notice also announced plans for developing the scope of the environmental review and content of the Supplemental EIS, and invited public participation in that process, including soliciting public comments. The Department received over 400,000 comments during the scoping period (including letters, cards, emails, and telephone calls), which were considered and reflected as appropriate in developing the scope of the Supplemental EIS. The Department also published all comments received during this and all other public comment periods in the review, consistent with its commitment to conduct an objective, rigorous, and transparent review process.

In March 2013, the Department released a Draft Supplemental EIS, which was posted on the Department's website for the project. The Department distributed copies to public libraries along the pipeline route and to interested Indian tribes, federal and state agencies, elected and appointed officials, media organizations, non-governmental organizations (NGOs), private landowners, and other interested parties. On March 27, 2013, the Department published a notice in the Federal Register inviting the public to comment on the document (78 FR 18665). The Department then held a public meeting on April 18, 2013, in Grand Island, Nebraska, to receive further views from the public and other interested parties. In total, the Department received more than 1.5 million submissions during the public comment period for the Draft Supplemental EIS. These submissions came from members of the public, federal, state, and local representatives, government agencies, Indian tribes, NGOs, and other interested groups and stakeholders. All comments were considered as part of the Supplemental EIS; Volumes V and VI of the Supplemental EIS address the comments that were received.

On February 5, 2014, five days after releasing the Supplemental EIS, the Department published a notice in the Federal Register inviting members of the public to comment within 30 days on any factors they deemed relevant to the national interest determination (79 FR 6984). Executive Order 13337 allows for such a public comment process, but does not require the Department to solicit public input. The response during the 30-day public comment period was unprecedented. The Department received more than three million submissions.

All comments were reviewed by subject matter experts from several Department bureaus who were knowledgeable about the proposed Project and involved in drafting sections of this Record of Decision and National Interest Determination, as well as by the third-party contractor engaged to assist the Department with tasks relating to the review of the permit application. The contractor, with guidance from Department experts, sorted the comments into six overarching issue areas discussed in the comments—environmental impacts (including climate change), cultural resources impacts, socioeconomic impacts, energy security, foreign policy considerations, and compliance with relevant federal and

state laws and regulations. For each of these issue areas, the contractor identified a number of themes that captured the ideas or points raised by public comments. The Department's subject matter experts directly reviewed all of the issues and information raised in the public comments. The Department determined that the comments largely addressed issues that were also raised during preparation of the Supplemental EIS.

3.3 Tribal Consultation: The Department directly contacted 84 Indian tribes within the United States that could have an interest in the resources potentially affected by the proposed Project. Of the 84 Indian tribes, 67 notified the Department that they would like to consult on the proposed Project or were undecided. The Department conducted extensive government-to-government consultations with those 67 Indian tribes on the environmental, cultural, and other potential impacts of the proposed Project. In addition to communications by phone, email, and letter, Department officials held tribal meetings in October 2012 (three meetings), May 2013 (one meeting), and July 2013 (teleconference). The face-to-face meetings were held in four locations: Billings, Montana; Pierre, South Dakota; Rapid City, South Dakota; and Lincoln, Nebraska.

In addition to the government-to-government consultations, the Department engaged in discussions consistent with Section 106 of the NHPA with Indian tribes, Tribal Historic Preservation Officers, State Historical Preservation Officers, and the Advisory Council on Historic Preservation. The topics of these discussions included cultural resources, in general, as well as cultural resources surveys, Traditional Cultural Properties surveys, effects on cultural resources, and potential mitigation. Additionally, Indian tribes were provided cultural resources survey reports for the proposed Project and were invited both to conduct Traditional Cultural Property surveys funded by Keystone and to help develop and participate in the Tribal Monitoring Plan. New cultural resources survey information provided by Keystone in its re-submitted application will be shared as appropriate according to the terms and conditions of the 2013 Amended Programmatic Agreement.

3.4 Consultation with Federal and State Agencies: Ten federal entities agreed to assist the Department as Cooperating Agencies during preparation of the Supplemental EIS: the U.S. Army Corps of Engineers, the Farm Service Agency, the Natural Resource Conservation Service, the Rural Utilities Service, the Department of Energy, the Bureau of Land Management, the National Park Service, the U.S. Fish and Wildlife Service (FWS), the Pipeline and Hazardous Materials Safety Administration's Office of Pipeline Safety (PHMSA), and the U.S. Environmental Protection Agency (EPA). These agencies had significant input into the drafting of the Draft and Final Supplemental EIS.

Consistent with Section 7 of the ESA, the Department consulted with the FWS and submitted a Biological Assessment on the proposed Project. The FWS issued a Biological Opinion in 2013 that is available as an attachment to the Supplemental EIS. Prior to issuance of the 2015 Decision, consultations with the FWS were reinitiated regarding the rufa red knot (*Calidris canutus rufa*), designated a threatened species effective January 12, 2015, and the northern long-eared bat (*Myotis septentrionalis*), designated a threatened species effective May 4, 2015. Following publication of the Supplemental EIS, the Department and FWS have concluded Section 7 consultations with

regard to both the rufa red knot and the northern long-eared bat to supplement the existing Biological Opinion for the proposed Project. The Department also reviewed the 2013 Biological Opinion and received confirmation from FWS that Section 7 consultations need not be reinitiated for any other species and that, following implementation of the conservation measures contained within that Opinion, no other species included in the project area would be adversely affected.

Executive Order 13337 requires that the Secretary request the views of eight specified U.S. federal agencies with regard to the permit application. Accordingly, the Department requested the views of the Department of Defense, the Department of Justice, the Department of the Interior, the Department of Commerce, the Department of Transportation, the Department of Energy, the Department of Homeland Security, and the EPA. The Department of Justice and the Department of Commerce informed the Department that they did not plan to provide any views with regard to the permit application. The other six agencies provided their views in writing; those views were released in conjunction with the 2015 Decision.

The Department has also monitored other federal and state permitting and licensing processes, including, for example, litigation and the recent application to the Nebraska Public Service Commission concerning the proposed Project's route through that state.

3.5 Information Provided by Keystone: The Department had robust communication with Keystone throughout the review of the application for the proposed Project. Keystone responded to multiple requests for information and provided supplemental views and information on its own initiative, including through letters on February 24, 2015, June 29, 2015, February 3, 2017, and March 17, 2017. The Department has taken all information provided by Keystone into account in making the national interest determination.

4.0 Project Background

4.1 Keystone XL Project: The proposed Project would consist of approximately 1,204 miles of new, 36-inch-diameter pipeline extending from Hardisty, Alberta, to Steele City, Nebraska. Approximately 875 miles of the pipeline would be located in the United States. The pipeline would cross the international border between Saskatchewan, Canada and the United States near the town of Morgan, Montana, in Phillips County. The border segment is from the international border near Morgan, Montana, to the first mainline shut-off valve within the United States located approximately 1.2 miles from the international border. The pipeline would have the capacity to deliver up to 830,000 bpd of crude oil. Annual quantities would likely vary based on market conditions and other factors.

Subject to commercial demand, Bakken crude will enter the pipeline within the United States through the proposed Bakken Marketlink Project—a five-mile pipeline with pumps, meters, and storage tanks that would connect to the Keystone XL pipeline near Baker, Montana. The facilities would supply up to 100,000 bpd of Bakken crude oil to the proposed Keystone XL pipeline.

At its southern terminus, the proposed Project would connect to the existing Keystone Cushing Extension pipeline, which extends from Steele City, Nebraska, to Cushing, Oklahoma. The Keystone Cushing Extension in turn connects to Keystone's Gulf Coast pipeline, which extends south to Nederland, Texas, in order to serve Gulf Coast refineries.

In addition to the pipeline and potential Bakken Marketlink Project facilities, the proposed Project would include ancillary facilities. Eighteen pumping stations would be located along the Keystone XL pipeline, and two pumping stations would be added to the Keystone Cushing Extension. Keystone further anticipates new pumping capacity on the Keystone Cushing Extension in Kansas. The pipeline would be located in a 50-foot-wide permanent right of way (ROW). The temporary construction ROW would be wider—110 feet—and access roads, construction camps, and related facilities would be needed during construction.

According to the application submitted by Keystone, the primary purpose of the proposed Project would be to transport crude oil from the border with Canada to delivery points in the United States (primarily to the Gulf Coast area). The proposed Project is meant to supply U.S. refineries with crude oil of the kind found in the WCSB (often called heavy crude oil). Subject to commercial demand, the proposed Project may also provide transportation for the kind of crude oil found within the Bakken formation of North Dakota and Montana (often called light crude oil).

Most recent U.S. production growth has been from tight oil formations—unlocked through technical innovations like hydraulic fracturing and horizontal drilling—that typically yield light, sweet crude. As a result, U.S. crude production growth has tended to displace imports from other countries also producing light, sweet crude—predominately in Africa. Oil sands bitumen consists of heavy, sour, viscous crude oil that is produced and marketed differently than most domestic unconventional crudes. Many U.S. refineries, particularly in the Midwest and Gulf Coast, are optimized to process heavy crudes like those from the oil sands.

As the Supplemental EIS explains, North American production growth coupled with constraints on transporting landlocked crude oil to market have contributed to discounts on the price of landlocked crude and led to growing volumes of crude shipped by rail. This has heightened the attractiveness of the proposed Project to many in industry. Keystone has stated that the proposed Project is commercially viable and sees the demand to be substantially similar to that which existed when Keystone first applied.

The Department notes that the ultimate disposition of crude oil that would be transported by the proposed Project, as well as any refined products produced from that crude oil, would be determined by market demand and applicable law. In the absence of heavy crude oil from Canada, U.S. refineries, particularly in the Gulf Coast, will continue to rely on comparable foreign heavy crudes.

4.2 Prior Permit Application: Keystone's first application for the Keystone XL pipeline was submitted to the Department on September 19, 2008. A Final EIS was published on August 26, 2011 (2011 Final EIS). The route proposed in 2008 included the same U.S.-Canadian crossing as the border currently proposed Project, but a different pipeline route in the United States. That route traversed a substantial portion of the Sand Hills Region of Nebraska, as identified by the Nebraska Department of Environmental Quality (NDEQ). Moreover, the 2011 Final EIS route went from Montana to Steele City, Nebraska, and then from Cushing, Oklahoma, to the Gulf Coast area.

In November 2011, the Department determined that additional information was needed to fully evaluate the application—in particular, information about alternative routes within Nebraska that would avoid the NDEQ-identified Sand Hills Region. In late December 2011, Congress enacted a provision of the Temporary Payroll Tax Cut Continuation Act that sought to require the President to make a decision on the Presidential permit for the 2008 application within 60 days. At the time, the prior administration determined that the deadline did not allow sufficient time for the Department to prepare a rigorous, transparent, and objective review of an alternative route through Nebraska. Accordingly, the Presidential permit was denied.

In February 2012, Keystone informed the Department that it considered the Gulf Coast portion of the originally proposed pipeline project (from Cushing, Oklahoma, to the Gulf Coast area) to have independent economic utility, and indicated that Keystone intended to proceed with construction of the Gulf Coast pipeline as a separate project, called the Gulf Coast Project. The Gulf Coast Project did not require a Presidential permit because it does not cross an international border. Construction on the Gulf Coast Project is now complete.

On May 4, 2012, Keystone filed a new Presidential permit application for the Keystone XL Project. The proposed Project has a new route and a new stated purpose and need. The new proposed route differs from the 2011 Final EIS Route in two significant ways: 1) it would avoid the environmentally sensitive NDEQ-identified Sand Hills Region and 2) it would terminate at Steele City, Nebraska. From Steele City, existing pipelines would transport the crude oil to the Gulf Coast area. The proposed Project no longer includes a southern segment.

In addition to the NDEQ-identified Sand Hills Region, the proposed Project route would avoid other areas in Nebraska (including portions of Keya Paha County) that have been identified by the NDEQ as having soil and topographic characteristics similar to the Sand Hills Region. The proposed Project route would also avoid or move further away from water wellhead protection areas for the towns of Clarks and Western, Nebraska.

On November 6, 2015, Secretary of State Kerry determined under Executive Order 13337 that issuing a Presidential permit to Keystone for the proposed Keystone XL pipeline's border facilities would not serve the national interest, and denied the permit application in the 2015 Decision. On January 24, 2017, President Trump issued the Presidential Memorandum which, inter alia, invited Keystone "to re-submit its application to the

Department of State for a Presidential Permit for the construction and operation of the Keystone XL Pipeline. . . ." On January 26, 2017, the Department received a re-submitted application from Keystone for the proposed Project. The proposed route in the re-submitted application includes minor route alterations due to changes in right-of-way and easement agreements with local property owners, but remains entirely within the area previously examined by the Department in the Supplemental EIS.

5.0 Issues Considered in the Final Supplemental Environmental Impact Statement

This Record of Decision and National Interest Determination is informed by the Supplemental EIS prepared by the Department and published in January 2014, which identified and analyzed a broad range of potential impacts of the proposed Project. The Presidential Memorandum directed the Department to consider to the maximum extent permitted by law the Supplemental EIS "and the environmental analysis, consultation, and review described in that document (including appendices)" to satisfy any provision of law that requires executive department consultation or review, including any applicable requirements of NEPA. As described above, the Department's determination with respect to an application for a Presidential permit is Presidential action, made through the exercise of Presidentially delegated authorities, and therefore the requirements of NEPA, the ESA, the NHPA, the APA, and other similar laws and regulations that do not apply to Presidential actions are inapplicable. As a matter of policy, however, and in order to inform the Department's determination regarding the national interest, the Department has reviewed the potential impacts of the proposed Project on the environment and cultural resources in a manner consistent, where appropriate, with these statutes.

The Supplemental EIS presents information and analysis on a range of potential impacts of the proposed Project. It also describes the tribal consultations undertaken as part of the Supplemental EIS process. The Supplemental EIS also considers reasonable alternative pipeline routes and No Action Alternative scenarios.

Key topics in the Supplemental EIS, particularly those that received significant public interest, are described below. The Supplemental EIS reflects the expected environmental impacts of the proposed Project. Certain topics examined therein such as greenhouse gas (GHG) emissions analysis and market analysis are dynamic, although, for the reasons discussed below, the Supplemental EIS continues to inform the Department's national interest determination in respect of these topics. With respect to other topics such as threatened and endangered species, changes brought about either by the passage of time or differences in underlying law or regulations are noted. The Department has reviewed and considered these changes and concluded that they do not represent substantial changes, do not present significant new information, and do not affect the continued reliability of the Supplemental EIS.

5.1 Greenhouse Gas (GHG) Emissions: GHG emissions and the potential climate change impacts associated with the proposed Project were key areas of interest highlighted by the comments received by the Department. The Supplemental EIS evaluates the relationship between the proposed Project with respect to GHG emissions

and climate change from the following perspectives:

- The GHG emissions associated with the construction and operation of the proposed Project and its connected actions;

- The indirect lifecycle (wells-to-wheels) GHG emissions associated with the WCSB crude oil that would be transported by the proposed Project as compared to the GHG emissions of the crudes it may displace; and

- How the GHG emissions associated with the proposed Project cumulatively contribute to climate change.

GHG Emissions Associated with Construction and Operation

According to the Supplemental EIS, the proposed Project would emit approximately 0.24 million metric tons of carbon dioxide (CO2) equivalents (MMTCO2e) per year during the construction period. These emissions would be emitted directly through fuel use in construction vehicles and equipment as well as land clearing activities, including open burning, and indirectly from electricity usage. To operate and maintain the pipeline, approximately 1.44 MMTCO2e would be emitted per year, largely attributable to electricity use for pump station power, fuel for vehicles and aircraft for maintenance and inspections, and fugitive methane emissions at connections. The 1.44 MMTCO2e emissions would be equivalent to GHG emissions from approximately 300,000 passenger vehicles operating for one year, or 71,928 homes using electricity for one year.

GHG Emissions Associated with the Indirect Lifecycle of WCSB Crudes

To enable a more comprehensive understanding of the potential indirect GHG impact of the proposed Project, it is important to consider the wider GHG emissions associated with the crude oil that would be transported by the proposed Project. A lifecycle analysis is a technique used to evaluate the environmental aspects and impacts (in this case GHGs) that are associated with a product, process, or service from raw materials acquisition through production, use, and end-of-life (wells-to-wheels). This approach evaluates the GHG implications of the WCSB crudes that would be transported by the proposed Project compared to other crude oils that would likely be replaced or displaced by those WCSB crudes in U.S. refineries (hereinafter, reference crudes). The actual increase in GHG lifecycle emissions attributable to the proposed Project depends on whether or how much approval and use of the pipeline would cause an increase in oil sands production. Conclusions drawn from the Department's market review, detailed further below, indicate that the proposed Project would be unlikely to significantly impact the rate of extraction in the oil sands and is therefore not likely to lead to a significant net increase in GHG emissions.

The Supplemental EIS analysis considers wells-to-wheels GHG emissions, including extraction, processing, transportation, refining, and refined product use (such as combustion of gasoline in cars) of WCSB crudes compared to other reference crudes, including heavy slates. The lifecycle analysis also considers the implications associated with other generated products during the lifecycle stages (so-called co-products) such as

petroleum coke. The largest single source of GHG emissions in the lifecycle analysis is the finished-fuel combustion of refined petroleum fuel products, which is consistent for different crude oils.

WCSB crudes are generally more GHG intensive than other crudes they would replace or displace in U.S. refineries, and emit an estimated 17 percent more GHGs on a lifecycle basis than the average barrel of crude oil refined in the United States. As the EPA notes in its letter of February 2, 2015 to the Secretary, "oil sands crude is substantially more carbon intensive than reference crudes and its use will significantly contribute to carbon pollution."

According to the Supplemental EIS, the total lifecycle emissions associated with production, refining, and combustion of 830,000 bpd of oil sands crude oil transported through the proposed Project is approximately 147 to 168 MMTCO2e per year. The annual lifecycle GHG emissions from 830,000 bpd of the four reference crudes examined in the Supplemental EIS are estimated to be 124 to 159 MMTCO2e. The range of incremental GHG emissions for crude oil that would be transported by the proposed Project is estimated to be 1.3 to 27.4 MMTCO2e annually. The estimated range of potential emissions is large because there are many variables, such as which reference crude is used for the comparison and which study is used for the comparison. Nevertheless, at the high end, the Supplemental EIS states that 27.4 MMTCO2e per year is equivalent to the annual GHG emissions from 5.7 million passenger vehicles or 7.8 coal-fired power plants.

GHG lifecycle emissions analysis performed by the Department after publication of the Supplemental EIS in the context of the environmental review for a Presidential permit for another pipeline, Enbridge's Line 67 Expansion, estimates that GHG emissions from WCSB crude may be five to 20 percent higher than previously indicated. Using the Greenhouse Gases, Regulated Emissions, and Energy Use in Transportation (GREET) model, an alternative "well-to-wheels" fuel-cycle model developed by the Argonne National Laboratory (Argonne National Laboratory 2016, 2015), the Line 67 Expansion Draft Supplemental EIS places emissions per barrel of WCSB at 584 kg CO2-eq per barrel, compared to approximately 485-555 kg CO2-eq per barrel to in the Supplemental EIS for the proposed Project.[1]

The estimates provided in the Supplemental EIS characterize the potential increase in emissions attributable to the proposed Project if one assumes that approval or denial of the proposed Project would directly result in a change in production of 830,000 bpd of oil sands crudes in Canada. That is because the estimates represent the total incremental emissions associated with production and consumption of 830,000 bpd of oil sands crude

[1] The primary driver for the Department's determination for Line 67 is the assumption that coke produced in the process of extraction of WCSB would not offset the use of coal as a source of energy to fuel WCSB extraction. If coke displaces coal, WCSB emissions would be 528 kg CO2-eq per barrel according to the Line 67 Expansion Supplemental EIS. We note that comparing lifecycle greenhouse gas emissions to the U.S. average mix in GREET could potentially lead to over-estimating the change in emissions from using heavy WCSB crude oil, and under-estimating the change from using lighter WCSB crude oil.

above and beyond the current baseline compared to the reference crudes. However, as discussed further below, the Department's analysis continues to show that the approval of this proposed Project is unlikely to have a substantial effect on the rate of extraction of the oil sands and is also therefore unlikely to directly result in significant change in production in oil sands crudes in Canada.

5.2 Market Analysis

Proposed Project's Impact on Oil Sands Production

The Supplemental EIS utilizes analysis of evolving market conditions, transportation costs, oil-sands supply costs, and varying supply-demand scenarios to inform conclusions about the proposed Project's potential impact on oil sands production. The analysis concluded at the time it was published in January 2014 that approval or denial of any one crude oil transport project, including the proposed Project, would be unlikely to significantly impact the rate of extraction in the oil sands, or the continued demand for heavy crude oil at refineries in the United States. The Supplemental EIS balances this position by emphasizing that uncertainty underlies a number of key variables critical to projecting Canadian production growth.

Generally, the dominant drivers of oil sands development remain more global than any single infrastructure project. Oil sands production and investment could slow or accelerate depending on oil price trends, regulations, and technological developments, but the potential effects of those factors on the industry's rate of expansion need not be conflated with the more limited effects of individual pipelines. Under most market conditions, alternative transportation infrastructure would allow growing oil sands production to reach markets irrespective of the proposed Project. Most recently, this has been demonstrated by the growth in rail loading capacity in Western Canada, which as of February 25, 2017, the National Energy Board (NEB) of Canada now estimates at over 1,075,000 bpd. This significant rail capacity has been utilized to export over 160 million barrels of Canadian crude oil to the United States since 2011. The Supplemental EIS also determined that construction of the proposed Project would have some effect on discrete decisions about whether to develop specific oil sands projects if (1) no new pipeline capacity to Canadian ports or to the United States becomes operational and (2) the price of oil in the long run persists at a level where other transport options are no longer economical.

Coupled with supply growth in the WCSB, major crude oil export pipelines from the region have largely operated at, or near, capacity for several years; an observation highlighted by Prime Minister Trudeau on November 29, 2016 when he announced the conditional approval of Kinder Morgan's expansion of the Trans Mountain pipeline from Alberta to the port at Vancouver, British Columbia, which would increase the pipeline's capacity from 300,000 bpd to 890,000 bpd of crude oil. Kinder Morgan expects to begin construction of the Trans Mountain pipeline in September 2017. Current market projections from the Energy Information Administration (EIA) and the International Energy Agency (IEA) anticipate production growth in Canadian WCSB to continue, even when factoring in delays and cancellations of certain planned large-scale greenfield

projects resulting from the current crude oil price environment, further stressing the capability of existing pipeline infrastructure to keep pace with supply growth, and suggesting that there continues to be sustained demand for additional pipeline capacity. This near-term production growth in the WCSB is due largely to the start of other projects with long lead-times and continued incremental investment by certain market players to expand production from existing brownfield projects.

The impact on oil sands development is difficult to gauge with precision, in part because the cost differential between other modes of transport and pipelines may change over time, and production costs vary from one oil sands development to another. While the Department does not know all of the production costs or other investment factors for specific Canadian projects, the Supplemental EIS concluded that many projects are expected to break even when sustained oil prices are in the range of $65-$75 per barrel. On this basis, the Department's analysis found that oil sands production is expected to be most sensitive to transport costs with oil prices in or below that range.

Since the publication of the Supplemental EIS, the price of benchmark West Texas Intermediate (WTI) crude oil has declined by over 50 percent from $98.23 per barrel in January 2014 to approximately $48 per barrel at present. This represents a sizeable near-term price decline; however, the Department notes that the 30-year real price average (i.e., the nominal price adjusted for inflation using March 2017 $) of WTI crude is $55 per barrel. Although prices have rebounded from 2016 lows, global liquids production for the time being continues to outpace consumption. Organization for Economic Cooperation and Development commercial stocks of crude oil remain approximately 300 million barrels above the five-year average. This includes U.S. commercial oil stocks, which are at an all-time high of 528 million barrels or approximately 35 days of domestic supply needs. The EIA expects a relatively balanced oil market in the next two years, with inventory builds averaging 100,000 bpd in 2017 and 200,000 bpd in 2018. However, the Department underscores that short-term fluctuations in price driven by current market supply and demand dynamics are less indicative of the industry's general outlook than the broader macroeconomic forces that drive investment in the oil and gas sector.

In making long-term investment decisions, companies often distinguish between new development and production from existing projects with previously sunk capital costs. While oil prices consistently below supply costs over the long-term may lead some investors to delay or even cancel some future projects, decisions about proceeding with or expanding existing projects and those already under construction or with financing in place are largely based on marginal operating costs. In general, existing projects and those under development are unlikely to slow or stop unless revenues persistently fall below current operating costs, which are much lower than total supply costs ($20 to $40 per barrel according to most estimates reviewed). Most reports further indicate that oil sands supply costs have fallen in the lower-price environment. Collectively, these factors help to explain why Canadian crude oil production, including from the oil sands, has proven resilient despite lower oil prices, including a period during the first quarter of 2016 when price remained at or below $40 per barrel. These market observations also

explain the growth trends expected by the Department and other market energy information organizations, such as the EIA, which predicts 340,000 bpd in crude production growth in Canada through 2018.

The Department recognizes that oil prices are volatile, particularly over the short term. However, the long-term trends that drive WCSB crude oil production and the amount of new transportation capacity needed to meet them, coupled with the documented ability of Canadian upstream producers to sustain production during a period of lower oil prices, lead the Department to have confidence in the forecasts presented by market experts at the EIA and IEA, and affirm the Department's conclusion that such infrastructure is supported by mid- and long-term market outlooks.

Crude-by-Rail

In recent years, industry has looked toward existing Canadian crude oil production forecasts and commercial realities tied to prevailing midstream bottlenecks as justification for further investment in alternative crude oil transportation. Although there are a number of possible alternative transportation avenues for crude from the oil sands to reach U.S. or other markets, significant investment has been made in the development of crude-by-rail loading and off-loading facilities throughout North America. Current WCSB rail loading capacity has been estimated to exceed 1,075,000 bpd, with potential to expand further. Under current market conditions, existing pipelines coupled with crude-by-rail facilities will likely have the capacity to accommodate new supply from upstream projects under construction and in various stages of completion in western Canada. Although existing rail capacity moderates the impact of pipeline constraints, according to NEB of Canada, it remains a more expensive form of transportation than pipelines, an observation that supports the economic utility and commercial viability of new pipeline infrastructure. Additionally, as stated in the Supplemental EIS, per unit rail transport of WCSB oil would be more GHG-intensive than transport by pipeline when accounting for the total aggregate lifecycle GHG emissions (including direct and indirect emissions).

The extent to which rail transport will actually occur, however, or would prove to be a major form of transport for WCSB crude to the United States in the long term, remains uncertain. Utilization of rail facilities will depend upon many factors, including the availability of cheaper pipeline transport options from the respective production areas, the rate of growth in emerging areas of crude production, demand from refineries that may be better served by rail from these sources, differences in the price of oil paid in the production areas and the price of oil paid at the refinery markets (particularly on the coasts), and arbitrage opportunities that may be available through faster rail-based transport.

Producers seeking to preserve margins in the face of narrowing price gaps between Western Canada Select crude, WTI, and other crudes such as the Mexican Maya, may seek to maximize the efficiency of existing pipeline infrastructure in lieu of rail. Moreover, implementation of new Department of Transportation rules intended to improve the safe transportation of large quantities of crude-by-rail may lead to a marginal

increase in crude-by-rail costs.

5.3 Potential Spill Risk and Safety Impacts: Many concerns were raised in comments received by the Department regarding the potential environmental effects of a pipeline release, leak, and/or spill. The Supplemental EIS analyzes impacts from potential releases from the proposed Project by analyzing historical spill data. The analysis identifies the types of pipeline system components that historically have been the source of spills, the sizes of those spills, and the distances those spills would likely travel. The resulting potential impacts to natural resources, such as surface waters and groundwater, are also evaluated and mitigation measures are included that are designed to prevent, detect, minimize, and respond to oil spills.

The Supplemental EIS analyzes historical crude oil pipeline incident data within the PHMSA and National Response Center incident databases. Over a period of ten years, from January 2002 through July 2012, a total of 1,692 incidents were reported in the United States, of which 321 were reported to be pipe incidents and 1,027 incidents were reported to involve different equipment components such as tanks, valves, or pumps.

Most spills over this period were small. Of the 1,692 incidents between 2002 and 2012, 79 percent of the incidents were in the small (zero to 50 barrel) range—roughly equivalent to a spill of up to 2,100 gallons. Four percent of the incidents were in the large (greater than 1,000 barrel) range. If a pipeline spill were to occur, the severity of its impact would depend on the volume and aerial extent of oil released; the distance of the impacted entity from the spill source; site-specific environmental circumstances, including climate and species present; and the timing and nature of response efforts.

An oil spill that reaches a surface waterbody or wetland could cause effects such as reduced dissolved oxygen levels or high benzene contaminant levels. The Supplemental EIS states that acute toxicity could occur if substantial amounts of crude oil were to enter rivers and streams. If diluted bitumen is accidentally released and it flowed into surface water, the diluent fraction would tend to volatilize or dissolve into the water, leaving bitumen behind to sink or become suspended. Upwards of 25 percent of residual hydrocarbons could be reasonably removed by natural attenuation, while active recovery methods would be required for remediation of the remaining spill volume. Aggressive cleanup methods could mix oil and water, which might result in longer-lasting impacts to sensitive waterbody habitat. Passive cleanup methods are less likely to impact resources, but require a timeframe on the order of tens of years.

There are 39 stream crossings within 40 miles upstream of protected or specially designated segments of the Niobrara and Missouri rivers, which are in proximity to the proposed Project route. The shortest distance an oil spill would have to travel to impact a protected waterbody is approximately 28.5 miles. Based on an analysis of PHMSA historical incident data of large-diameter pipeline releases, the probability of a spill occurring that would convey oil to a protected waterbody is once every 542 years.

Spilled crude oil could affect wildlife directly and indirectly. Direct effects include

physical processes such as oiling and toxicological effects, which could cause sickness or mortality. Indirect effects include habitat impacts, nutrient cycling disruptions, and alterations to the ecosystem.

A surface release could produce localized effects on plant populations by direct oiling or by oil permeating through the soil, affecting root systems and indirectly affecting plant respiration and nutrient uptake. Generally, most past spills on terrestrial habitats have caused minor ecological damage, and ecosystems have shown a good potential for recovery.

At the time of the release of the Supplemental EIS, there were 1,232 identified wells within the potential range of a large spill from the proposed Project. In Nebraska, the potential spill range from the proposed Project overlaps with the Steele City Wellhead Protection Area. Keystone agreed to provide an alternative water supply if an accidental release from the proposed Project contaminates groundwater or surface water used as potable water or for irrigation or industrial purposes.

Normal operations would be expected to result in less than one human injury per year. In the event of a spill, human health exposure pathways could include direct contact with crude oil, inhalation of airborne emissions from crude oil, or consumption of food or water contaminated by either the crude oil or components of the crude oil. Mitigation measures, including spill response and containment and emergency response plans, would reduce and minimize human and environmental exposures.

Keystone has agreed to incorporate additional mitigation measures in the design, construction, and operation of the proposed Project, in some instances exceeding what is normally required, including 59 Special Conditions, 57 of which were recommended by PHMSA. These commitments by Keystone remain in effect. Many of these mitigation measures are intended to reduce the likelihood of a release occurring. Other measures provide mitigation intended to reduce the consequences and impact of a spill should such an event occur.

Since the publication of the Supplemental EIS, several new studies related to cleanup of diluted bitumen have been published. The National Academy of Science (NAS) 2016 study, Spills of Diluted Bitumen from Pipelines: A Comparative Study of Environmental Fate, Effects, and Response, found that diluted bitumen presents more challenges for cleanup response than other types of oil commonly moved by pipeline. The NAS 2016 study also found that various government agencies (PHMSA, EPA, and the U.S. Coast Guard) and first responders are in need of more training and better communication in order to adequately and effectively address spills of diluted bitumen.

But as described in the Supplemental EIS, Appendix Z, Compiled Mitigation Measures, Keystone has agreed to develop and carry out multiple mitigation measures including developing monitoring plans and response plans, among other spill and spill-prevention mitigation measures. For example, if a spill were to occur, Keystone would provide material safety data sheets to first responders within one hour of the occurrence, and

would provide potable water for any affected communities, businesses, or affected entities within the spill area. Additionally, during the development and construction phase of the project, Keystone has agreed to consult with local emergency responders during development of an Emergency Response Plan (ERP) and update its mitigation and spill response plans with new knowledge or information on the chemistry of diluted bitumen as it becomes available. Accordingly, the measures that Keystone has already committed to—including commitments relating to development of an ERP and other mitigation plans that account for new information –adequately address the new challenges, training needs, and communication needs identified in the NAS 2016 study.

The Supplemental EIS also discusses transportation by rail, in particular as part of the No Action Alternative scenarios (in other words, scenarios that may occur if the proposed Project were denied), and concludes that transport by rail likely results in a greater number of injuries and fatalities per ton-mile than transportation by pipeline, as well as a greater number of accidental releases of crude oil and a greater overall volume of crude oil released. However, the average size of an accidental release associated with crude-by-rail transportation is smaller than the average size of an accidental release associated with a pipeline.

5.4 Socioeconomic Impacts: Socioeconomic impacts associated with the proposed Project were also of particular concern in the comments received by the Department throughout its process. The Supplemental EIS analyzes these impacts and provides information regarding economic activity that may result from an approval of the proposed Project.

Employment and Economic Activity

The Department utilized subject matter experts and established methodologies to characterize the macroeconomic impacts of the proposed Project in the Supplemental EIS. Benchmarking against 2010 economic data, construction spending on the proposed Project was found to support a combined total of approximately 42,100 jobs throughout the United States for the up to two-year construction period. Of these jobs, approximately 16,100 would be direct jobs supported at firms that are awarded contracts for goods and services, including construction, by Keystone. The other approximately 26,000 jobs would result from indirect and induced spending; this would consist of goods and services purchased by the construction contractors and spending by employees working for either the construction contractor or for any supplier of goods and services required in the construction process. About 12,000 jobs, or 29 percent of the total 42,100 jobs, would be supported in Montana, South Dakota, Nebraska, and Kansas.

Of the 42,100 supported jobs described above, approximately 3,900 (or 1,950 per year if construction took two years) would comprise a direct, temporary, construction workforce in the proposed Project area. Employment supported by construction of the proposed Project would translate to approximately $2.05 billion in employee earnings. Of this, approximately 20 percent ($405 million in earnings) would be allocated to workers in the proposed Project area. The remaining 80 percent, or $1.6 billion, would occur in other locations around the country.

According to Keystone, once the proposed Project enters service, operations would require approximately 50 total employees in the United States: 35 permanent employees and 15 temporary contractors. This small number would result in negligible impacts on population, housing, and public services in the proposed Project area.

The total estimated property tax from the proposed Project in the first full year of operations would be approximately $55.6 million spread across 27 counties in three states. This impact to local property tax revenue receipts would be substantial for many counties, constituting a property tax revenue benefit of 10 percent or more in 17 of these 27 counties. Operation of the proposed Project is not expected to have an impact on residential or agricultural property values.

Construction contracts, materials, and support purchased in the United States would total approximately $3.1 billion. Another approximately $233 million would be spent on construction camps for workers in remote locations of Montana, South Dakota, and northern Nebraska. Construction of the proposed Project would contribute approximately $3.4 billion to the U.S. gross domestic product (GDP). This figure includes not only earnings by workers, but all other income earned by businesses and individuals engaged in the production of goods and services demanded by the proposed Project, such as profits, rent, interest, and dividends.

According to the U.S. Bureau of Economic Analysis, the U.S. oil and gas industry contributed 1.1% to total U.S. GDP in 2015. The proposed Project would make a meaningful contribution to this critically important sector of U.S. economy.

Since 2010, from which data the economic data was benchmarked, the U.S. economy has returned closer to full employment capacity but simultaneously has seen relative economic weakness in certain sectors and states due to the downturn in global energy prices in 2014. As a result, the economic benefits in terms of job creation from the proposed Project may be significantly different than the initial estimates.

Health Impacts

A number of commenters raised concerns about the potential for impacts on human health associated with the proposed Project. The Department took into account, with peer-reviewed research where appropriate, impacts to human health throughout the various resource areas in the Supplemental EIS.

For example, in the Potential Releases chapter, the Supplemental EIS examined potential health risks associated with exposure to crude oil and other relevant chemicals, were there to be a spill. In the Air Quality and Noise chapter, the Supplemental EIS addressed air pollution that would be associated with the construction and operation of the proposed Project. In the Cumulative Effects Assessment and Extraterritorial Concerns chapter, the Supplemental EIS described potential changes in pollution associated with refineries. Finally, the Supplemental EIS also examined potential human health impacts in Canada associated with oil sands development and pipeline construction and operation.

Environmental Justice

According to the Office of Environmental Justice in EPA, environmental justice refers to the "fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." A total of 17 separate census areas with minority and/or low income populations could potentially be affected by construction or operation of the proposed Project. Temporary environmental justice impacts during construction could include exposure to construction dust and noise, disruption to traffic patterns, and increased competition for medical or health services in underserved populations. Positive impacts could include increased employment and earnings.

Minority or low-income populations could be more vulnerable should an oil release occur along the segment of the pipeline that transits through their communities. Further, Indian tribes with significant dependence on natural resources could be disproportionately affected.

Mitigation of environmental justice concerns would include ensuring adequate communication with affected populations, such as through public awareness materials in appropriate languages so as to ensure an appropriate level of emergency preparedness. With respect to employment opportunities, Keystone has committed to employee and supplier diversity and has programs in place to mitigate impacts on vulnerable populations.

Some comments, particularly from Indian tribes, have expressed concern that temporary camps of construction workers along the proposed Project route may increase crime and otherwise disrupt local communities. In their letters to the Department of February 2, 2015, the Department of Homeland Security and the Department of the Interior also expressed concerns in this regard. Keystone committed to take several measures to ensure greater safety for those communities along the route, including security provisions and a code of conduct for the workers.

5.5 Physical Disturbance Impacts:

Water Resources

Construction and operation of the proposed Project could result in temporary and permanent surface water impacts, including stream sedimentation, changes in stream channels and stability, and temporary reduction in stream flow. The proposed Project's pipeline route would avoid surface water whenever possible, but would cross approximately 1,073 surface water bodies, including 56 perennial rivers and streams, as well as approximately 24 miles of mapped floodplains. Mitigation measures would include tunneling the pipeline underneath major rivers to mitigate construction impacts, erosion control during construction, and restoration of waterbodies as soon as practical after construction.

Wetlands

The proposed Project would affect approximately 383 acres of wetlands, two acres of which may be permanently lost. Remaining wetlands affected by the proposed Project would remain as functioning wetlands, provided that impact minimization and restoration efforts described in the mitigation plan are successful. The proposed route includes modifications to the route that Keystone originally proposed in 2012 to avoid wetland areas (such as the sensitive NDEQ-identified Sand Hills Region) and Keystone has committed to additional mitigation measures. Additionally, Keystone has identified mitigation measures for the protection of sensitive areas, including wetlands, such as industry-standard avoidance measures and best practices for working near sensitive areas as described in the Construction, Mitigation, and Reclamation Plan (CMRP), as well as a commitment to abide by all state, local, and tribal regulations and requirements. Finally, Keystone will work with state and local response agencies to develop and carry-out mitigation measures related to work near wetlands.

Threatened and Endangered Species

Thirteen federally listed threatened or endangered species occur in the proposed project area. The endangered American burying beetle (*Nicrophorus americanus*) is the only species that is likely to be adversely affected by the proposed Project, but other species could potentially be affected. These include the federally endangered black-footed ferret (*Mustela nigripes*), interior least tern (*Sternula antillarum*), whooping crane (*Grus americana*), and pallid sturgeon (*Scaphirhynchus albus*); and the threatened piping plover (*Charadrius melodus*), western prairie fringed orchid (*Platanthera praeclara*), northern long-eared bat (*Myotis septentrionalis*), and rufa red knot (*Calidris canutus rufa*).

The FWS issued a Biological Opinion in May 2013 to the Department regarding potential impacts of the proposed Project on seven federally protected species. The American burying beetle was the only species determined by the FWS to likely be adversely affected by the proposed Project. Since that time, two additional species have become federally listed as threatened—the northern long-eared bat and the rufa red knot. The consultations for both species were completed, with the FWS concurring in a "may affect, but is not likely to adversely affect" determination. The Department also reviewed the 2013 Biological Opinion and received confirmation from FWS that Section 7 consultations need not be reinitiated for any other species and that, following implementation of the conservation measures contained within that Opinion, no other species included in the project area would be adversely affected. The Department is committed to ensuring that all measures identified in the 2013 Biological Opinion, as supplemented, are implemented, including by Keystone.

Geology and Soils

The proposed Project's pipeline route extends through relatively flat and stable areas, and the potential for seismic hazards (earthquakes), landslides, or subsidence (sink holes) is low. The route would avoid the NDEQ-identified Sand Hills Region, where soils are particularly susceptible to damage from pipeline construction. Potential impacts to soil resources in other areas associated with construction or operation of the proposed Project and connected actions include soil erosion, loss of topsoil, soil compaction, an increase in

the proportion of large rocks in the topsoil, soil mixing, soil contamination, and related reductions in the productivity of desirable vegetation or crops. Mitigation measures would include construction of temporary erosion control systems, implementation of topsoil segregation methods, and restoration of the ROW after construction.

Terrestrial Vegetation

Potential construction and operations-related impacts to terrestrial vegetation resources associated with the proposed Project include impacts to cultivated crops, developed land, grassland/pasture, upland forest, open water, forested wetlands, emergent herbaceous wetlands, and shrub-scrub communities. The proposed Project route would impact biologically unique landscapes and vegetation communities of conservation concern. Keystone committed to restore areas to preconstruction conditions as practicable, and reseed disturbed areas, and to use specific best management practices and procedures to minimize and mitigate the potential impacts to native prairie areas.

Wildlife

The proposed Project would cause minor impacts to wildlife and wildlife habitat. Potential impacts to wildlife include habitat loss, alteration, and fragmentation; direct mortality during construction and operation (e.g., wildlife collisions with vehicles and power lines/power poles); and reduced survival or reproduction due to stress or avoidance of feeding caused by factors such as construction and operations noise and increased human activity. Mitigation measures to reduce potential construction and operations-related effects to wildlife where habitat is entered would include construction timing restrictions and buffer zones developed in consultation with regulatory agencies as well as measures to minimize adverse effects to wildlife habitats. Keystone committed to develop and implement a conservation plan for migratory birds and bald and golden eagles and their habitats in consultation with the FWS.

Fisheries

Impacts to fisheries within the rivers and perennial streams crossed by the proposed Project route would occur during construction and would be temporary. The CMRP contains measures for waterbody crossings to reduce potential effects on fish and aquatic/stream bank habitat and otherwise minimize potential impacts to fisheries resources. Mitigation measures would include best practices in open-cut stream crossings to reduce stream bed disturbance, sediment impacts, and interference with spawning periods; crossing under large rivers using horizontal directional drilling methods; minimization of vehicle contact with surface waters; and development of site-specific contingency plans to address unintended releases of drilling fluids that include preventative measures and a spill response plan.

Land Use, Recreation, and Visual Resources

Approximately 15,296 acres of land would be affected by construction of the proposed Project, though only approximately 5,569 acres would be retained for operation within permanent easements along the pipeline ROW and at the locations of ancillary facilities (e.g., access roads, pump stations). Approximately 89 percent of the total affected acreage (13,597 acres) is privately owned and the remainder government-owned.

Rangeland (approximately 63 percent) and agricultural land (approximately 33 percent) comprise the vast majority of land use types that would be affected by construction. Impacts to land use resources include lease or acquisition and development of the pipeline ROW and land for ancillary facilities (e.g., access roads, pump stations, and construction camps), damage to agricultural features and productivity, visual impacts, and increased dust and noise.

Construction activities would temporarily affect recreational traffic and use patterns in special management and recreational areas, such as historic or scenic trails and rivers with recreational designations. Impacts of operation of the proposed Project on recreation would be minimal.

Visual impacts associated with the proposed Project would primarily occur during construction, when pipeline and ancillary facility construction, trenching, and facilities such as pipe yards would be visible. Permanent visual impacts following operation would include the presence of new ancillary facilities as well as visual disturbances in the landscape, such as tree removal, along the pipeline route.

Keystone committed to compensate landowners for construction- and operation-related impacts. It would implement measures to reduce impacts to land uses, recreation, and visual resources such as topsoil protection, restoring disturbed areas, and developing traffic access and management plans.

Air Quality and Noise

Construction dust and emissions from construction equipment would typically be localized, intermittent, and temporary since pipeline construction would move through an area relatively quickly. During normal operation of the proposed Project, there would be only minor emissions from valves and pumping equipment at the pump stations. Keystone would implement mitigation measures to reduce air quality impacts, including dust control measures and compliance with state and local air quality restrictions.

Construction noise impacts would also be localized, intermittent, and temporary. Noise impacts from operation of the pipeline would be limited to the electrically driven pump stations. During construction, Keystone would limit the hours during which activities with high-decibel noise levels are conducted in residential areas, require noise mitigation procedures, and develop site-specific mitigation plans to comply with regulations. During operations, Keystone would implement a noise control plan to mitigate noise impacts at affected sites and, as necessary, install sound barriers.

5.6 Cultural Resources: Pipeline construction may present a risk to historic and cultural resources unless appropriately addressed through avoidance or mitigation. This risk was a key concern for Indian tribes and other commenters. The Department of Interior in its February 2, 2015 letter to the Secretary reiterated these concerns. The Department concluded a Programmatic Agreement (an agreement with several interested parties that contemplates mitigation of certain cultural resources impacts in the event of construction). The Programmatic Agreement is appended to the Supplemental EIS, and

was concluded in consultation with Indian tribes, federal and state agencies, and the permit applicant. The Department incorporated input from Indian tribes to amend the Programmatic Agreement on cultural resources that had been developed for Keystone's 2008 permit application. The Programmatic Agreement describes the processes that would be followed by Keystone and applicable state and federal agencies to identify cultural resources and to avoid or mitigate adverse impacts.

The proposed Project was designed to avoid disturbing cultural resources listed in the National Register of Historic Places (NRHP), those considered to be eligible for listing in the NRHP, and others of potential concern that have not been evaluated for NRHP listing, to the extent possible. With regard to cultural resources that cannot be avoided, Keystone has committed to minimize and mitigate impacts whenever feasible. Additionally, Keystone would implement Unanticipated Discovery Plans in order to ensure minimization of impacts to as-yet-unknown cultural resources that might be inadvertently encountered during construction or operation of the proposed Project.

5.7 Cumulative Effects: The cumulative effects analysis in the Supplemental EIS evaluates the way that the proposed Project's impacts interact with the effects of other past, present, or reasonably foreseeable future actions or projects. The goal of the cumulative impacts analysis is to identify situations where sets of comparatively small individual impacts, taken together, constitute a larger collective impact. Cumulative effects associated with the proposed Project and connected actions vary among individual environmental resources and locations. Generally, where long-term or permanent impacts from the proposed Project are absent, the potential for additive cumulative effects with other past, present, and reasonably foreseeable future projects is negligible.

5.8 Alternatives: The Supplemental EIS provides a detailed description of the categories of alternatives to the proposed Project that were analyzed, as well as the alternative screening process and the detailed alternatives identified for further evaluation.

Consistent with NEPA and Council on Environmental Quality (CEQ) regulations, the Department compared the proposed Project with four reasonable alternatives: a pipeline that partly follows an alternative route (the "I-90 Corridor Pipeline Alternative"), and three different "No Action Alternative" scenarios that could result if the Presidential permit is not granted and the crude oil from the WCSB and the Bakken formations is carried on a different form of transport.

Consistent with CEQ regulations and the Department's authority, the Supplemental EIS specifically identifies the alternatives that are before the decisionmaker in considering the application and making the national interest determination pursuant to Executive Order 13337: the No Action Alternative (Permit denial) and the proposed Project (Permit approval).

No Action Alternative

The Supplemental EIS separately analyzed three No Action Alternative scenarios, which are described briefly below. The No Action Alternative analysis considers what would

likely happen if the Presidential permit would be denied or the proposed Project would not otherwise implemented. It includes the Status Quo Baseline, which serves as a benchmark against which other alternatives are evaluated. Under the Status Quo Baseline, the proposed Project would not be constructed, its capacity to transport WCSB crude would not be replaced, and the resulting direct, indirect, and cumulative impacts that are described in this Supplemental EIS would not occur. The Status Quo Baseline is a snapshot of the crude oil production and delivery systems at January 2014 levels.

The No Action Alternative includes analysis of three alternative transport scenarios that, based on the findings of the market analysis, are believed to meet the proposed Project's purpose (i.e., providing WCSB and Bakken crude oil to meet refinery demand in the Gulf Coast area) if the Presidential permit for the proposed Project were denied, or if the pipeline were otherwise not constructed. Under the alternative transport scenarios, other environmental impacts would occur in lieu of the proposed Project. The Supplemental EIS includes analysis of various combinations of transportation modes for oil, including truck, barge, tanker, and rail. These scenarios are considered representative of the crude oil transport alternatives with which the market could respond in the absence of the proposed Project. These three alternative transport scenarios (the Rail and Pipeline Scenario, Rail and Tanker Scenario, and Rail Direct to the Gulf Coast Scenario) are described below.

Rail and Pipeline Scenario: Under this scenario, WCSB and Bakken crude oil (in the form of dilbit or synbit) would be shipped via rail from Lloydminster, Saskatchewan, and Epping, North Dakota respectively (the nearest rail terminal served by two Class I rail companies for both locations), to Stroud, Oklahoma, where it would be temporarily stored and then transported via existing and expanded pipelines approximately 17 miles to Cushing, Oklahoma to interconnect with the interstate oil pipeline system. This scenario would require the construction of two new or expanded rail loading terminals in Lloydminster, Saskatchewan (the possible loading point for WCSB crude oil), one new terminal in Epping, North Dakota (the representative loading point for Bakken crude oil), seven new terminals in Stroud, and up to 14 unit trains (consisting of approximately 100 cars carrying the same material and destined for the same delivery location) per day (12 from Lloydminster and two from Epping) to transport the equivalent volume of crude oil as would be transported by the proposed Project.

Rail and Tanker Scenario: The second transportation scenario assumes WCSB and Bakken crude oil would be transported by rail from Lloydminster to a western Canada port (assumed to be Prince Rupert, British Columbia), where it would be loaded onto Suezmax tankers (capable of carrying approximately 986,000 barrels of WCSB crude oil) for transport to the U.S. Gulf Coast (Houston and/or Port Arthur) via the Panama Canal. Bakken crude would be shipped from Epping to Stroud via BNSF Railway or Union Pacific rail lines, similar to the method described under the rail and pipeline scenario. The rail and tanker scenario would require up to 12 unit trains per day between Lloydminster and Prince Rupert, and up to two unit trains per day between Epping and Stroud. This scenario would require the construction of two new or expanded rail loading facilities in Lloydminster with other existing terminals in the area handling the

majority of the WCSB for shipping to Prince Rupert. Facilities in Prince Rupert would include a new rail unloading and storage facility and a new marine terminal encompassing approximately 4,200 acres and capable of accommodating two Suezmax tankers. For the Bakken crude portion of this Scenario, one new rail terminal would be necessary in both Epping, North Dakota, and Stroud, Nebraska.

Rail Direct to the Gulf Coast Scenario: The third transportation scenario assumes that WCSB and Bakken crude oil would be shipped by rail from Lloydminster, Saskatchewan, and Epping, North Dakota, directly to existing rail facilities in the Gulf Coast region capable of off-loading up to 14 unit trains per day. These existing facilities would then either ship the crude oil by pipeline or barge the short distance to nearby refineries. As with the rail and tanker scenario, this scenario would likely require construction of up to two new or expanded terminals to accommodate the additional WCSB shipments out of Canada. One new rail loading terminal would be needed in Epping to ship Bakken crude oil. Sufficient off-loading rail facilities currently exist or are proposed in the Gulf Coast area such that no new terminals would need to be built under this scenario.

Comparison of Alternatives Before the Decisionmaker

The Supplemental EIS provides detailed analysis of the differences between these alternatives. With regard to GHG emissions, during operation of the No Action Alternative transportation scenarios, including rail and combination modes, the increased number of trains along the rail routes would produce GHG emissions from diesel fuel combustion and electricity generation to support rail terminal operations. Annual GHG emissions (direct and indirect) attributed to the No Action transportation scenarios would be greater than for the proposed Project, but those emissions relate solely to the movement of equivalent amounts of oil from Alberta to the Gulf Coast. Construction of the rail terminals would also involve large numbers of truck trips to transport construction materials and equipment. This increased traffic could cause congestion on roads. Increased shipment of crude by rail could reduce rail capacity available for other goods.

Transportation by rail would likely lead to a greater number of injuries and fatalities per ton-mile than transportation by pipeline, as well as a greater number of accidental releases of crude oil and a greater overall volume of crude oil released. However, the average size of an accidental release associated with crude-by-rail transportation is smaller than the average accidental release associated with a pipeline. Physical disturbance impacts of the No Action Alternative would vary depending upon the modes of transportation chosen by shippers. All three scenarios would require new or expanded facilities, likely concentrated near loading and off-loading terminals. Nevertheless, expansion of infrastructure would affect fewer acres of land (1,500-6,427) during construction than a new pipeline. During operations, the No Action Alternative would permanently affect between 1,500 acres and 6,303 acres of land, compared to 5,309 acres for the proposed Project.

6.0 Basis for Decision

Acting on behalf of the President of the United States under authority delegated by the Secretary of State to him, the Under Secretary of State for Political Affairs has determined that it serves the national interest to issue a Presidential permit to TransCanada Keystone Pipeline, L.P. to construct, connect, operate, and maintain pipeline facilities at the U.S.-Canada border in Phillips County, Montana, as part of the proposed Project. In accordance with the Presidential Memorandum dated January 24, 2017, and Executive Order 13337, the Department has considered Keystone's Presidential permit application originally filed with the Department on May 4, 2012 and re-submitted to the Department on January 26, 2017, and all input received over the course of the Department's review. The determination to issue a Presidential permit for the proposed Project is based on consideration of a broad range of factors, including the following assessments:

- The Department finds that the proposed Project will meaningfully support U.S. energy security by providing additional infrastructure for the dependable supply of crude oil. Global energy security is a vital part of U.S. national security. Moreover, crude oil is vital to the U.S. economy and is used to produce transportation fuels, fuel oils for heating and electricity generation, asphalt for our roads, and petrochemical feedstocks used for the manufacturing of chemicals, synthetic rubber, and a variety of plastics. Accordingly, the Department works closely with our international partners to ensure that adequate supplies of energy reach the global economy and to help manage geopolitical changes arising from shifting patterns of energy production and consumption. Whether promoting national and regional markets that facilitate financing for transformational and clean energy or inspiring civil society and governments to embrace transparent and responsible development of natural resources, the Department works to ensure energy is employed as a tool for stability, security, and prosperity. For U.S. policymakers, this has often translated into an acute focus on oil markets. Historically, oil has been a major source of U.S. energy security concerns due to our relatively high volume of net imports, and oil's economic importance and military uses. Such concerns are well founded. Over the past year, crude oil supply disruptions internationally have trended noticeably higher when controlling for Iran's return to the international oil market. Largely attributable to political instability and manipulative market tactics on the part of OPEC, when compared to disruptions at the time of the 2015 Decision, today unplanned disruptions are over 500,000 bpd higher, having reached a peak high of nearly one million bpd in September 2016. Moreover, OPEC's total spare capacity remains at or below two million bpd, which provides very little cushion for fluctuations in supply in a context of rapidly rising demand or further geopolitical disruptions. While U.S. oil imports have abated sharply in recent years, the United States remains a net oil importer. Moreover, even if the United States were self-sufficient in terms of meeting its domestic energy needs, because oil is traded globally, the United States would stay integrated with global oil markets and subject to global price volatility. Accordingly, the U.S. national interest in ensuring access to stable, reliable, and affordable energy supplies will persist in the foreseeable future.

- Canada's role as the largest and fastest-growing source of U.S. crude imports cannot

be dismissed. According to the latest statistics from the EIA, the United States imported 3.17 million bpd of crude oil from Canada in 2016, which accounted for more than 43 percent of total U.S. crude oil imports. Although domestic production growth from tight oil formations, which is predominately light crude, continues to supplant the majority of international alternatives, U.S. imports of Canadian crude oil are increasing. The vast majority of these imports reach U.S. markets via existing pipeline infrastructure between Canada and the United States. A growing share, however, reaches markets by rail. Over 160 million barrels of Canadian crude oil has been imported by rail from Canada since 2011. Current estimates for WCSB rail loading capacity show crude oil transport by rail has potential to grow further.

- Canadian oil is a relatively stable and secure source of energy supply for many reasons, and few countries share all of the political or physical characteristics that enable Canada to remain in this position. Its producing areas are physically close to the U.S. market, and there are limited chokepoints to disrupt trade between Canada and the United States. Canada has a low likelihood of political unrest, resource nationalism, or conflict—above-ground factors that sometimes disrupt oil production in other regions. Additionally, it is not a member of OPEC, which acts to restrict oil production and influence market conditions. The Canadian oil sector is efficiently run, without undue political interference. Canadian oil sands projects have low production decline rates compared to conventional oil fields, providing greater geologic certainty of future supply levels. Moreover, as the Canadian Government's conditional approval of the Trans Mountain pipeline illustrates, failure to approve new transboundary pipeline infrastructure may redirect this source of reliable supply to Asian markets.

- Any impact on prices for refined petroleum products would be minimal if the proposed Project is approved. The Supplemental EIS recognized that the proposed Project is unlikely to have a meaningful effect on crude flows and domestic fuel prices. While crude oil prices matter to those involved in producing oil or refining oil into products, most Americans are mainly concerned with the price of gasoline and other refined products. The price of those refined products in the United States continues to be set largely by global crude prices, which are tied to global production and consumption, rather than the availability of pipelines. The findings in the Supplemental EIS have been reinforced by EIA studies that assert that U.S. gasoline prices move with the international benchmark Brent crude oil price rather than WTI. Accordingly, energy security concerns stemming from the proposed Project's impact on domestic fuel prices are largely unwarranted—cross-border pipeline capacity does not measurably translate into lower retail gasoline prices. Oil trade is driven by commercial considerations and occurs in the context of a globally traded market in which crude oil and products are relatively fungible. The market continually adjusts both logistically and in terms of price to balance global supply and demand. As a result, the level or origin of U.S. oil imports has a minimal impact on the prices U.S. consumers pay for refined products.

- By itself the proposed Project is unlikely to significantly impact the level of GHG-

intensive extraction of oil sands crude or the continued demand for heavy crude oil at refineries in the United States. As stated in the Supplemental EIS, the dominant drivers of oil sands development remain more global than any single infrastructure project. Moreover, under most market conditions, alternative transportation infrastructure would allow growing oil sands production to reach markets irrespective of the proposed Project. Still, uncertainties about the future growth of oil sands production remain. Oil prices are volatile, particularly over the short term. However, the long-term price and technological trends that drive WCSB crude oil production and subsequently the amount of new transportation capacity needed to meet them, coupled with the documented ability of Canadian upstream producers to sustain production during a brief period of lower oil prices, leads the Department to have confidence in the forecasts presented by market experts at the EIA and IEA, and affirms the Department's conclusion that such infrastructure is supported by mid- and long-term market outlooks.

- In the 2015 Decision, the Department determined that approval of the proposed Project at that time would have undercut the credibility and influence of the United States in urging other countries to address climate change. Since then, there have been numerous developments related to global action to address climate change, including announcements by many countries of their plans to do so. In this changed global context, a decision to approve this proposed Project at this time would not undermine U.S. objectives in this area. Moreover, a decision to approve this proposed Project would support U.S. priorities relating to energy security, economic development, and infrastructure.

- The Department recognizes the importance of the proposed Project to Canada and places great significance on maintaining strong bilateral relations. The United States and Canada are the closest of allies, economic partners, and friends. This unique bilateral relationship is based on shared history, common values, and a vast and intricate network of ties between our federal governments, states, cities, and people. In many economic sectors the United States and Canada enjoy deeper, more integrated structures than found even among European Union member states. The United States has over $2 billion in trade per day, U.S.-Canadian supply chains are interlinked, and U.S. and Canadian companies are heavily invested in each other's markets. The two countries coordinate closely on most foreign policy issues and have a robust partnership in critical areas around the world. Irrespective of the proposed Project, our relationship with Canada will endure. However, the United States recognizes Canada's interest in the completion of the proposed Project and finds that it is in the United States' interest to strengthen the role Canada plays as a secure conduit for crude oil to reach the U.S. market, and more broadly, to ensure our shared interests in energy, environmental, and economic issues continue to prosper.

- The Department considered the economic benefits of the proposed Project for the United States using an input-output model calibrated to 2010 data. During construction over a two-year period, the model estimates spending on the proposed Project would support approximately 42,100 jobs (direct, indirect, and induced jobs

combined), of which approximately 3,900 would be direct construction jobs. The majority of these jobs would be short-term in nature. According to the applicant, were the proposed Project to enter service, operations would require approximately 50 employees in the United States, consisting of 35 full-time employees and 15 temporary contractors. The proposed Project would also generate tax revenue for communities in the pipeline's path and it was estimated that pipeline activity would contribute $3.4 billion to U.S. GDP. Since 2010, the U. S. economy has returned closer to full employment capacity but simultaneously has seen relative economic weakness in certain sectors and states due to the downturn in global energy prices in 2014. As a result, the economic benefits in terms of job creation from the proposed Project may be more significant than the initial estimates. The economic benefits are likely to be meaningful and reflect the importance policymakers place on positive near- and long-term economic growth.

- There are a variety of potential environmental and cultural impacts associated with the proposed Project, just as there would be for alternative methods of transporting crude oil. TransCanada Keystone Pipeline, L.P. has agreed to abide by all the terms and conditions of the mitigation measures outlined in the Supplemental EIS, including all Appendices and supplements, follow all state, local, and tribal laws and regulations with respect to the construction and operation of the proposed Project, follow monitoring and reporting requirements, and carry out response activities of any spills if they occur. Additionally, the Department has considered the concerns of some Indian tribes raised in the context of the proposed Project regarding sacred cultural sites and avoidance of adverse impacts to the environment, including to surface and groundwater resources.

Having weighed multiple policy considerations, the Under Secretary of State for Political Affairs finds that, at this time, the proposed Project's potential to bolster U.S. energy security by providing additional infrastructure for the dependable supply of crude oil, its role in supporting, directly and indirectly, a significant number of U.S. jobs and provide increased revenues to local communities that will bolster the U.S. economy, its ability to reinforce our bilateral relationship with Canada, and its limited impact on other factors considered by the Department, all contribute to a determination that issuance of a Presidential permit for this proposed Project serves the national interest.

7.0 National Interest Determination

Pursuant to the authority vested in me under Executive Order 13337 of April 30, 2004, the Presidential Memorandum dated January 24, 2017, and Department of State Delegation of Authority No. 118-2 of January 26, 2006, I hereby determine that issuance of a permit to TransCanada Keystone Pipeline, L.P. (Keystone), a limited partnership organized under the laws of the State of Delaware, to construct, connect, operate, and maintain facilities at the border of the United States and Canada for the transport of crude oil from Canada to the United States across the international boundary in Phillips County, Montana, would serve the national interest.

The Presidential permit issued to TransCanada Keystone Pipeline, L.P. shall include authorizations to construct, connect, operate and maintain facilities at the border of the United States facilities for the transport of crude oil from Canada to the United States as described in the Presidential permit application dated January 26, 2017. No actions shall be taken by TransCanada Keystone Pipeline, L.P. pursuant to this authorization prior to Keystone's acquisition of all other necessary federal, state, and local permits and approvals from agencies of competent jurisdiction.

23 March 2017
Date

Thomas A. Shannon, Jr.
Under Secretary of State for Political Affairs

APPENDIX I

THE SECRETARY OF TRANSPORTATION
WASHINGTON DC 20590

November 4, 2015

The Honorable John Kerry
Secretary
U.S. Department of State
2201 C Street, NW
Washington, DC 20520

Dear Secretary Kerry:

I am responding to a letter of November 3, 2015, from Elizabeth I. Millard, the Acting Executive Secretary of the U.S. Department of State, about Executive Order 13337 (April 20, 2004), regarding the Application of TransCanada Keystone Pipeline, L.P., for a Presidential Permit that would authorize construction, connection, operation, and maintenance of a range of facilities at the border of the United States, including pipelines for liquid petroleum products.

I do not request that you refer the application to the President.

Sincerely,

Anthony R. Foxx

DEPARTMENT OF STATE
RECORD OF DECISION AND NATIONAL INTEREST DETERMINATION

TransCanada Keystone Pipeline, L.P. Application for Presidential Permit

Contents:

1.0 Summary

On May 4, 2012, TransCanada Keystone Pipeline, L.P. (Keystone) submitted an application to the U.S. Department of State (Department) for a Presidential Permit that would authorize construction, connection, operation, and maintenance of pipeline facilities at the United States-Canada border in Phillips County, Montana, to import crude oil from Canada into the United States. The proposed project, called Keystone XL (the proposed Project), would consist of approximately 1,204 miles of new, 36-inch-diameter pipeline extending from Hardisty, Alberta, to Steele City, Nebraska. The proposed Project would have the capacity to deliver up to 830,000 barrels per day (bpd) of crude oil. It would predominantly transport crude oil from the Western Canadian Sedimentary Basin (WCSB), but would also transport quantities of crude oil from Montana and North Dakota via a proposed pipeline and associated facilities known as the Bakken Marketlink.

Keystone is a limited partnership organized under Delaware law with a primary business address in Houston, Texas. Its affiliate, TransCanada Pipelines Ltd., would operate the proposed Project. TransCanada Pipelines Ltd. is a limited company organized under the laws of Canada with its headquarters located in Calgary, Alberta, Canada. Both Keystone and TransCanada Pipelines Ltd. are owned by affiliates of TransCanada Corporation, a Canadian company with stock publicly traded on the Toronto and New York stock exchanges.

Executive Order 13337 (April 30, 2004) delegates to the Secretary of State the President's authority to receive applications for permits for the construction, connection, operation, or maintenance of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels (except for natural gas) at the borders of the United States and to issue or deny such Presidential Permits upon a national interest determination. The determination is Presidential in nature, and therefore the requirements of the National Environmental Policy Act of 1969 (NEPA), the National Historic Preservation Act of 1966 (NHPA), and the Endangered Species Act (ESA) are inapplicable. Nevertheless, the Department's review of the Presidential Permit application for the proposed Project has, as a matter of policy, been conducted in a manner consistent with NEPA. A Final Supplemental Environmental Impact Statement (Supplemental EIS) was released on January 31, 2014. In the Supplemental EIS, the Department evaluated the potential construction and operational impacts of the proposed Project and alternative impacts that may occur without the proposed Project on a wide range of environmental and cultural resources. Similarly, as a matter of policy, the Department conducted reviews of the proposed Project consistent with Section 106 of the NHPA, as amended, and with Section 7 of the ESA. The Department solicited public comment and conducted a broad range of consultations with state, local, tribal, and foreign governments and other federal agencies as it considered Keystone's application.

Under authority delegated by the President of the United States, and following an evaluation of the proposed Project, the Secretary of State has determined that issuing a Presidential Permit to Keystone to construct, connect, operate, and maintain at the border of the United States pipeline facilities for the transport of crude oil from Canada to the

United States as described in the Presidential Permit application for the proposed Project would not serve the national interest. Accordingly, the request for a Presidential Permit is denied.

2.0 Legal Authority

The President of the United States has authority to require permits for transboundary infrastructure projects, based upon his Constitutional powers. In Executive Order 13337, acting pursuant to the Constitution and laws of the United States, including Section 301 of Title 3 of the United States Code, the President delegated to the Secretary of State the authority to receive applications and make determinations regarding approval or denial of a Presidential Permit for certain types of border facilities, including those for cross-border petroleum pipelines, based on the Secretary's finding as to whether issuance of a permit would serve the national interest. Because the proposed Project seeks to build new petroleum facilities that cross the international border, the authority to make a determination for the issuance of a Presidential Permit for the border facilities has been delegated to the Secretary of State by the President. Once the Secretary makes a proposed determination on behalf of the President pursuant to Executive Order 13337, any of the Cabinet-level officials of the eight agencies named by the President in the Executive Order may indicate disagreement with it and request that the Secretary refer the application to the President. The Secretary's determination on behalf of the President stands and the Presidential Permit is issued or denied consistent with that decision if none of the Cabinet-level officials chooses to refer the application to the President.

As noted above, when reviewing an application for a Presidential Permit, the Secretary is required by the Executive Order to determine if issuance of the permit would serve the national interest. The determination is made pursuant to the President's Constitutional authority. No statute establishes criteria for this determination. The President or his delegate may take into account factors he or she deems germane to the national interest. With regard to the proposed Project, the Secretary has considered a range of factors, including but not limited to foreign policy; energy security; environmental, cultural, and economic impacts; and compliance with applicable law and policy. The determination is Presidential in nature and therefore the requirements of NEPA, the ESA, and the NHPA are inapplicable. Nevertheless, as a matter of policy and in order to inform the Secretary's determination regarding the national interest, the Department has reviewed the potential impacts of the action on the environment and cultural resources in a manner consistent, where appropriate, with these statutes. The purpose of preparing an environmental impact statement and undertaking the other statutory processes noted above was to produce a comprehensive review to inform decisionmakers and the relevant Executive Branch agencies about the potential environmental impacts of the proposed Project.

3.0 Agency and Tribal Involvement and Public Comment

The Department conducted extensive public outreach and consultation during several stages of its consideration of Keystone's Presidential Permit application in order to solicit

input on issues to be considered. The Department also conducted government-to-government consultation with Indian tribes regarding historic properties in a manner consistent with the NHPA, and consulted with relevant agencies consistent with the ESA and other statutes as appropriate. Finally, the Department sought views of other federal agencies as required by Executive Order 13337. The public notice, outreach, and consultation efforts during consideration of Keystone's application are further detailed below. The Department has taken all comments and relevant information into account in making the national interest determination. As directed by the President, the Department also has considered the input from agencies listed in Executive Order 13337.

3.1 Public Notice: Upon receipt of Keystone's application, the Department published in the Federal Register a Notice of Receipt of the Keystone XL Pipeline Application (77 FR 27533, May 10, 2012). At that time, the Department also established a website that it updated with information and significant documents throughout its review of the Presidential Permit application (*see* http://www.keystonepipeline-xl.state.gov/).

3.2 Public Comment Periods: On June 15, 2012, the Department published a notice in the Federal Register informing the public that it intended to prepare a Supplemental Environmental Impact Statement (77 FR 36032). The notice also announced plans for developing the scope of the environmental review and content of the Supplemental EIS, and invited public participation in that process, including soliciting public comments. The Department received over 400,000 comments during the scoping period (including letters, cards, emails, and telephone calls), which were considered and reflected as appropriate in developing the scope of the Supplemental EIS. The Department also published all comments received during this and all other public comment periods in the review, consistent with its commitment to conduct an objective, rigorous, and transparent review process.

In March 2013, the Department released a Draft Supplemental EIS, which was posted on the Department's website for the project. The Department distributed copies to public libraries along the pipeline route and to interested Indian tribes, federal and state agencies, elected and appointed officials, media organizations, non-governmental organizations (NGOs), private landowners, and other interested parties. On March 27, 2013, the Department published a notice in the Federal Register inviting the public to comment on the document (78 FR 18665). The Department then held a public meeting on April 18, 2013, in Grand Island, Nebraska, to receive further views from the public and other interested parties. In total, the Department received more than 1.5 million submissions during the public comment period for the Draft Supplemental EIS. These submissions came from members of the public, federal, state, and local representatives, government agencies, Indian tribes, NGOs, and other interested groups and stakeholders. All comments were considered as part of the Supplemental EIS; Volumes V and VI of the Supplemental EIS address the comments that were received.

On February 5, 2014, five days after releasing the Final Supplemental EIS, the Department published a notice in the Federal Register inviting members of the public to comment within 30 days on any factors they deemed relevant to the national interest

determination (79 FR 6984). Executive Order 13337 allows for such a public comment process, but does not require the Department to solicit public input. The response during the 30-day public comment period was unprecedented. The Department received more than 3 million submissions.

All comments were reviewed by subject matter experts from several Department bureaus who were knowledgeable about the proposed Project and involved in drafting sections of this Record of Decision and National Interest Determination, as well as by the third-party contractor engaged to assist the Department with tasks relating to the review of the permit application. The contractor, with guidance from Department experts, sorted the comments into six overarching issue areas discussed in the comments—environmental impacts (including climate change), cultural resources impacts, socioeconomic impacts, energy security, foreign policy considerations, and compliance with relevant federal and state laws and regulations. For each of these issue areas, the contractor identified a number of themes that captured the ideas or points raised by public comments. The Department's subject matter experts directly reviewed all of the issues and information raised in the public comments. The Department determined that the comments largely addressed issues that were also raised during preparation of the Supplemental EIS.

3.3 Tribal Consultation: The Department directly contacted 84 Indian tribes within the United States that could have an interest in the resources potentially affected by the proposed Project. Of the 84 Indian tribes, 67 notified the Department that they would like to consult on the proposed Project or were undecided. The Department conducted extensive government-to-government consultations with those 67 Indian tribes on the environmental, cultural, and other potential impacts of the proposed Project. In addition to communications by phone, email, and letter, Department officials held tribal meetings in October 2012 (three meetings), May 2013 (one meeting), and July 2013 (teleconference). The face-to-face meetings were held in four locations: Billings, Montana; Pierre, South Dakota; Rapid City, South Dakota; and Lincoln, Nebraska.

In addition to the government-to-government consultations, the Department engaged in discussions consistent with Section 106 of the NHPA with Indian tribes, Tribal Historic Preservation Officers, State Historical Preservation Officers, and the Advisory Council on Historical Preservation. The topics of these discussions included cultural resources, in general, as well as cultural resources surveys, Traditional Cultural Properties surveys, effects on cultural resources, and potential mitigation. Additionally, Indian tribes were provided cultural resources survey reports for the proposed Project and were invited both to conduct Traditional Cultural Property surveys funded by Keystone and to help develop and participate in the Tribal Monitoring Plan.

3.4 Consultation with Federal and State Agencies: Ten federal entities agreed to assist the Department as Cooperating Agencies during preparation of the Supplemental EIS: the U.S. Army Corps of Engineers, the Farm Service Agency, the Natural Resource Conservation Service, the Rural Utilities Service, the Department of Energy, the Bureau of Land Management, the National Park Service, the U.S. Fish and Wildlife Service (FWS), the Pipeline and Hazardous Materials Safety Administration's Office of Pipeline

Safety (PHMSA), and the U.S. Environmental Protection Agency (EPA). These agencies had significant input into the drafting of the Draft and Final Supplemental Environmental Impact Statements.

Consistent with Section 7 of the ESA, the Department consulted with the FWS and submitted a Biological Assessment on the proposed Project. The FWS issued a Biological Opinion in 2012 that is available as an attachment to the Supplemental EIS. Prior to issuance of this Record of Decision and National Interest Determination, consultations with the FWS were reinitiated regarding the rufa red knot (*Calidris canutus rufa*), designated a threatened species effective January 12, 2015, and the northern long-eared bat (*Myotis septentrionalis*), designated a threatened species effective May 4, 2015. The Department and FWS have concluded consultations with regard to the rufa red knot, but are still consulting on the northern long-eared bat.

Executive Order 13337 requires that the Secretary request the views of eight specified U.S. federal agencies with regard to the permit application. Accordingly, the Department requested the views of the Department of Defense, the Department of Justice, the Department of the Interior, the Department of Commerce, the Department of Transportation, the Department of Energy, the Department of Homeland Security, and the Environmental Protection Agency. The Department of Justice and the Department of Commerce informed the Department that they did not plan to provide any views with regard to the permit application. The other six agencies provided their views in writing; those views have been released in conjunction with this document.

The Department has also monitored other federal and state permitting and licensing processes, including, for example, litigation and the recent application to the Nebraska Public Service Commission concerning the proposed Project's route through that state.

3.5 Information Provided by Keystone: The Department had robust communication with Keystone throughout the review of the application for the proposed Project. Keystone responded to multiple requests for information and provided supplemental views and information on its own initiative, including through letters on February 24, 2015, and June 29, 2015. The Department has taken all information provided by Keystone into account in making the national interest determination.

4.0 Project Background

4.1 Keystone XL Project: The proposed Project would consist of approximately 1,204 miles of new, 36-inch-diameter pipeline extending from Hardisty, Alberta, to Steele City, Nebraska. Approximately 875 miles of the pipeline would be located in the United States. The pipeline would cross the international border between Saskatchewan, Canada and the United States near the town of Morgan, Montana, in Phillips County. The pipeline would have the capacity to deliver up to 830,000 bpd of crude oil. Annual quantities would likely vary based on market conditions and other factors.

Bakken crude would enter the pipeline within the United States through the proposed Bakken Marketlink Project—a five-mile pipeline with pumps, meters, and storage tanks that would connect to the Keystone XL pipeline near Baker, Montana. The facilities would supply up to 100,000 bpd of Bakken crude oil to the proposed Keystone XL pipeline.

At its southern terminus, the proposed Project would connect to the existing Keystone Cushing Extension pipeline, which extends from Steele City, Nebraska, to Cushing, Oklahoma. The Keystone Cushing Extension in turn connects to Keystone's Gulf Coast pipeline, which extends south to Nederland, Texas, in order to serve Gulf Coast refineries.

In addition to the pipeline and Bakken Marketlink facilities, the proposed Project would include ancillary facilities. Eighteen pumping stations would be located along the Keystone XL pipeline, and two pumping stations would be added to the Keystone Cushing Extension. Keystone further anticipates new pumping capacity on the Keystone Cushing Extension in Kansas. The pipeline would be located in a 50-foot-wide permanent right of way (ROW). The temporary construction ROW would be wider—110 feet—and access roads, construction camps, and related facilities would be needed during construction.

According to the application submitted by Keystone, the primary purpose of the proposed Project would be to transport crude oil from the border with Canada to delivery points in the United States (primarily to the Gulf Coast area). The proposed Project is meant to supply U.S. refineries with crude oil of the kind found in the WCSB (often called heavy crude oil). The proposed Project would also provide transportation for the kind of crude oil found within the Bakken formation of North Dakota and Montana (often called light crude oil).

Most recent U.S. production growth has been from tight oil formations—unlocked through technical innovations like hydraulic fracturing and horizontal drilling—that typically yield light, sweet crude. As a result, U.S. crude production growth has tended to displace imports from other countries also producing light, sweet crude—predominately in Africa. Oil sands bitumen consists of heavy, sour, viscous crude oil that is produced and marketed differently than most domestic unconventional crudes. Many U.S. refineries, particularly in the Midwest and Gulf Coast, are optimized to process heavy crudes like those from the oil sands.

As the Supplemental EIS explains, North American production growth coupled with constraints on transporting landlocked crude oil to market have kept prices of that crude low. This has heightened the attractiveness of the proposed Project to many in industry, and Keystone has stated that the pipeline capacity is already fully subscribed.

The Department notes that the ultimate disposition of crude oil that would be transported by the proposed Project, as well as any refined products produced from that crude oil, would be determined by market demand and applicable law. In the absence of heavy

crude oil from Canada, U.S. refineries, particularly in the Gulf Coast, will continue to rely on comparable foreign heavy crudes.

4.2 Prior Permit Application: Keystone's first application for the Keystone XL pipeline was submitted to the Department on September 19, 2008. A Final EIS was published on August 26, 2011. The route proposed in 2008 included the same U.S.-Canadian border crossing as the currently proposed Project, but a different pipeline route in the United States. That route traversed a substantial portion of the Sand Hills Region of Nebraska, as identified by the Nebraska Department of Environmental Quality (NDEQ). Moreover, the 2011 Final EIS route went from Montana to Steele City, Nebraska, and then from Cushing, Oklahoma, to the Gulf Coast area.

In November 2011, the Department determined that additional information was needed to fully evaluate the application—in particular, information about alternative routes within Nebraska that would avoid the NDEQ-identified Sand Hills Region. In late December 2011, Congress enacted a provision of the Temporary Payroll Tax Cut Continuation Act that sought to require the President to make a decision on the Presidential Permit for the 2008 application within 60 days. That deadline did not allow sufficient time for the Department to prepare a rigorous, transparent, and objective review of an alternative route through Nebraska. Accordingly, the Presidential Permit was denied.

In February 2012, Keystone informed the Department that it considered the Gulf Coast portion of the originally proposed pipeline project (from Cushing, Oklahoma, to the Gulf Coast area) to have independent economic utility, and indicated that Keystone intended to proceed with construction of the Gulf Coast pipeline as a separate project, called the Gulf Coast Project. The Gulf Coast Project did not require a Presidential Permit because it does not cross an international border. Construction on the Gulf Coast Project is now complete.

On May 4, 2012, Keystone filed a new Presidential Permit application for the Keystone XL Project. The proposed Project has a new route and a new stated purpose and need. The new proposed route differs from the 2011 Final EIS Route in two significant ways: 1) it would avoid the environmentally sensitive NDEQ-identified Sand Hills Region and 2) it would terminate at Steele City, Nebraska. From Steele City, existing pipelines would transport the crude oil to the Gulf Coast area. The proposed Project no longer includes a southern segment.

In addition to the NDEQ-identified Sand Hills Region, the proposed Project route would avoid other areas in Nebraska (including portions of Keya Paha County) that have been identified by the NDEQ as having soil and topographic characteristics similar to the Sand Hills Region. The proposed Project route would also avoid or move further away from water wellhead protection areas for the towns of Clarks and Western, Nebraska.

5.0 Issues Considered in the Final Supplemental Environmental Impact Statement

This Record of Decision and National Interest Determination is informed by the Supplemental EIS prepared by the Department and published in January 2014, which identified and analyzed a broad range of potential impacts of the proposed Project.

The Supplemental EIS presents information and analysis on a range of potential impacts of the proposed Project. It also describes the tribal consultations undertaken as part of the Supplemental EIS process. The Supplemental EIS also considers reasonable alternative pipeline routes and No Action Alternative scenarios.

Key topics in the Supplemental EIS, particularly those receiving significant public interest, are described below.

5.1 Greenhouse Gases and Climate Change Impacts: Greenhouse gases and the potential climate change impacts associated with the proposed Project were key areas of interest highlighted by the comments received by the Department. The Supplemental EIS evaluates the relationship between the proposed Project with respect to GHG emissions and climate change from the following perspectives:

- The GHG emissions associated with the construction and operation of the proposed Project and its connected actions;

- The indirect lifecycle (wells-to-wheels) GHG emissions associated with the WCSB crude oil that would be transported by the proposed Project as compared to the GHG emissions of the crudes it may displace; and

- How the GHG emissions associated with the proposed Project cumulatively contribute to climate change.

GHG Emissions Associated with Construction and Operation

The proposed Project would emit approximately 0.24 million metric tons of carbon dioxide (CO2) equivalents (MMTCO2e) per year during the construction period. These emissions would be emitted directly through fuel use in construction vehicles and equipment as well as land clearing activities, including open burning, and indirectly from electricity usage. To operate and maintain the pipeline, approximately 1.44 MMTCO2e would be emitted per year, largely attributable to electricity use for pump station power, fuel for vehicles and aircraft for maintenance and inspections, and fugitive methane emissions at connections. The 1.44 MMTCO2e emissions would be equivalent to GHG emissions from approximately 300,000 passenger vehicles operating for 1 year, or 71,928 homes using electricity for 1 year.

GHG Emissions Associated with the Indirect Lifecycle of WCSB Crudes

To enable a more comprehensive understanding of the potential indirect GHG impact of the proposed Project, it is important to consider the wider GHG emissions associated with the crude oil that would be transported by the proposed Project. A lifecycle analysis is a technique used to evaluate the environmental aspects and impacts (in this case GHGs) that are associated with a product, process, or service from raw materials acquisition

through production, use, and end-of-life (wells-to-wheels). This approach evaluates the GHG implications of the WCSB crudes that would be transported by the proposed Project compared to other crude oils that would likely be replaced or displaced by those WCSB crudes in U.S. refineries (hereinafter, reference crudes).

The Supplemental EIS analysis considers wells-to-wheels GHG emissions, including extraction, processing, transportation, refining, and refined product use (such as combustion of gasoline in cars) of WCSB crudes compared to other reference crudes, including heavy slates. The lifecycle analysis also considers the implications associated with other generated products during the lifecycle stages (so-called co-products) such as petroleum coke. The largest single source of GHG emissions in the lifecycle analysis is the finished-fuel combustion of refined petroleum fuel products, which is consistent for different crude oils.

WCSB crudes are generally more GHG intensive than other crudes they would replace or displace in U.S. refineries, and emit an estimated 17 percent more GHGs on a lifecycle basis than the average barrel of crude oil refined in the United States. As the EPA notes in its letter of February 2, 2015 to the Secretary, "oil sands crude is substantially more carbon intensive than reference crudes and its use will significantly contribute to carbon pollution."

The total lifecycle emissions associated with production, refining, and combustion of 830,000 bpd of oil sands crude oil transported through the proposed Project is approximately 147 to 168 MMTCO2e per year. The annual lifecycle GHG emissions from 830,000 bpd of the four reference crudes examined in the Supplemental EIS are estimated to be 124 to 159 MMTCO2e. The range of incremental GHG emissions for crude oil that would be transported by the proposed Project is estimated to be 1.3 to 27.4 MMTCO2e annually. The estimated range of potential emissions is large because there are many variables, such as which reference crude is used for the comparison and which study is used for the comparison. Nevertheless, at the high end, the Supplemental EIS states that 27.4 MMTCO2e per year is equivalent to the annual GHG emissions from 5.7 million passenger vehicles or 7.8 coal-fired power plants.

These estimates characterize the potential increase in emissions attributable to the proposed Project if one assumes that approval or denial of the proposed Project would directly result in a change in production of 830,000 bpd of oil sands crudes in Canada. That is because the above estimates represent the total incremental emissions associated with production and consumption of 830,000 bpd of oil sands crude above and beyond the current baseline compared to the reference crudes. However, the actual increase in GHG emissions attributable to the proposed Project depends on whether or how much approval and use of the pipeline would cause an increase in oil sands production.

5.2 Market Analysis

Proposed Project's Impact on Oil Sands Production

The Supplemental EIS utilizes analysis of evolving market conditions, transportation costs, oil-sands supply costs, and varying supply-demand scenarios to inform conclusions about the proposed Project's potential impact on oil sands production. The analysis concluded at the time it was published in January 2014 that approval or denial of any one crude oil transport project, including the proposed Project, would be unlikely to significantly impact the rate of extraction in the oil sands, or the continued demand for heavy crude oil at refineries in the United States. However, the Supplemental EIS balances this position by emphasizing that uncertainty underlies a number of key variables critical to projecting Canadian production growth – which is reinforced by analysis of lower oil prices.

Generally, the dominant drivers of oil sands development remain more global than any single infrastructure project. Oil sands production and investment could slow or accelerate depending on oil price trends, regulations, and technological developments, but the potential effects of those factors on the industry's rate of expansion need not be conflated with the more limited effects of individual pipelines. Under most market conditions, alternative transportation infrastructure would allow growing oil sands production to reach markets irrespective of the proposed Project. However, construction of the proposed Project would have some effect on discrete decisions about whether to develop specific oil sands projects if (1) no new pipeline capacity to Canadian ports or to the United States becomes operational and (2) the price of oil in the long run persists at a level where other transport options are no longer economical.

The impact on oil sands development is difficult to gauge with precision, in part because the cost differential between other modes of transport and pipelines may change over time, and production costs vary from one oil sands development to another. While the Department does not know all of the production costs or other investment factors for specific Canadian projects, the Supplemental EIS concluded that many projects are expected to break even when sustained oil prices are in the range of $65-$75 per barrel. On this basis, the Department's analysis found that oil sands production is expected to be most sensitive to transport costs with oil prices in or below that range.

In making long-term investment decisions, companies often distinguish between new development and production from existing projects with previously sunk capital costs. While oil prices consistently below supply costs over the long-term may delay or even cancel some future projects, decisions about proceeding with or expanding existing projects and those already under construction or with financing in place are largely based on marginal operating costs. In general, existing projects and those under development are unlikely to slow or stop unless revenues fall below current operating costs, which are much lower than total supply costs ($20 to $40 per barrel according to most estimates reviewed). This helps to explain why, to date, Canadian crude oil production, including from the oil sands, has proven resilient despite a significant drop in the price of oil, and it underpins the Department's recognition that some additional Canadian crude production is probable in the near-term.

Since the publication of the Supplemental EIS, the price of the benchmark West Texas Intermediate (WTI) crude oil has declined by over 60 percent from $98.23 a barrel in January of 2014 to a low of $38.24 a barrel in August 2015. WTI is approximately $45 a barrel at present. The lower prices represent the degree to which global liquids production continues to outpace consumption. Despite an estimated 1.2 million bpd of growth in global consumption of petroleum and other liquids in 2014, global production increased by 2.3 million bpd. This pattern, which has continued throughout 2015, has resulted in global liquids inventory builds that are estimated at approximately 2.3 million bpd through the first seven months of the year, the highest level of inventory builds through July of any year since 1998.

Though some companies investing in the oil sands have indicated that they plan to move forward with existing operations and projects under construction, others have cut back on capital expenditures. The Department notes that several upstream producers and oilfield service companies have pursued layoffs in order to lower operating costs. Recent projections anticipate that Canadian oil production will continue to grow, but potentially at a slower rate than previously anticipated. Moreover, recent price drops highlight the uncertainty recognized in the Supplemental EIS of the long-term estimates.

While the Department understands that short-term fluctuations in price are less indicative of the industry's general outlook than broader macroeconomic forces, the Department highlights that oil prices are volatile, particularly over the short term, and long-term trends that drive the investment decisions of oil-sands producers are difficult to predict. Canadian production growth forecasts and the amount of new transportation capacity needed to meet them are uncertain. As a result, the crude oil price thresholds potentially relevant to future production levels could change if supply costs or production expectations prove different than estimated in the Supplemental EIS. While it is not possible to draw firm conclusions about the impact of the recent drop in oil prices on long-term Canadian production, the Department remains cognizant of its short-term impact and the potential for a continued and broader impact in the long term.

Crude-by-Rail

In recent years, industry has looked toward existing Canadian crude oil production forecasts and commercial realities tied to prevailing midstream bottlenecks as justification for further investment in alternative crude oil transportation. Although there are a number of possible alternative transportation avenues for crude from the oil sands to reach U.S. or other markets, significant investment has been made in the development of crude-by-rail loading and off-loading facilities throughout North America. Current WCSB rail loading capacity has been estimated to exceed 775,000 bpd and continues to grow. Under current market conditions, existing pipelines coupled with crude-by-rail facilities will likely have the capacity to accommodate new supply from upstream projects under construction and in various stages of completion in western Canada.

The extent to which rail transport will actually occur, however, or would prove to be a major form of transport for WCSB crude to the United States in the long term, remains uncertain. Utilization of rail facilities will depend upon many factors, including the

availability of cheaper pipeline transport options from the respective production areas, the rate of growth in emerging areas of crude production, demand from refineries that may be better served by rail from these sources, differences in the price of oil paid in the production areas and the price of oil paid at the refinery markets (particularly on the coasts), and arbitrage opportunities that may be available through faster rail-based transport.

Producers seeking to preserve margins in the face of narrowing price gaps between Western Canada Select crude, WTI, and other crudes such as the Mexican Maya, may seek to maximize the efficiency of existing pipeline infrastructure in lieu of rail. Moreover, implementation of new Department of Transportation rules intended to improve the safe transportation of large quantities of crude-by-rail may lead to a marginal increase in crude-by-rail costs.

5.3 Potential Spill Risk and Safety Impacts: Many concerns were raised in comments received by the Department regarding the potential environmental effects of a pipeline release, leak, and/or spill. The Supplemental EIS analyzes impacts from potential releases from the proposed Project by analyzing historical spill data. The analysis identifies the types of pipeline system components that historically have been the source of spills, the sizes of those spills, and the distances those spills would likely travel. The resulting potential impacts to natural resources, such as surface waters and groundwater, are also evaluated and mitigation measures are included that are designed to prevent, detect, minimize, and respond to oil spills.

The Supplemental EIS analyzes historical crude oil pipeline incident data within the PHMSA and National Response Center incident databases. Over a period of ten years, from January 2002 through July 2012, a total of 1,692 incidents were reported in the United States, of which 321 were reported to be pipe incidents and 1,027 incidents were reported to involve different equipment components such as tanks, valves, or pumps.

Most spills over this period were small. Of the 1,692 incidents between 2002 and 2012, 79 percent of the incidents were in the small (zero to 50 barrel) range—roughly equivalent to a spill of up to 2,100 gallons. Four percent of the incidents were in the large (greater than 1,000 barrel) range. If a pipeline spill were to occur, the severity of its impact would depend on the volume and aerial extent of oil released; the distance of the impacted entity from the spill source; site-specific environmental circumstances, including climate and species present; and the timing and nature of response efforts.

An oil spill that reaches a surface waterbody or wetland could cause effects such as reduced dissolved oxygen levels or high benzene contaminant levels. The Supplemental EIS states that acute toxicity could occur if substantial amounts of crude oil were to enter rivers and streams. If diluted bitumen were released and it flowed into surface water, the diluent fraction would tend to volatilize or dissolve into the water, leaving bitumen behind to sink or become suspended. Upwards of 25 percent of residual hydrocarbons could be reasonably removed by natural attenuation, while active recovery methods would be required for remediation of the remaining spill volume. Aggressive cleanup

methods could mix oil and water, which might result in longer-lasting impacts to sensitive waterbody habitat. Passive cleanup methods are less likely to impact resources, but require a timeframe on the order of tens of years.

There are 39 stream crossings within 40 miles upstream of protected or specially designated segments of the Niobrara and Missouri rivers, which are in proximity to the proposed Project route. The shortest distance an oil spill would have to travel to impact a protected waterbody is approximately 28.5 miles. Based on an analysis of PHMSA historical incident data of large-diameter pipeline releases, the probability of a spill occurring that would convey oil to a protected waterbody is once every 542 years.

Spilled crude oil could affect wildlife directly and indirectly. Direct effects include physical processes such as oiling and toxicological effects, which could cause sickness or mortality. Indirect effects include habitat impacts, nutrient cycling disruptions, and alterations to the ecosystem.

A surface release could produce localized effects on plant populations by direct oiling or by oil permeating through the soil, affecting root systems and indirectly affecting plant respiration and nutrient uptake. Generally, most past spills on terrestrial habitats have caused minor ecological damage, and ecosystems have shown a good potential for recovery.

There are 1,232 identified wells within the potential range of a large spill from the proposed Project. In Nebraska, the potential spill range from the proposed Project overlaps with the Steele City Wellhead Protection Area. Keystone agreed to provide an alternative water supply if an accidental release from the proposed Project contaminates groundwater or surface water used as potable water or for irrigation or industrial purposes.

Normal operations would be expected to result in less than one human injury per year. In the event of a spill, human health exposure pathways could include direct contact with crude oil, inhalation of airborne emissions from crude oil, or consumption of food or water contaminated by either the crude oil or components of the crude oil. Mitigation measures, including spill response and containment and emergency response plans, would reduce and minimize human and environmental exposures.

Keystone has agreed to incorporate additional mitigation measures in the design, construction, and operation of the proposed Project, in some instances exceeding what is normally required, including 59 Special Conditions recommended by PHMSA. Many of these mitigation measures are intended to reduce the likelihood of a release occurring. Other measures provide mitigation intended to reduce the consequences and impact of a spill should such an event occur.

The Supplemental EIS also discusses transportation by rail, in particular as part of the No Action Alternative scenarios (in other words, scenarios that may occur if the proposed Project is denied), and concludes that transport by rail likely results in a greater number

of injuries and fatalities per ton-mile than transportation by pipeline, as well as a greater number of accidental releases of crude oil and a greater overall volume of crude oil released. However, the average size of an accidental release associated with crude-by-rail transportation is smaller than the average size of an accidental release associated with a pipeline.

5.4 Socioeconomic Impacts: Socioeconomic impacts associated with the proposed Project were also of particular concern in the comments received by the Department throughout its process. The Supplemental EIS analyzes these impacts and provides information regarding economic activity that may result from an approval of the proposed Project.

Employment and Economic Activity

The Department utilized subject matter experts and established methodologies to characterize the macroeconomic impacts of the proposed project. Construction spending on the proposed Project was found to support a combined total of approximately 42,100 jobs throughout the United States for the up to two-year construction period. Of these jobs, approximately 16,100 would be direct jobs supported at firms that are awarded contracts for goods and services, including construction, by Keystone. The other approximately 26,000 jobs would result from indirect and induced spending; this would consist of goods and services purchased by the construction contractors and spending by employees working for either the construction contractor or for any supplier of goods and services required in the construction process. About 12,000 jobs, or 29 percent of the total 42,100 jobs, would be supported in Montana, South Dakota, Nebraska, and Kansas.

Of the 42,100 supported jobs described above, approximately 3,900 (or 1,950 per year if construction took two years) would comprise a direct, temporary, construction workforce in the proposed Project area. Employment supported by construction of the proposed Project would translate to approximately $2.05 billion in employee earnings. Of this, approximately 20 percent ($405 million in earnings) would be allocated to workers in the proposed Project area. The remaining 80 percent, or $1.6 billion, would occur in other locations around the country.

According to Keystone, once the proposed Project enters service, operations would require approximately 50 total employees in the United States: 35 permanent employees and 15 temporary contractors. This small number would result in negligible impacts on population, housing, and public services in the proposed Project area.

The total estimated property tax from the proposed Project in the first full year of operations would be approximately $55.6 million spread across 27 counties in three states. This impact to local property tax revenue receipts would be substantial for many counties, constituting a property tax revenue benefit of 10 percent or more in 17 of these 27 counties. Operation of the proposed Project is not expected to have an impact on residential or agricultural property values.

Construction contracts, materials, and support purchased in the United States would total approximately $3.1 billion. Another approximately $233 million would be spent on construction camps for workers in remote locations of Montana, South Dakota, and northern Nebraska. Construction of the proposed Project would contribute approximately $3.4 billion to the U.S. gross domestic product (GDP). This figure includes not only earnings by workers, but all other income earned by businesses and individuals engaged in the production of goods and services demanded by the proposed Project, such as profits, rent, interest, and dividends.

When compared with the GDP in 2012 (the figure available when the Supplemental EIS was drafted), the proposed Project's contribution represents approximately 0.02 percent of annual economic activity across the nation.

Health Impacts

A number of commenters raised concerns about the potential for impacts on human health associated with the proposed Project. The Department took into account, with peer-reviewed research where appropriate, impacts to human health throughout the various resource areas in the Supplemental EIS.

For example, in the Potential Releases chapter, the Supplemental EIS examined potential health risks associated with exposure to crude oil and other relevant chemicals, were there to be a spill. In the Air Quality and Noise chapter, the Supplemental EIS addressed air pollution that would be associated with the construction and operation of the proposed Project. In the Cumulative Effects Assessment and Extraterritorial Concerns chapter, the Supplemental EIS described potential changes in pollution associated with refineries. Finally, the Supplemental EIS also examined potential human health impacts in Canada associated with oil sands development and pipeline construction and operation.

Environmental Justice

According to the Office of Environmental Justice in EPA, environmental justice refers to the "fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." A total of 17 separate census areas with minority and/or low income populations could potentially be affected by construction or operation of the proposed Project. Temporary environmental justice impacts during construction could include exposure to construction dust and noise, disruption to traffic patterns, and increased competition for medical or health services in underserved populations. Positive impacts could include increased employment and earnings.

Minority or low-income populations could be more vulnerable should an oil release occur along the segment of the pipeline that transits through their communities. Further, Indian tribes with significant dependence on natural resources could be disproportionately affected.

Mitigation of environmental justice concerns would include ensuring adequate communication with affected populations, such as through public awareness materials in appropriate languages so as to ensure an appropriate level of emergency preparedness. With respect to employment opportunities, Keystone has committed to employee and supplier diversity and has programs in place to mitigate impacts on vulnerable populations.

Some comments, particularly from Indian tribes, have expressed concern that temporary camps of construction workers along the proposed Project route may increase crime and otherwise disrupt local communities. In their letters to the Department of February 2, 2015, the Department of Homeland Security and the Department of the Interior also expressed concerns in this regard. Keystone committed to take several measures to ensure greater safety for those communities along the route, including security provisions and a code of conduct for the workers.

5.5 Physical Disturbance Impacts:

Water Resources

Construction and operation of the proposed Project could result in temporary and permanent surface water impacts, including stream sedimentation, changes in stream channels and stability, and temporary reduction in stream flow. The proposed Project's pipeline route would avoid surface water whenever possible, but would cross approximately 1,073 surface water bodies, including 56 perennial rivers and streams, as well as approximately 24 miles of mapped floodplains. Mitigation measures would include tunneling the pipeline underneath major rivers to mitigate construction impacts, erosion control during construction, and restoration of waterbodies as soon as practical after construction.

Wetlands

The proposed Project would affect approximately 383 acres of wetlands, two acres of which may be permanently lost. Remaining wetlands affected by the proposed Project would remain as functioning wetlands, provided that impact minimization and restoration efforts described in the mitigation plan are successful. Keystone has made route modifications to avoid wetland areas (such as the sensitive NDEQ-identified Sand Hills Region) and has committed to additional mitigation measures.

Threatened and Endangered Species

Fifteen federally protected, proposed, and candidate species occur in the proposed Project area: 13 federally listed threatened or endangered species, and two candidate species for listing as threatened or endangered. The endangered American burying beetle (*Nicrophorus americanus*) is the only species that is likely to be adversely affected by the proposed Project, but other species could potentially be affected. Those include the federally endangered black-footed ferret (*Mustela nigripes*), interior least tern (*Sternula antillarum*), whooping crane (*Grus americana*), and pallid sturgeon (*Scaphirhynchus albus*); the threatened piping plover (*Charadrius melodus*), Western prairie fringed orchids (*Platanthera praeclara*), northern long-eared bat (*Myotis septentrionalis*), and

rufa red knot (*Calidris canutus rufa*); and federal candidate species the greater sage-grouse (*Centrocercus urophasianus*) and Sprague's pipit (*Anthus spragueii*).

The FWS issued a May 2013 Biological Opinion regarding potential impacts of the proposed Project on seven federally protected species and included conservation measures for two federal candidate species. The American burying beetle was the only species likely to be adversely affected by the proposed Project, but the FWS has determined that its continued existence would not likely be jeopardized. Keystone committed to avoidance and conservation measures as well as compensatory mitigation for species included in the May 2013 FWS Biological Opinion and four implementing agreements (appendices to the Biological Opinion). Keystone has also developed species-specific assessment, avoidance, conservation, and compensatory mitigation measures for other Federal or state species of concern.

The Department reinitiated ESA Section 7 consultations with the FWS on whether the proposed Project could have impacts on the northern long-eared bat and the rufa red knot (both recently designated as threatened), and if so, to develop avoidance and conservation measures as appropriate. The Department and FWS have concluded consultations with regard to the rufa red knot, but are still consulting on the northern long-eared bat.

Geology and Soils

The proposed Project's pipeline route extends through relatively flat and stable areas, and the potential for seismic hazards (earthquakes), landslides, or subsidence (sink holes) is low. The route would avoid the NDEQ-identified Sand Hills Region, where soils are particularly susceptible to damage from pipeline construction. Potential impacts to soil resources in other areas associated with construction or operation of the proposed Project and connected actions include soil erosion, loss of topsoil, soil compaction, an increase in the proportion of large rocks in the topsoil, soil mixing, soil contamination, and related reductions in the productivity of desirable vegetation or crops. Mitigation measures would include construction of temporary erosion control systems, implementation of topsoil segregation methods, and restoration of the ROW after construction.

Terrestrial Vegetation

Potential construction and operations-related impacts to terrestrial vegetation resources associated with the proposed Project include impacts to cultivated crops, developed land, grassland/pasture, upland forest, open water, forested wetlands, emergent herbaceous wetlands, and shrub-scrub communities. The proposed Project route would impact biologically unique landscapes and vegetation communities of conservation concern. Keystone committed to restore areas to preconstruction conditions as practicable, and reseed disturbed areas, and to use specific best management practices and procedures to minimize and mitigate the potential impacts to native prairie areas.

Wildlife

The proposed Project would cause minor impacts to wildlife and wildlife habitat. Potential impacts to wildlife include habitat loss, alteration, and fragmentation; direct mortality during construction and operation (e.g., wildlife collisions with vehicles and

power lines/power poles); and reduced survival or reproduction due to stress or avoidance of feeding caused by factors such as construction and operations noise and increased human activity. Mitigation measures to reduce potential construction and operations-related effects to wildlife where habitat is entered would include construction timing restrictions and buffer zones developed in consultation with regulatory agencies as well as measures to minimize adverse effects to wildlife habitats. Keystone committed to develop and implement a conservation plan for migratory birds and bald and golden eagles and their habitats in consultation with the FWS.

Fisheries

Impacts to fisheries within the rivers and perennial streams crossed by the proposed Project route would occur during construction and would be temporary. The Construction, Mitigation, and Reclamation Plan contains measures for waterbody crossings to reduce potential effects on fish and aquatic/stream bank habitat and otherwise minimize potential impacts to fisheries resources. Mitigation measures would include best practices in open-cut stream crossings to reduce stream bed disturbance, sediment impacts, and interference with spawning periods; crossing under large rivers using horizontal directional drilling methods; minimization of vehicle contact with surface waters; and development of site-specific contingency plans to address unintended releases of drilling fluids that include preventative measures and a spill response plan.

Land Use, Recreation, and Visual Resources

Approximately 15,296 acres of land would be affected by construction of the proposed Project, though only approximately 5,569 acres would be retained for operation within permanent easements along the pipeline ROW and at the locations of ancillary facilities (e.g., access roads, pump stations). Approximately 89 percent of the total affected acreage (13,597 acres) is privately owned and the remainder government-owned. Rangeland (approximately 63 percent) and agricultural land (approximately 33 percent) comprise the vast majority of land use types that would be affected by construction. Impacts to land use resources include lease or acquisition and development of the pipeline ROW and land for ancillary facilities (e.g., access roads, pump stations, and construction camps), damage to agricultural features and productivity, visual impacts, and increased dust and noise.

Construction activities would temporarily affect recreational traffic and use patterns in special management and recreational areas, such as historic or scenic trails and rivers with recreational designations. Impacts of operation of the proposed Project on recreation would be minimal.

Visual impacts associated with the proposed Project would primarily occur during construction, when pipeline and ancillary facility construction, trenching, and facilities such as pipe yards would be visible. Permanent visual impacts following operation would include the presence of new ancillary facilities as well as visual disturbances in the landscape, such as tree removal, along the pipeline route.

Keystone committed to compensate landowners for construction- and operation-related impacts. It would implement measures to reduce impacts to land uses, recreation, and visual resources such as topsoil protection, restoring disturbed areas, and developing traffic access and management plans.

Air Quality and Noise

If the proposed Project is permitted, construction dust and emissions from construction equipment would typically be localized, intermittent, and temporary since pipeline construction would move through an area relatively quickly. During normal operation of the proposed Project, there would be only minor emissions from valves and pumping equipment at the pump stations. Keystone would implement mitigation measures to reduce air quality impacts, including dust control measures and compliance with state and local air quality restrictions.

Construction noise impacts would also be localized, intermittent, and temporary. Noise impacts from operation of the pipeline would be limited to the electrically driven pump stations. During construction, Keystone would limit the hours during which activities with high-decibel noise levels are conducted in residential areas, require noise mitigation procedures, and develop site-specific mitigation plans to comply with regulations. During operations, Keystone would implement a noise control plan to mitigate noise impacts at affected sites and, as necessary, install sound barriers.

5.6 Cultural Resources: Pipeline construction may present a risk to historic and cultural resources unless appropriately addressed through avoidance or mitigation. This risk was a key concern for Indian tribes and other commenters. The Department of Interior in its February 2, 2015 letter to the Secretary reiterated these concerns. The Department concluded a Programmatic Agreement (an agreement with several interested parties that contemplates mitigation of certain cultural resources impacts in the event of construction). The Programmatic Agreement is appended to the Supplemental EIS, and was concluded in consultation with Indian tribes, federal and state agencies, and the permit applicant. The Department incorporated input from Indian tribes to amend the Programmatic Agreement on cultural resources that had been developed for Keystone's 2008 permit application. The Programmatic Agreement describes the processes that would be followed by Keystone and applicable state and federal agencies to identify cultural resources and to avoid or mitigate adverse impacts.

The proposed Project was designed to avoid disturbing cultural resources listed in the National Register of Historic Places (NRHP), those considered to be eligible for listing in the NRHP, and others of potential concern that have not been evaluated for NRHP listing, to the extent possible. With regard to cultural resources that cannot be avoided, Keystone has committed to minimize and mitigate impacts whenever feasible. Additionally, Keystone would implement Unanticipated Discovery Plans in order to ensure minimization of impacts to as-yet-unknown cultural resources that might be inadvertently encountered during construction or operation of the proposed Project.

5.7 Cumulative Effects: The cumulative effects analysis in the Supplemental EIS evaluates the way that the proposed Project's impacts interact with the effects of other past, present, or reasonably foreseeable future actions or projects. The goal of the cumulative impacts analysis is to identify situations where sets of comparatively small individual impacts, taken together, constitute a larger collective impact. Cumulative effects associated with the proposed Project and connected actions vary among individual environmental resources and locations. Generally, where long-term or permanent impacts from the proposed Project are absent, the potential for additive cumulative effects with other past, present, and reasonably foreseeable future projects is negligible.

5.8 Alternatives: The Supplemental EIS provides a detailed description of the categories of alternatives to the proposed Project that were analyzed, as well as the alternative screening process and the detailed alternatives identified for further evaluation.

Consistent with NEPA and Council on Environmental Quality (CEQ) regulations, the Department compared the proposed Project with four reasonable alternatives: a pipeline that partly follows an alternative route (the "I-90 Corridor Pipeline Alternative"), and three different "No Action Alternative" scenarios that could result if the Presidential Permit is not granted and the crude oil from the WCSB and the Bakken formations is carried on a different form of transport.

Consistent with CEQ regulations and the Department's authority, the Supplemental EIS specifically identifies the alternatives that are before the decisionmaker in considering the application and making the national interest determination pursuant to the President's Executive Order 13337: the No Action Alternative (Permit denial) and the proposed Project (Permit approval).

No Action Alternative

The Supplemental EIS separately analyzed three No Action Alternative scenarios, which are described briefly below. The No Action Alternative analysis considers what would likely happen if the Presidential Permit is denied or the proposed Project is not otherwise implemented. It includes the Status Quo Baseline, which serves as a benchmark against which other alternatives are evaluated. Under the Status Quo Baseline, the proposed Project would not be constructed, its capacity to transport WCSB crude would not be replaced, and the resulting direct, indirect, and cumulative impacts that are described in this Supplemental EIS would not occur. The Status Quo Baseline is a snapshot of the crude oil production and delivery systems at January 2014 levels.

The No Action Alternative includes analysis of three alternative transport scenarios that, based on the findings of the market analysis, are believed to meet the proposed Project's purpose (i.e., providing WCSB and Bakken crude oil to meet refinery demand in the Gulf Coast area) if the Presidential Permit for the proposed Project were denied, or if the pipeline were otherwise not constructed. Under the alternative transport scenarios, other environmental impacts would occur in lieu of the proposed Project. The Supplemental EIS includes analysis of various combinations of transportation modes for oil, including

truck, barge, tanker, and rail. These scenarios are considered representative of the crude oil transport alternatives with which the market could respond in the absence of the proposed Project. These three alternative transport scenarios (the Rail and Pipeline Scenario, Rail and Tanker Scenario, and Rail Direct to the Gulf Coast Scenario) are described below.

Rail and Pipeline Scenario: Under this scenario, WCSB and Bakken crude oil (in the form of dilbit or synbit) would be shipped via rail from Lloydminster, Saskatchewan and Epping, North Dakota respectively (the nearest rail terminal served by two Class I rail companies for both locations), to Stroud, Oklahoma, where it would be temporarily stored and then transported via existing and expanded pipelines approximately 17 miles to Cushing, Oklahoma to interconnect with the interstate oil pipeline system. This scenario would require the construction of two new or expanded rail loading terminals in Lloydminster, Saskatchewan (the possible loading point for WCSB crude oil), one new terminal in Epping, North Dakota (the representative loading point for Bakken crude oil), seven new terminals in Stroud, and up to 14 unit trains (consisting of approximately 100 cars carrying the same material and destined for the same delivery location) per day (12 from Lloydminster and two from Epping) to transport the equivalent volume of crude oil as would be transported by the proposed Project.

Rail and Tanker Scenario: The second transportation scenario assumes WCSB and Bakken crude oil would be transported by rail from Lloydminster to a western Canada port (assumed to be Prince Rupert, British Columbia), where it would be loaded onto Suezmax tankers (capable of carrying approximately 986,000 barrels of WCSB crude oil) for transport to the U.S. Gulf Coast (Houston and/or Port Arthur) via the Panama Canal. Bakken crude would be shipped from Epping to Stroud via BNSF Railway or Union Pacific rail lines, similar to the method described under the rail and pipeline scenario. The rail and tanker scenario would require up to 12 unit trains per day between Lloydminster and Prince Rupert, and up to two unit trains per day between Epping and Stroud. This scenario would require the construction of two new or expanded rail loading facilities in Lloydminster with other existing terminals in the area handling the majority of the WCSB for shipping to Prince Rupert. Facilities in Prince Rupert would include a new rail unloading and storage facility and a new marine terminal encompassing approximately 4,200 acres and capable of accommodating two Suezmax tankers. For the Bakken crude portion of this Scenario, one new rail terminal would be necessary in both Epping, North Dakota, and Stroud, Nebraska.

Rail Direct to the Gulf Coast Scenario: The third transportation scenario assumes that WCSB and Bakken crude oil would be shipped by rail from Lloydminster, Saskatchewan, and Epping, North Dakota, directly to existing rail facilities in the Gulf Coast region capable of off-loading up to 14 unit trains per day. These existing facilities would then either ship the crude oil by pipeline or barge the short distance to nearby refineries. As with the rail and tanker scenario, this scenario would likely require construction of up to two new or expanded terminals to accommodate the additional WCSB shipments out of Canada. One new rail loading terminal would be needed in Epping to ship Bakken crude

oil. Sufficient off-loading rail facilities currently exist or are proposed in the Gulf Coast area such that no new terminals would need to be built under this scenario.

Comparison of Alternatives Before the Decisionmaker

The Supplemental EIS provides detailed analysis of the differences between these alternatives. With regard to GHG emissions, during operation of the No Action Alternative transportation scenarios, including rail and combination modes, the increased number of trains along the rail routes would produce GHG emissions from diesel fuel combustion and electricity generation to support rail terminal operations. Annual GHG emissions (direct and indirect) attributed to the No Action transportation scenarios would be greater than for the proposed Project, but those emissions relate solely to the movement of equivalent amounts of oil from Alberta to the Gulf Coast. Construction of the rail terminals would also involve large numbers of truck trips to transport construction materials and equipment. This increased traffic could cause congestion on roads. Increased shipment of crude by rail could reduce rail capacity available for other goods.

Transportation by rail would likely lead to a greater number of injuries and fatalities per ton-mile than transportation by pipeline, as well as a greater number of accidental releases of crude oil and a greater overall volume of crude oil released. However, the average size of an accidental release associated with crude-by-rail transportation is smaller than the average accidental release associated with a pipeline.

Physical disturbance impacts of the No Action Alternative would vary depending upon the modes of transportation chosen by shippers. All three scenarios would require new or expanded facilities, likely concentrated near loading and off-loading terminals. Nevertheless, expansion of infrastructure would affect fewer acres of land (1,500-6,427) during construction than a new pipeline. During operations, the No Action Alternative would permanently affect between 1,500 acres and 6,303 acres of land, compared to 5,309 acres for the proposed Project.

6.0 Foreign Affairs and Energy Security

***6.1 North American Energy Security*:** Short-term energy security typically refers to security of supply, or a country's ability to procure fuels that satisfy its current energy mix. Over the long-term, however, energy security encompasses broader considerations about the structure, level, and composition of energy supply and demand. Both short-term supply security and long-term efforts to address broader policy goals by reducing demand or moving towards alternative energy sources were common themes in public comments. Recognizing that global energy security is a vital part of U.S. national security, the Department works closely with our international partners to ensure adequate supplies of energy reach the global economy and to help manage geopolitical changes arising from shifting patterns of energy production and consumption. Whether promoting national and regional markets that facilitate financing for transformational and clean energy or inspiring civil society and governments to embrace transparent and responsible development of natural resources, the Department works to ensure energy is employed as a tool for stability, security, and prosperity.

Historically, oil has been a major source of U.S. energy security concerns due to our relatively high volume of net imports, and oil's economic importance and military uses. While U.S. oil imports have abated sharply in recent years, the United States remains a net oil importer. Accordingly, the U.S. national interest in ensuring access to stable, reliable, and affordable energy supplies will persist in the foreseeable future. Furthermore, because oil is traded globally, the United States will remain integrated with global oil markets and subject to global price volatility. Nonetheless, U.S. energy security does not exist in a vacuum and must be weighed in tandem with a number of other critical foreign policy considerations, including climate change and U.S. policies that lay the foundation for a clean energy future.

U.S. policymakers have often viewed oil imports from neighboring countries as beneficial for energy security. As such, Canada's role as the largest and fastest-growing source of U.S. crude imports cannot be dismissed. According to the latest statistics from the Energy Information Administration (EIA), the United States imported 2.88 million bpd of crude oil from Canada in 2014, which accounted for more than 39 percent of total U.S. crude oil imports (net U.S. crude imports were 6.99 million bpd day in 2014) and is an increase of 12 percent over 2013 volumes from Canada. Although domestic production growth from tight oil formations, which is predominately light crude, continues to supplant the majority of international alternatives, U.S. imports of Canadian crude oil are increasing. The vast majority of these imports reach U.S. markets via existing pipeline infrastructure between Canada and the United States. A growing share, however, reaches markets by rail. In 2014 crude imports by rail from Canada exceeded 140,000 bpd. While WCSB rail loading capacity has continued to grow, through August 2015, crude imports by rail from Canada have averaged 103,000 bpd.

Canadian oil is a relatively stable and secure source of energy supply for many reasons, and few countries share all of the political or physical characteristics that enable Canada to remain in this position. Its producing areas are physically close to the U.S. market, and there are limited chokepoints to disrupt trade between Canada and the United States. Canada has a low likelihood of political unrest, resource nationalism, or conflict – above-ground factors that sometimes disrupt oil production in other regions. Additionally, it is not a member of OPEC, which acts to restrict oil production and influence market conditions. The Canadian oil sector is efficiently run, without undue political interference. Canadian oil sands projects have low production decline rates compared to conventional oil fields, providing greater geologic certainty of future supply levels.

The proposed Keystone XL pipeline would serve as a reliable means of transport for U.S. crude oil imports. However, the significance of the pipeline for U.S. energy security is limited. The Supplemental EIS indicates that in most scenarios the proposed Project is unlikely to change significantly the pattern of U.S. crude oil consumption. Alternative and existing pipelines from Canada, crude by rail, and seaborne oil imports could all play a role in different scenarios. In so far as U.S. demand continues to be met in part by foreign crude oil imports, domestic refineries capable of processing heavy crude will

likely maintain access to Canadian crude oil, which will compete with comparable foreign heavy crudes to meet domestic needs.

As with its analysis of the proposed Project's impact on crude flows, the Supplemental EIS recognized that the proposed Project is unlikely to have a meaningful effect on domestic fuel prices. While crude oil prices matter to those involved in producing oil or refining oil into products, most Americans are mainly concerned with the price of gasoline and other refined products. The price of those refined products in the United States continues to be set largely by global crude prices, which are tied to global production and consumption, rather than the availability of pipelines. The findings in the Supplemental EIS have been reinforced by EIA studies that assert that U.S. gasoline prices move with the international benchmark Brent crude oil price rather than WTI. Accordingly, energy security concerns stemming from the proposed Project's impact on domestic fuel prices are largely unwarranted – cross-border pipeline capacity does not measurably translate into lower retail gasoline prices.

As policy makers engage in strategic planning related to the domestic and global energy mix of the future, the link between energy security and climate change is also an important consideration. The 2014 Quadrennial Defense Review and the International Security Advisory Board's report on energy geopolitics highlights the role energy plays in solving the challenge posed by climate change. At present, expected fossil-fuel consumption trends would make it impossible to meet climate change mitigation goals. Ambitious energy policies—on a global scale—are necessary to address the challenge and mitigate risks. To safeguard broader national security interests, energy use must also be sustainable—not just in terms of ensuring available supplies for the future, but also in terms of lowering the impact that energy use is having on the global environment. As countries prioritize and address their energy security needs, including access to affordable and sustainable energy, it is imperative that fundamental reform of the global energy system is pursued to avoid significant growth in greenhouse gas emissions and the correlated costs of climate mitigation and adaptation.

***6.2 Relationship with Canada*:** Canada remains an ardent proponent of the Keystone XL Pipeline and has repeatedly and strongly advocated for the proposed Project at all levels within the U.S. Government. As such, a decision against the proposed Project could temper Canada's willingness to partner with the United States on some bilateral and international issues. A negative permit decision may lead to a cooling of U.S.-Canadian relations and could affect Canadian cooperation on Western Hemisphere issues and international security cooperation. However, the United States' enduring bilateral relationship with Canada, including as it pertains to trade relations and energy interconnectivity, is resilient and is likely to outlast any single foreign policy discrepancy.

Canada is and will remain one of the United States' closest strategic allies. Numerous geographic, defense, commercial, political, environmental, and social ties bind the two countries. We have the biggest and the most consequential economic relationship in the world with over $2 billion per day in trade. Canada shares U.S. values in the global promotion of democratic governance and free markets and coordinates closely with the

United States on most foreign policy issues. U.S.-Canadian supply chains are interlinked and U.S. and Canadian companies are heavily invested in each other's markets. We recognize Canada's role as a secure conduit for crude oil to reach the U.S. market, and we acknowledge the United States' role as the Canadian energy sector's number one customer.

***6.3 Climate Change-Related Foreign Policy Considerations*:** The State Department's consideration of the application for the proposed Project is informed by the broader context of climate change and the leadership role that the United States has and must continue to play internationally on climate change. More and more frequently, national governments have placed climate change-related issues on the agendas of a range of high-level bilateral and multilateral negotiations, including among heads of state and foreign ministers, making U.S. credibility on the fight to combat climate change a major factor in determining U.S. foreign policy success.

The vital importance of climate change leadership to U.S. foreign policy is not surprising:

- The science has made clear that to move onto an emissions trajectory consistent with keeping the global temperature increase below 2 degrees Celsius above pre-industrial levels, the world needs to be making a decisive shift to lower carbon energy sources now.

- Countries around the world widely accept the conclusive scientific evidence that climate change is occurring now, and that human activity is the dominant cause of increasing temperatures. 2014 was the warmest year on record, following on a succession since 2000 of 13 of the warmest years on record, and global GHG concentrations continue to rise in the atmosphere.

- There is increasing understanding by governments, experts, and the public that every region of the world is affected by the negative impacts of climate change, including the likelihood of more frequent and intense droughts, floods, and storm surges in some regions; rising sea levels; and impacts on a host of habitats that support communities and livelihoods. There is further understanding that GHG emissions and climate change do not respect national boundaries.

- Additionally, as indicated in the 2014 Quadrennial Defense Review, the U.S. national security community has recognized that climate change is a threat multiplier that will aggravate stressors abroad such as poverty, environmental degradation, political instability, and social tensions. This assessment is shared by many allies, including the United Kingdom, Germany, and France. Indeed, the Global Security Defense Index prepared by the American Security Project indicates that about 70 percent of nations have explicitly stated that climate change is a national security concern.

A broad range of countries, both developed and developing, are implementing plans to reduce their emissions and to increase the resilience of their economies. How the U.S. is

viewed as addressing climate change may affect the U.S. relationship with many of those countries, especially those that are vulnerable to climate change impacts, across a range of foreign policy priorities.

Over the past few years, the United States has acted concertedly to reduce emissions and has taken other actions to combat climate change across relevant sectors. This has generally involved transitioning wherever practicable away from more-polluting to less-polluting sources of energy, driving toward greater energy efficiency, and shifting away from more potent greenhouse gases. Other governments follow the United States' domestic rulemaking and policy process with interest, including:

- The adoption and implementation of the Clean Power Plan, which will advance the transition to clean energy sources, including natural gas and renewable energy;

- The marked increase in fuel economy standards for light- and heavy-duty vehicles, which has served to reduce combustion of fossil fuels by increasing vehicle efficiency and promoting a transition to advanced vehicles;

- Increases in efficiency standards in a broad range of household and commercial appliances and federal buildings, which will save individual Americans thousands of dollars; and

- A range of actions to reduce highly potent greenhouse gases, including methane and hydrofluorocarbons.

The United States is the world's largest economy and second-largest GHG emitter. As such, strong U.S. domestic policy to combat climate change sets an important example for other countries and puts an "action speaks louder than words" credibility behind the U.S. message. The United States' ambitious efforts at home help spur ambitious climate action by others, driving global emissions trends in the right direction. In short, the extent to which the United States takes action and is understood to be a leader is directly correlated to the United States' effectiveness in encouraging other countries to step up and take strong action on climate change.

The impact that U.S. climate-related actions can have on those of other countries was evident in the U.S.-China joint announcement in 2014 of the two nations' respective actions to reduce their emissions, as well as the 2015 joint Presidential statement in which China announced it will launch its national carbon emissions trading system in 2017. China's specific commitments to limit its emissions mark a major advance in its approach, and were surely encouraged by its assessment of the corresponding U.S. actions. Likewise, the more than 150 countries that have come forward with their emissions targets were similarly encouraged by U.S. leadership.

Further, the U.S. commitment to combatting climate change through its own domestic actions and policy decisions has enhanced and will enhance prospects for reaching a global climate agreement in December of 2015. Over the course of this year, countries have been determining the actions they will undertake in the context of this agreement to reduce their domestic emissions over the next 10-15 years, and strong U.S. efforts at home have had a positive impact. Sustained U.S. climate leadership will also help to encourage implementation of targets countries have put forward, and continued progress worldwide in combatting climate change. Advancing U.S. climate change policy in the international arena is also one of the United States' best tools to reduce the significant and costly adverse impacts of climate change at home.

As such, it is strategically important for the U.S. to continue to play a leadership role in the worldwide fight against climate change, and the perception of U.S. leadership is enhanced when the United States Government is seen as taking strong action to combat climate change. It is important, therefore, to understand that the decision on whether to approve the permit application for the proposed Project is not just a matter of high domestic interest and scrutiny, but also one that is likely to have international ramifications. Many will see it as a test of U.S. willingness to take significant and difficult decisions as part of a broader effort to address climate change.

The broad perception of the oil that would be carried by the proposed Project is that it would be "dirty" – more GHG-intensive over its lifecycle than alternate sources of crude, owing to the combination of the use of the heavy crude itself with the far more GHG-intensive process of extraction. This perception is supported by the findings in the SEIS. Whether or not that oil would still find other transport to market in the absence of the proposed Project (that complex issue is analyzed in the Supplemental EIS), the general perception is that a decision to approve the pipeline would pave the way for the long-term and intensive extraction and importation of that oil into the United States. Issuing a permit for the proposed Project would thus be understood at this time as a decision to facilitate particularly GHG-intensive crude imports into the United States for the long term, undermining the power of U.S. example as a leader in promoting the transformation to low-carbon economies.

Therefore, a decision to approve this proposed Project would undermine U.S. objectives on climate change; it could call into question internationally the broader efforts of the United States to transition to less-polluting forms of energy and would raise doubts about the U.S. resolve to do so. In turn, this could raise questions for some countries about how aggressively they should combat climate change domestically, and potentially reduce the United States' ability to advance climate and broader objectives with allies and other partners in various bilateral and multilateral contexts. An approval of the proposed Project would also undermine U.S. national security objectives as described in the 2015 National Security Strategy, which identified climate change and the reduction of global emissions as a U.S. national security priority, and limit the United States' ability to combat the negative impacts of climate change within U.S. borders. Conversely, a decision to deny the permit would support U.S. relationships with countries where

climate issues are important and encourage actions that combat climate change and benefit the United States.

7.0 Basis for Decision

Under the authority delegated to him by the President of the United States, the Secretary of State has determined that it would not serve the national interest to issue a Presidential Permit to TransCanada Keystone Pipeline L.P. to construct, connect, operate, and maintain pipeline facilities at the United States-Canada border in Phillips County, Montana, as part of the proposed Project. The Secretary of State has considered Keystone's Presidential Permit application filed with the Department on May 4, 2012, and all input received over the course of the Department's review. The determination to deny a Presidential Permit for the proposed Project is based on consideration of a broad range of factors, including the following assessments:

- While the proposed Project would have a limited benefit for energy security by providing additional infrastructure for the dependable supply of crude oil (and President Obama has previously emphasized the importance of sourcing foreign oil from our "neighbors like Canada and Mexico that are stable and steady and reliable sources"), the absence of the proposed Project will not prevent Canada from continuing to serve as a secure source of energy supply. Nor is it likely to significantly increase demand for crude imports from other, less reliable sources in most circumstances. The negligible-to-limited benefit to energy security potentially provided by the proposed Project is outweighed by the Secretary's assessment of the importance of the United States leading where it can by making difficult choices on issues of climate change at this time.

- Even if the proposed Project were approved, any impact on prices for refined petroleum products would be minimal. Oil trade is driven by commercial considerations and occurs in the context of a globally traded market in which crude oil and products are relatively fungible. The market continually adjusts both logistically and in terms of price to balance global supply and demand. As a result, the level or origin of U.S. oil imports has a minimal impact on the prices U.S. consumers pay for refined products.

- Uncertainties about the future growth of oil sands production remain. Oil prices are volatile, particularly over the short term, and long-term trends that drive the investment decisions of oil-sands producers are difficult to predict. Since production remains uncertain post 2018, the corresponding amount of transportation infrastructure required also remains uncertain. While the proposed Project by itself is unlikely to significantly impact the level of GHG-intensive extraction of oil sands crude or the continued demand for heavy crude oil at refineries in the United States, it is critical for the United States to prioritize actions that are not perceived as enabling further GHG emissions globally. Irrespective of the uncertainty highlighted above, an approval of the proposed

Project would facilitate transportation into our country of a highly carbon intensive energy source.

- The Department recognizes the importance of the proposed Project to Canada and places great significance on maintaining strong bilateral relations. Canada is one of the United States' closest strategic allies, and our economies are deeply integrated with over $2 billion in trade per day. Although the Government of Canada has indicated its strong interest in the completion of the Keystone XL pipeline and a denial of the permit will have a negative impact on our relationship, our strong and historic relationship with Canada will endure. The United States will continue to work with Canada to ensure our shared interests in energy, environmental, and economic issues prosper.

- The Department has considered the concerns of some Indian tribes raised in the context of the proposed Project regarding sacred cultural sites and avoidance of adverse impacts to the environment, including to surface and groundwater resources.

- The Department has considered the economic benefits of the proposed Project for the United States. During construction over a two-year period, spending on the proposed Project would support approximately 42,100 jobs (direct, indirect, and induced jobs combined), of which approximately 3,900 would be direct construction jobs. The majority of these jobs would be short-term in nature. According to the applicant, were the proposed project to enter service, operations would require approximately 50 employees in the United States, consisting of 35 full-time employees and 15 temporary contractors. The proposed Project would also generate tax revenue for communities in the pipeline's path and it is estimated that pipeline activity would contribute .02 percent to the national G.D.P. based on 2012 statistics. These economic benefits are meaningful, but in the assessment of the Secretary of State, they do not outweigh the fact that an approval would undermine the United States' successful foreign policy engagement in efforts to combat climate change on a global scale. Domestically, the United States must prioritize the development of a green economy, and work to transition to jobs that catalyze a clean energy future. Clean energy jobs would better utilize the skilled manufacturing workforce here in the United States and ensure that American workers are at the forefront of an industry that is in increasingly high demand throughout the world.

- This is a critical time for action on climate change. The science is clear and widely accepted, including among foreign governments, that climate change is occurring now, that human activity is the dominant cause, and that climate change impacts are already being felt around the world. These impacts include, among others, sea-level rise, and more frequent and intense droughts, floods, and storm surges. The decision to approve or deny a Presidential Permit for the proposed Project will be understood by many foreign governments and their citizens as a test of U.S. resolve to undertake significant and difficult decisions as part of a

broader effort to address climate change. In the judgment of the Secretary of State, the general understanding of the international community is that a decision to approve the proposed Project would precipitate the extraction and increased consumption of particularly GHG-intensive crude oil. Such a decision would be viewed internationally as inconsistent with the broader U.S. efforts to transition to less-polluting forms of energy and would undercut the credibility and influence of the United States in urging other countries to put forward ambitious actions and implement efforts to combat climate change, including in advance of the December 2015 climate negotiations.

- United States actions relating to climate have a significant leveraging effect on global emissions trends. The 2015 National Security Strategy identifies climate change and the reduction of global emissions as a national security priority for the United States. The large majority of greenhouse gas emissions are produced outside the United States, and the extent to which other countries take significant actions to reduce their emissions will largely determine the severity, scope, and timing of the negative impacts of climate change in the United States. Climate change serves as a threat multiplier. U.S. leadership on climate change strengthens our leverage with our international partners and helps enable us to convince other countries to make and implement meaningful reductions in their domestic emissions, to support our positions in international climate negotiations, and to support our objectives in bilateral and multilateral contexts.

- There would be a variety of other potential environmental and cultural impacts associated with the proposed Project (many of which Keystone agreed to mitigate), just as there would be for alternative methods of transporting crude oil. Comparing the non-GHG potential environmental impacts and cultural impacts of the proposed Project with those of alternatives for transporting crude oil yields a mixed picture. All of these potential impacts were part of the Department's consideration.

President Obama has made clear that "[t]he net effects of the pipeline's impact on our climate will be absolutely critical to determining whether this project can go forward."[1] While the permitting decision involves weighing many different policy considerations, a key consideration at this time is that granting a Presidential Permit for this proposed Project would undermine U.S. climate leadership and thereby have an adverse impact on encouraging other States to combat climate change and work to achieve and implement a robust and meaningful global climate agreement. Strong climate targets and an effective global climate agreement would lead to a reduction in global GHG emissions that would have a direct and beneficial impact on the national security and other interests of the United States. The world will continue to use fossil fuels, we know this. The Department will continue to evaluate applications for cross-border fossil fuel pipelines on their merits. But approving the proposed Project would not serve the national interest.

[1] Speech by President Barack Obama at Georgetown University, June 25, 2013.

8.0 National Interest Determination

Pursuant to the authority vested in me by the President under Executive Order 13337 of April 30, 2004 and subject to satisfaction of the requirements of sections 1(h) and 1(i) of Executive Order 13337, I hereby determine that issuance of a permit to TransCanada Keystone Pipeline, L.P., a limited partnership organized under the laws of the State of Delaware, to construct, connect, operate, and maintain facilities at the border of the United States and Canada for the transport of crude oil from Canada to the United States across the international boundary in Phillips County, Montana, would not serve the national interest.

The Secretaries of Defense, Interior, Commerce, Energy, Homeland Security and Transportation, the Attorney General, and the Administrator of the Environmental Protection Agency will be notified of this determination, and the determination will be final unless further consultations are required or the matter must be referred to the President for consideration and final decision pursuant to section 1(i) of said Executive Order.

NOV 3 2015

Date

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

INDIGENOUS ENVIRONMENTAL NETWORK, et al., and NORTHERN PLAINS RESOURCE COUNCIL, et al., Plaintiffs, vs. UNITED STATES DEPARTMENT OF STATE, et al., Federal Defendants, and TRANSCANADA CORPORATION, et al., Intervenor-Defendants.	Civil Docket Nos. CV 17-29-GF-BMM and CV 17-31-GF-BMM

Transcript of Motion Hearing

Missouri River Federal Courthouse
125 Central Avenue West
Great Falls, MT 59404
Monday, January 14, 2019
1:34 p.m. to 2:48 p.m.

BEFORE THE HONORABLE BRIAN MORRIS

UNITED STATES DISTRICT COURT JUDGE

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PROCEEDINGS

(Open court.)

THE COURT: Please be seated.

Madam Clerk, please announce the next case on the Court's calendar.

THE CLERK: This Court will now conduct a motion hearing in Cause Numbers CV 17-29-GF-BMM, Indigenous Environmental Network, et al. versus United States Department of State, et al. and CV 17-31-GF-BMM, Northern Plains Resource Council, et al. v Thomas Shannon, Jr., et al.

THE COURT: Good afternoon, Mr. Patten. Mr. Volker. Would you identify the rest of the people at your table.

MR.VOLKER: Yes, thank you, Your Honor.

We have at the table counsel for the Northern Plains Resource Council.

THE COURT: Oh, I'm sorry, Mr. Hayes. I see you there. Okay, Mr. Hayes. And who is with you, Mr. Hayes?

MR. HAYES: Good morning, Your Honor. We also have Jaclyn Prange and Cecilia Segal and myself all on behalf of Northern Plains Resource Council.

THE COURT: All right. Thank you. Welcome.

And, then, Mr. Roth, Mr. Oven, Mr. Steenland, and Mr. Whitfield.

Okay. This is a motion filed by intervener TransCanada for a stay pending appeal.

Who is going to argue today? Mr. Steenland, go ahead, please.

MR. STEENLAND: Thank you, Your Honor. May it please the Court. Peter Steenland on behalf of TransCanada in support of our motion for stay pending appeal.

We have two requests pending before the Court: First, that we be allowed to resume what we have called the preconstruction activities; secondly, that the stay be issued to allow us to actually construct the pipeline.

TransCanada believes that our request for stays are fully justified for both of those activities. We believe that we have fully satisfied the applicable four-part standard. But for today we'd like to focus on return to the preconstruction activities without necessarily waiving any entitlement to the argument about our right to construct the larger proposal.

In doing so, Your Honor, let me start with just an observation. We know, of course, that in November the Court ruled on the cross-motions for summary judgment. But if for whatever reason this Court had been focused on other matters with a greater priority, if for whatever reason the Court had not gotten to issue that summary judgment motion when it did, if hypothetically the Court were to issue its summary judgment motion today, it is I think a fact that virtually all of the preconstruction activities would have been completed. The pipe yards would have been constructed and the pipe assembled. Most

of the work camps would have been assembled and ready for occupancy.

But there was, as we know, a regular reporting by TransCanada on status of these various undertakings from the beginning. The company's been fully transparent. There's been no surprise.

Secondly, there's been no concern from the Court about what we have been doing. The focus has been on construction and can we avoid preliminary injunctions and things like that. But while that was going on, we were doing the preconstruction, and there's been no objection from plaintiffs.

But the day the Court ruled on summary judgment, all of a sudden, activities that had been perfectly acceptable the day before were illegal under someone's interpretation of NEPA. Activities that had a minor impact all of a sudden became irreparable and needed to be enjoined.

So that's just an observation. I want to briefly talk about the four-part stay. But it does seem to me that if the scenario had been a little different, we would be in a different place.

In terms of the four-part stay, let's talk briefly about success on the merits. And I have no intention of rehashing the mountain of briefs, Your Honor. We have been down that road so many times. But let me, if I may, hit just a

couple of really critical points.

The first point has to do with this Court's jurisdiction to review and whether this is an act of the President or whether this is an action by the State Department that is subject to an APA.

I'd like to read a sentence from a record of decision: "The determination is presidential in nature; and, therefore, the requirements of NEPA, the EISA, and the National Historic Preservation Act are inapplicable. Nevertheless, as a matter of policy and in order to inform the Secretary's determination regarding the national interest, the Department has reviewed this stuff."

That, Your Honor, was a statement by the Obama administration. That was the ROD/NID signed by the Obama administration's Secretary of State, and it represents a continuous consistent position as to what the nature of this action is. It is presidential action. NEPA is being applied to simply inform this as a matter of policy. That has been the view of the decision makers from day one.

THE COURT: Mr. Steenland, was that Secretary Clinton or Secretary Kerry?

MR. STEENLAND: Secretary Kerry, sir.

THE COURT: What year?

MR. STEENLAND: That is the RON/NID of November 23, 2018, signed by Secretary Kerry. It's in the record. And it

mirrors the language in the most recent ROD/NID by the Trump administration. The language is identical.

Now, what we have to look at, Your Honor, is how did the State Department come to this place? Why are they here? They are here because of an executive order. They are here because an executive order directs them to do the President's -- to exercise the President's authority. It is the only authorization for the Department of State. There is no statute. There is nothing else out there that could create that type of legal responsibility. And if the executive order is the only authority, then we have to say that either this is not presidential action, or the President did something to divest himself of that authority.

And that's where the plaintiffs have gone from day one. Because they have recognized the litigation involving the original Keystone pipeline where the court in DC and the court in South Dakota said, "Nope. We can't review these records of decision."

And so what they say is that somehow -- and quoting the Court on page 10 of its order of November 22, 2017 -- "The President waived any right in his memorandum to review the State Department's decision. The State Department on its own initiative prepared a final supplemental EIS."

But if we take a look carefully, Your Honor, at what the President did for this project, what we see is that he

directed -- and I'm going to read from the memorandum of January 24, 2017, by the President -- "The agency notification and 15-day delay requirements of Sections 1(g), 1(h), and 1(i) of the executive order are hereby waived on the basis that under the circumstances observation of these requirements would be unnecessary, unwarranted, and a waste of resources."

If you go to those provisions in the executive order -- that's in the case as well -- you will see notification requirements in those three provisions. But, Your Honor, in each of those provisions, it has to do with interagency coordination. There is no relinquishment of presidential authority. This was a somewhat inartful way -- and, yeah, it was only the third day of a new administration, so I think we've got to cut it some slack -- of saying, "Let's expedite this process. We don't need 15-day reviews by 14 agencies. Let's get it done."

And that, that single point, Your Honor, is the hinge on which this whole case pivots. Because if it's presidential action, we shouldn't be here. And if it's the State Department assuming responsibility for some statutory authority that no one has found, then maybe the APA applies.

But let us now remember that NEPA is not major federal action. Plaintiffs run those two together. NEPA is the report. NEPA is the study that you do on major federal action. And if there's no major federal action, there's no

NEPA, and there's surely no review.

Now, you know, I was preparing for this case and happened to look at another document that was on my desk. It's from another matter, but it's a presidential permit. The permit was issued in 1956. It's a border crossing permit. And you know what? It's signed by Dwight D. Eisenhower. It's his signature. Now, I imagine that if we had this permit signed by Donald J. Trump, we probably wouldn't be here. It's signed by the person to whom he delegated this authority, and that doesn't change.

These are consistent agency views. Our friends on the plaintiffs' side will say, "Oh, yeah, but the State Department said back in 2008 that NEPA applies and the regulations and stuff like that." And, you know, I guess that's why we're here because it's a somewhat confused ledger.

There are arguments you could make on the other side. But I don't know of any authority that exists to hold that a statement by an agency in an ongoing process or even promulgation of NEPA regulations somehow has the dignity of a statute authorizing the agency to take action and somehow transmogrifies what would be presidential action into run-of-the-mill APA activities.

Enough on that. We have other things to discuss here, Your Honor.

With regard to likelihood of success on the merits

having to do with NEPA adequacy, our concern in this regard, Your Honor, is that with respect to the findings of this Court where the Court has held that NEPA has been violated, it has to do with new information. These violations: We're talking about a new way to measure greenhouse gases, three new oil spills, cumulative impacts with regard to another pipeline.

There is from our perspective inadequacy because the test for supplementing the EIS, the test for inadequacy, is significant new information that presents a substantially different point of view. It's what I informally refer to as a holy-cow moment. It's something you didn't know before that would cause you to go back and look at it again.

And the courts have recognized this. The Supreme Court has recognized this in several of its cases because new information comes out every day, and under some circumstances you would never get to closure. And so have you to be able to say, "Is this really significant?"

Well, I mean, let's take, for example, the question of whether the cumulative impacts were adequately addressed with regard to the Alberta Clipper because that's a finding of violation. You know, in all honesty, the State Department probably dropped the ball. They are not here, so maybe I can say that. It would have been better if they had said something about it. But it's harmless error. The reason it's harmless error is because three months later they analyzed those

cumulative impacts. They looked at them in the other record of decision, and they found them to be inconsequential.

So the purpose of NEPA is to inform decision makers to educate the public. Was a decision maker informed? You are darn right he was. Was the public educated? It's a public document. Do we want you to say you've got to go back and redo this and simply reiterate what you have already said because you didn't do it here even though these purposes have been served? I don't think so. That's what courts call fly specking. That's the nitpicky stuff that gives NEPA a bad name.

On the main line alternative, we had to look at that. But as the State Department explained, that decision was made. And it was afterwards that the Nebraska state regulatory agency said, "You can't go where you want to go; you have to do something else."

Now, the plaintiffs respond by saying, "It doesn't matter. That fact doesn't matter. You knew there was an alternative because you put it in your application."

But that wasn't what the -- that's not what TransCanada was seeking. TransCanada was seeking approval of what it wanted to build, and that doesn't rise to the level of a proposal for activity. It's an option. It's an alternative that they weren't advocating. No one was advocating, but they had to put something in the report. I don't think that

triggers a duty under NEPA.

Alternatively, there's an even more chilling prospect because they say, "You didn't surrender authority over this. Take a look at the permit. You've got authority to modify it. You've got authority to cancel it. You claimed authority to enforce it."

But in the NEPA world, federal agencies issue permits all of the time that look like that. And if that theory were held applicable, you would have endless NEPA exposure on decisions that agencies had made 10, 15 years ago. "Oh, something's changed." And that's contrary to what the Supreme Court has said in the Utah forestry case. When it's over, it's over. Agencies make decisions, and they move on. NEPA is a procedural statute. It's not substantive.

Let me talk about injury. Particularly with respect to preconstruction activities, the plaintiffs are not going to be harmed. There has to be a nexus, Your Honor. There has to be a connection between the procedural violation and the environmental injury in order for an injunction to apply. The Supreme Court has disposed of the notion that environmental harm is automatically presumed in all environmental cases and irreparable injury follows. That doesn't exist anymore. After *Monsanto*, after *NRDC v Winter*, those old cases simply don't apply. You have to link the irreparable injury to the violation. And in this case, all of the violations involve

operation of the pipeline. None involve construction as found by this Court.

Now, if this Court had said, "Purpose and need is flawed," we wouldn't be making this argument. We couldn't because that would go to the very heart of the NEPA process. But the Court upheld that. And if we look just at the violations that Your Honor has found, they are all operations. They all deal with oil spills. They deal with greenhouse gases. They deal with other things. None involved construction. And, by golly, none involve preconstruction.

THE COURT: What about the failure to finish the surveys? Wouldn't that construction related? And the Nebraska issue, isn't that construction related?

MR. STEENLAND: The failure to issue the surveys: The surveys, as I understand it, are largely done. But that gets to an issue on the merits because, in that regard, the plaintiffs would put us in a catch-22. You cannot survey some land unless you get the landowner's permission to enter upon it. And there are some landowners who will not give you that permission until you have gotten all of your authorizations. And if you can't get the authorizations because you haven't surveyed the land, that is a true catch-22.

In order to address that, the State Department and TransCanada signed a programatic agreement, which is applicable and binding and occurs in every single case of this nature. It

guides the conditions and activities of all parties, if construction occurs, and describes how you will respond if there is some type of protected issue. So you're irreparable injury is addressed by the programatic agreement. This is a recognized mechanism for addressing survey concerns.

Now, the only injury, the sole injury, that this Court identified in its October -- I mean, it's December 7th ruling, as injury to the plaintiffs was bureaucratic momentum. That's it. Bureaucratic momentum, however, applies to when the government is not only the sponsor but the actor. It's when the Corp is building its own project. Bureaucratic momentum has no application if we're in that other NEPA world of licensing and permitting. Because there is no momentum. Instead, what we have are two things: The first thing we have is a CEQ regulation. And CEQ regulation allows applicants to plan, design, or perform other work necessary to support an application while NEPA is underway.

The Court's quote of the CEQ regulation deals with what cannot be done when the federal government is the actor. With all due respect, that's the wrong subparagraph. And so we say, TransCanada says, "We don't worry about bureaucratic momentum." The reason we don't worry about bureaucratic momentum is because it doesn't exist. We know that for a fact because several years ago the company took a multi-million dollar hit when the Obama administration denied the permit.

There was no bureaucratic momentum there, and we don't see it here. What we see instead is the presumption that federal decision makers will make the right decision. That's what the Ninth Circuit said many years ago in *Conner v Buford*. There's a difference between one type of lease and another type of lease. And you get one because there is no momentum. You presume when the issue gets to the right people, they will do the right thing.

In contrast, talk about irreparable injury to TransCanada. And in this regard, Your Honor has the latest declaration from Mr. Ramsey. The latest declaration from Mr. Ramsey was one of a series that began well over a year ago, where we have updated the Court on what is going on. And as we said in our declaration in paragraph 3, "This declaration provides a more detailed explanation of when -- when those harms will occur."

It was intended to update the Court on those kinds of issues. I know our friends from IEN have objected, but we never said that it was intended to bolster our motion. That's their words, not ours. And what we say is, as Mr. Ramsey indicates, we're not going to make up for lost revenue. We can't make up for paying taxes and other payments to local governments once this pipeline is up and running. We can't employ thousands of workers.

And the plaintiffs say, "Well, wait a minute. This

is irreparable injury, and you're talking dollars. Dollars are not irreparable."

And I guess in a classic sense if we had a contract dispute with them, that would be true. But I don't think it's true here. It's not true here because we haven't asked for and they haven't provided a bond, and virtually all environmental cases don't get bonds. I know Judge Posner required one about 15 years ago, but there's no bond here. And what that means is that we do have injury. And our injury has to be balanced against others and their injury.

When it comes to preconstruction, from our perspective, that respectfully is a no-brainer. As Mr. Ramsey says, "We need to get back out in the field." And if we finish the preconstruction, if we can get the preconstruction resumed and running again by February 1, then we have a chance to begin work in June. If we have to wait until after March 15, or around March 15, we can maybe get something done in August. Otherwise, we lose the season. Those are preconstruction. That's the work camps, that's the pipe yards. That's the principle focus of today.

Plaintiffs say, "Oh, no, no, no, no. This is all self-inflicted." And I want to ask, "Where is the authority or the declaration for us to self-enjoin ourselves?" Is there some new principle of environmental law that says any time one of these organizations files a law suit, the applicant must

freeze in its shoes and not take any steps whatsoever toward moving to accept and implement a permit? I don't know that's true. I don't think so. You know, surely you can't do irreparable activities. Surely you can't taint the decision making. You can't do any of those things. But I see no basis for self-enjoining, and that's what they are asking. To me, that doesn't make sense.

So for a variety of reasons --

THE COURT: Well, Mr. Steenland --

MR. STEENLAND: Yes.

THE COURT: -- I understand your self-enjoining argument. But, in particular, what activities -- and I tried to go through this at the hearing, the most recent hearing we had, about what activities -- at that time it was paragraph 18 of the declaration -- that allowed everything in 16 and 17 as I recall.

MR. STEENLAND: Right.

THE COURT: And some of the things in 18. So which activities in 18 do you think should be allowed to go forward that would not cause harm to the plaintiffs?

MR. STEENLAND: I'll be very specific, Your Honor. We should be able to finish grading and preparing the yards off the right-of-way where pipes will be assembled in preparation for construction. We should be permitted to transport those pipes to the yards, and we should be allowed to resume

construction -- by "construction," I mean minor grading on the work camps -- and preparing the work -- where the workers will live while they are building this project. Those are the --

THE COURT: Hold on, Mr. Steenland. Give me more detail about the scope of these activities? Where are the pipe yards located and the work camps?

MR. STEENLAND: They are all off the right-of-way. They are on private land. They are on land that has been leased. They all have local permits that are required for this activity. And they will be completely rehabilitated, remediated, at the conclusion of the construction. They will be returned to being --

THE COURT: Okay. So assuming that's true --

MR. STEENLAND: Yes.

THE COURT: -- and assuming the Ninth Circuit were to affirm me, you're taking these activities as your own risk.

MR. STEENLAND: Absolutely.

THE COURT: Your own financial risk.

MR. STEENLAND: Absolutely. There is no mistake about that, yes, sir.

THE COURT: All right. I think I understand that part. But then, I guess, do we have the disagreement, though, emerge about the *Navy* case.

MR. STEENLAND: With respect to the Fourth Circuit and the *Navy* case, I think we have to recall, again, the Navy

was building its own facility, and there were certain things the Fourth Circuit allowed the Navy to do, and other things that the Navy couldn't do. What we're --

THE COURT: Let me halt you there.

Comparing activity that I allowed versus what the Fourth Circuit allowed, what was the difference? I don't recall being --

MR. STEENLAND: I think that in large measure the principle difference is that these are temporary activities. These are activities that by themselves plaintiffs have never objected to.

THE COURT: But how do they differ from what the Fourth Circuit allowed in the *Navy* case?

MR. STEENLAND: I think what the Fourth Circuit was talking about were things that were probably moving the Navy toward an ultimate decision on selecting that spot as the landing field.

THE COURT: I understand that's your argument; the bureaucratic momentum shouldn't apply because that's government action. What activities, though, did the Fourth Circuit allow that I did not?

MR. STEENLAND: I think that because they were a different type of activity, it's somewhat difficult to make that contrast.

THE COURT: Well, the other case that came up in the

last order was the *Colorado Wild* case. In that case, as I recall, there were permits issued for a private company to construct the road. The permits were issued by the Forest Service. Isn't that right?

MR. STEENLAND: Yep.

THE COURT: How do we have a different situation here?

MR. STEENLAND: I don't think that there was a showing there that the road construction was in any way going to -- well, let me restate it.

I think there was concern that that was an integral first step in allowing the activity involved in the forest. And the reason that the Court disallowed the road construction was because in that case there would have been, I think, a legitimate concern of irreparable injury. And there is none here.

THE COURT: In the form of the road being built?

MR. STEENLAND: I'm sorry?

THE COURT: In the form of the road being built?

MR. STEENLAND: Yes. Yes, in the form of the road being built. And what I would do is turn Your Honor to the Norrie affidavit. Because what we have done in this matter was to share with you some photographs from the construction of the original TransCanada project where we had pipeline yards. And we have a before, a during, and an after.

Again, if what we're going to do is store pipe prior to construction and if we're going to prepare a work camp that's fully permitted by state and local authorities and return that to the status quo ante, and TransCanada is willing to do that on its own nickel while awaiting decisions by the Bureau of Land Management, Corps of Engineers, and the Department of State, I think they should be allowed to do that.

THE COURT: So how is that different, though, from the road construction in *Colorado Wild*? Are you saying they wouldn't have reclaimed the road there?

MR. STEENLAND: I'm not sure that they would have. And I think it was far more of an integral aspect of the project itself. This is preconstruction that's separate. If you are going to undertake the activity in the Colorado road case, you are going to need the road. It becomes part of the project. It's like the first step. This is not that situation.

THE COURT: The steps are preliminary to construction but not necessary to the running of the pipeline. Is that what you are telling me?

MR. STEENLAND: The steps are preliminary to the construction, but they are not part of the permit. They are not part of the activity authorized by the Secretary when the Department of State issued the permit that this Court set aside. These are not part of that regulatory scheme. They are

of a different nature itself. They are on private land that's been privately leased. Fully permitted. And there's -- you could argue that there's no federal authority over this stuff because it's not part of the project. It's preparatory to the project.

THE COURT: In *Colorado Wild*, that was Forest Service land.

MR. STEENLAND: I believe so.

THE COURT: All right. What about the *Navy* case?

MR. STEENLAND: That was land that the Navy was preparing to purchase and acquire as an airfield.

THE COURT: Go ahead.

MR. STEENLAND: So for those reasons, I would ask that the Court rule as we have requested. Thank you.

THE COURT: So to be clear, just to clarify again, the paragraph 18 activities you seek are the construction of the camps and the pipe yards and transportation of the pipe?

MR. STEENLAND: Yes, sir.

THE COURT: All right. That's it?

MR. STEENLAND: That's it.

THE COURT: Okay. Thank you, Mr. Steenland.

MR. STEENLAND: Thank you, Your Honor.

THE COURT: I'll give you a chance to rebut.

Who is going to argue for plaintiffs first?

MR.VOLKER: If it please the Court, Stephan Volker

for plaintiffs IEN and NCRA. I'll take the last point first, Your Honor.

The Court correctly examined the holding of the Fourth Circuit in *National Audubon Society v Department of Navy*. Critical to the Court's examination of that case was the fact that the Court was careful to distinguish between actions that did not physically harm the environment and did not narrow the scope of alternatives. In this case, that's exactly what we have.

Let me quote from the Audubon Society decision because I think it's very illustrative. At page 203 of 422 F.3d, the Court said, "Agency action prior to completing a sufficient environmental study, violates NEPA only when it actually damages the environment or limits the choice of reasonable alternatives," close quote. Both of those impacts have been proven here.

First, as explained in detail in our opposition to the motion for stay, TransCanada proposes extensive clearing along the pipeline route and construction of pipeline storage, yards, worker camps, and contractor workers.

THE COURT: These are private lands, aren't they?

MR.VOLKER: It doesn't matter. Under NEPA, the court's review is co-extensive with the agency's duty to --

THE COURT: Why couldn't that landowner, independent of a pipeline being built, go out and get a permit to construct

a large parking lot or buildings there? It's of no concern of mine, is it?

MR.VOLKER: Of course not.

THE COURT: Why does it matter now if it's a parking lot or a storage yard related to this pipeline? It's going to go away. They claim it's going to go away. They've got photographic proof of the reclamation.

MR.VOLKER: Okay. I'll take those questions in order. First of all, the sole purpose of the pipeline is to secure tar sands from Alberta. And for that reason a presidential permit is required to cross the boundary.

That being the admitted fact, then any construction of the pipeline and construction of worker camps, pipeline storage areas, contractor camps, et cetera, necessary for construction of that pipeline falls within the duty of the Department of State to examine those impacts.

And a good example would be the *Stewart v. Potts* case out of the Southern District of Texas that was quoted with approval by the Ninth Circuit in *Save Our Sonoran*. There, there were parts of the projects at issue, a golf course in the Texas case and a large subdivision in the Arizona case, the *Save Our Sonoran* case. And the Court was careful to note that where the activities proposed by the developer are interdependent and inextricably intertwined with impacts on resources protected by the Clean Water Act, that the Corps of

Engineers's jurisdiction extends to all aspects of the project because without any of those features of the project, the project would not go ahead.

Taking a step back and looking at our case, Your Honor, if TransCanada were permitted to construct the pipeline all the way up to 1.2 miles from the boundary, under the supposition that this Court lacks jurisdiction over those portions of the pipeline because they did not by themselves require a presidential permit, then the effect would be the Department of State would escape responsibility for its NEPA duties. And this Court's jurisdiction would be sacrificed impermissibly to advance TransCanada's development interest.

The law is to the contrary. The law looks at the project in its entirely. And whereas here, the Department of State has by its publication of the final supplement EIS and the ROD relating to that and made other pronouncements, it has assumed responsibility for conducting a proper NEPA analysis. This Court has ruled correctly that the NEPA analysis must comprehend all of the foreseeable impacts of the project in its entirety. In that case, the Court's jurisdiction is co-extensive with the agency's duty to comply with NEPA or with the Engaged Species Act and with the APA. And, thus far, this Court has absolutely followed the law in that respect.

And I'd be happy to go into more detail there, but the bottom line here is that it would make this all a charade,

the Department of State's Environmental Impact Statement and this Court's proceeding thus far, if TransCanada could escape the effect of the law by proceeding to build its project as if neither the Department of State's permit nor this Court's jurisdiction applied.

THE COURT: Well, there's a difference between building a pipeline and choosing -- what if TransCanada says, "We're going to get a big helicopter crane and haul all of the pipe, set it down gently in an open field that we've leased from a farmer in northeast Montana and store it there." Why can't they do that if that's what they want? They're waiting for the construction of the pipeline. They are not building a pipeline yet. It's just in the vicinity now.

MR.VOLKER: Well, there are a couple good reasons. First of all, as the Fourth Circuit explained, if there's physical damage to the environment or, and more specifically applicable here, if there is a foreclosing or narrowing of alternatives that affect the federal agency's review in consideration of the project's alternatives and impacts, in that case, it's impermissible for the project proponent to build that part of the project.

For example, Your Honor, if TransCanada were allowed to clear 873.8 miles of its pipeline route all the way from Steel City, Nebraska, up to just shy of the border crossing in Montana, it would be beyond credibility for anybody to accept

the notion that having cleared that land, having built access roads to it, having constructed dozens of worker camps, pipeline storage areas, and contractor camps, all based on the supposition that that would be where the pipeline route would go, it would be beyond credibility for anyone to accept the notion that would not foreclose alternatives considered by the Department of State.

THE COURT: Mr. Volker, Mr. Steenland asked for three activities: the pipe yards, the moving of the pipe, and the worker camps. So that's different than clearing a route. We're talking about -- I don't know how many we would have, but a number scattered over some miles on private land. And it's their financial risk if the permit doesn't get issued.

MR.VOLKER: Well, I'd like to back up a bit on that. I'm not sure I'm prepared to accept the notion that clearing of the pipeline right-of-way is not part of the request of the motion for stay. It seemed to be part of it when I read it. And if Mr. Steenland is backing away from that part, perhaps that should be made explicit.

But as I understand it, we have both clearing activities, and then we have subsequent activities designed to prevent migratory birds from taking advantage of their historical habitat use of that pipe line route, both of which are physical interaction with the environment that harms plaintiffs' interest in protecting wildlife.

And, moreover, if we have, as here, a record that contradicts sharply the self-serving assertions made at the last minute, and after our brief was submitted, by TransCanada suggesting that actually the impacts would be much less -- we made an objection timely to the consideration of Dr. Ramsey's declaration, and we would renew that here, just so the record is clear, that it should not be considered by the Court because it violates local Rule 7.3.

Beyond that, the record that we're reviewing is the one prepared by the Department of State indicating that 11,666 acres of right-of-way would be cleared for this project. There would be, according to that same record, a permanent loss of wetlands, permanent modifications of wetland vegetation, loss alteration of wetland soil integrity. These are all admitted by the Department of State.

We further have a number of statements, both by the Department of State and TransCanada, and including the earlier permissible declaration from Mr. Ramsey, confirming that indeed these activities, these so-called preconstruction activities are part and parcel of the construction process and are essential for its appropriate progress over time.

The administrative record that we have before the Court indicates 1,037 acres would be used for pipe storage yards, 479 acres for contractor yards, and between 400 and 800 acres for construction camps. These are all referenced in our

briefs, and I'd be happy to provide record citations to assist the Court's review.

But the bottom line here is that TransCanada is asking this Court to accept at face value casual assurances based on two photographs, black and white photographs, that suggest that complete rehabilitation of the lands involved will be made. I'm not prepared to accept that, and I think the record contradicts that sharply, particularly with respect to wetland areas that would be impacted.

THE COURT: How do you respond to Mr. Steenland's argument that the violations that I found with regard to the NEPA process and the ESA process go to the operation of the pipeline, as opposed to its construction? He's talking about preconstruction activities here.

MR.VOLKER: Well, I don't accept the premise of TransCanada's argument for several reasons. First of all, plaintiffs have consistently opposed both construction and operation, and they have consistently provided the Court with the --

THE COURT: Oh, I know you have, but my order only dealt with operation.

MR.VOLKER: Well, the order, as the Court pointed out earlier this afternoon, it did point out that substantively the failure to survey 1,038 acres for cultural resources was a site-specific finding of a NEPA violation. That obviously

means that activity that would pass those acreages would be a direct violation of the Court's finding that NEPA had been violated. Likewise, the Court's finding that the alteration of the project, to include the main line alternative route in Nebraska, likewise, was a clear violation of NEPA as the Court correctly ruled. And construction of that pipeline route and preconstruction activities associated with that would likewise directly violate the Court's NEPA ruling.

So we have the Court ruling that this project's fundamental justification, as expressed in the Trump administration's national interest determination, was plagued by a failure to examine the cumulative climate change impacts of the project because the Albert Clipper impacts were ignored, and the GREET model in documenting a much high level of climate change impacts was also overlooked. And, more importantly, contrary to *FCC v Fox Television*, and the *Organized Village of Kake v the Department of Agriculture,* the Ninth Circuit ruling is directly on point, and the Court correctly relied on it.

Contrary to that authority, the national interest determination in this case simply discarded and disregarded contrary specific factual findings by Secretary Kerry that are indeed compelling. They are based on a comprehensive review of the facts. And absent any discussion of those findings and the presentation of countervailing factual findings that's sufficient to show a rational basis for moving from one set of

findings to another, the agency in this case, the Department of State, simply can't make that leap, that reversal of course, as the Court has correctly ruled.

So here we have a situation where the Court at the highest level, the substantive decision, whether or not to allow this project to proceed, was without compliance with the Administrative Procedure Act. And that decision, Your Honor, could not be broader in its scope. It means that any activities taken by TransCanada that have a demonstrable adverse environment impact, as shown here by this record, and that would foreclose consideration of alternatives, narrowing them to one specific pipeline route, that those activities consistent with the Ninth Circuit's ruling in *Save Our Sonoran* and other court rulings we've cited, violates both the integrity of this Court's order and the substance of the laws that this Court has properly construed and enforced here.

If it please the Court, I'll move on to some of the other points made.

THE COURT: Is Mr. Hayes going to argue as well?

MR.VOLKER: Yes.

THE COURT: Pardon me?

MR.VOLKER: That Mr. Steenland argued as well or that Ms. Prange will?

THE COURT: Oh, Ms. Prange.

Are you going to argue as well, Ms. Prange?

MS. PRANGE: Yes.

THE COURT: I am in the middle of a trial, and we're starting at 3:00 o'clock.

MR.VOLKER: Oh, I see.

THE COURT: So I've got to get you done by 3:00. So why don't you wrap up soon. I need to give Mr. Steenland a chance to have a brief rebuttal.

MR.VOLKER: Yes, of course, Your Honor. Thank you.

With regard to the threshold question whether the Court has jurisdiction, as the Court correctly ruled on November 22, 2017, there are about a baker's dozen reasons why the Department of State acted as an agency. There was clear agency action in issuing the ROD and preparing an EIS. Otherwise, it would be a ten-year exercise in futility, a charade, that misled millions of people who commented on this project. That cannot possibly be the law.

And although Mr. Steenland said he would not rehash points, each of the points he presented actually did do that. So I'd rely on the Court's well-reasoned rulings to date.

As for the Nebraska --

THE COURT: Mr. Volker, if I believe the lawyer every time he said he wouldn't rehash points, we'd have a whole lifetime of time available.

MR.VOLKER: Well, I have detailed responses to the so-called rehash points, but I won't go into those, Your Honor.

In deference to the time constraints -- and I apologize -- let me just see if we could focus the Court's assessment on what I think is the key point here, and that is the Court's jurisdiction to effectively enforce the laws over which the Court exercises jurisdiction.

And it would be the height of irrationality to go through this long, this ten-year agency review process, and this two to three year court review process only to find that TransCanada could have built this thing all the way up to 1.2 miles from the Canadian border. No agency reviewing this has taken that absurd position. We're well past that point.

THE COURT: Why don't you address one final point. Mr. Steenland argues that the bureaucratic momentum concern on which I relied in my order relates only when the action to be taken is by a federal agency. As opposed to here, we have the federal government issuing a permit for a private act to proceed. And all we have are various federal and state agencies having to issue permits or licenses in this case.

MR.VOLKER: I believe that the actual rule, as recognized by many court rulings, is much broader than as suggested by Mr. Steenland; and that it applies fully where a federal agency, as here, is issuing a permit for a private project because that permit is not issued in isolation. There are a number of related federal permits -- whether it's by the Bureau of Land Management, the Corps of Engineers, or the

Department of State, as we're starting with -- all of them relate to a single project for which under NEPA a single comprehensive EIS must be done.

And consistent with *Save Our Sonoran* and other cases we've cited, the Court's jurisdiction extends to the entire reach of those statutes that require protection of the resources that are affected by the project. And, here, it's an interdependent/interrelated project where if it can't cross the border, it won't take place. And it would be contrary to the wealth of authority that we've cited to allow all of the impacts to take place and then find that the permit across the border could not issue. Then you would have all of the reasons not to do the project occurring, and none of the reasons advanced by TransCanada, presumed economic benefits, taking place. That would be a travesty of justice, Your Honor. Thank you.

THE COURT: Thank you.

MS. PRANGE: Good afternoon, Your Honor. I'll try to make this really quick.

THE COURT: Is it "Prange" or --

MS. PRANGE: It's "Prange," correct.

THE COURT: "Prange."

MS. PRANGE: Yeah.

THE COURT: Okay. Go ahead, please.

MS. PRANGE: So I won't repeat the merits, unless

Your Honor has any questions on the merits, and I'll focus here on the balancing of the harms.

It's imperative that the Court preserve the status quote here. There's no reason TransCanada should continue to build this pipeline after losing on the merits.

THE COURT: They are not building the pipeline. No one is suggestion they have the right to build a pipeline. The only question I'm reviewing is can they take preliminary steps on private property subject to local and state permits to construct the pipe yards, transport the pipe, and the worker camps.

MS. PRANGE: Right.

THE COURT: How does that fit into the harms analysis?

MS. PRANGE: Sure. I'll address those points directly, Your Honor.

So the first question about whether the preconstruction, as TransCanada argues, is not connected to the harms identified in Your Honor's order, there are no cases saying that the harm needs to be directly connected to the deficiencies found in the Court's order. And I want to correct some of the language that has been used, this nexus test, which I think stems from the Supreme Court's *Public Citizen* case. But I think that nexus test relates to a scope of the NEPA review.

But the correct test here is whether there's a sufficient causal connection between the injury and the activity that is sought to be enjoined. And that's from the *National Wildlife Federation* case which we cited extensively in our papers on the motion to amend the injunction. But, basically, the Court says that it's fine to be practical there.

And, here, there is a connection there. The injury that we're seeking to prevent, which is this bureaucratic steamroller injury, is directly connected to these activities, these pipe yards and these worker camps.

THE COURT: But Mr. Steenland argues the bureaucratic momentum theory applies when the federal agency is the actor constructing the project. How do you distinguish that argument?

MS. PRANGE: That's not right, Your Honor. As you pointed out, the *Colorado Wild* case involved a private proponent. And I'd say even beyond that, logically, that distinguishing factor doesn't really distinguish the case. It doesn't make sense because the harm is whether in the EIS process -- here, there is a current EIS process happening. The State Department has told us that much, that there could be a skewing of the analysis or of the decision making. And that skewing could happen regardless whether the proponent is a private proponent or a governmental proponent.

THE COURT: Well, why is that skewing? I thought

bureaucratic momentum is once the Navy decides we're going to purchase the property, once they've made preparations to purchase that property, once they have moved down that path, the Navy itself, those actions acquire a life of their own. They have a momentum. They can't be stopped because we've already decided to do that. Versus here, everything TransCanada wants to do has to be subject to a permit, either by the federal government or various state and local governments.

MS. PRANGE: As in *Colorado Wild*, Your Honor, that same momentum can apply to the agency that is reviewing the action. So I'll give examples from this case, which is the location of the pipe yards and the worker camps could prejudice any determination or changes that need to be made to the route due to, for example, concerns about oil spills that come from the revised analysis or mitigation measures. Or even more broadly --

THE COURT: How does construction of camps affect that?

MS. PRANGE: Because they are near the route. I mean, we don't have a lot of detail of what's going on, but presumably near the route because if they're going to put the pipes in the ground nearby -- so that is, in effect, solidified, and they're locking in where that location is going to be. So that's going to make it more difficult for that

location to change.

THE COURT: Well, how is that locking them in? I mean, say it's in Nebraska where I've ordered them to do a new EIS. They build a worker camp near Grand Island or something, and I say, "Oh, no, we're not going to use that route. You have to go over here." Is that going to affect the decision makers's outcome? You say, "Well, they built a camp there." Are they going to put a pipeline there?

MS. PRANGE: Yes, they could. And, in fact, I think we are already seeing some of this here, which is that there are already some things already constructed already on the ground. So TransCanada is using those, bringing them to the Court and saying, "Therefore, we should be able to keep going."

THE COURT: Like what?

MS. PRANGE: It's like a snowball effect that's happening.

THE COURT: Like where? Like what? Give me an example.

MS. PRANGE: Your Honor, we just don't have the details from where the -- these camps, the pipe yards that are in the declaration --

THE COURT: You said there are some things that are being constructed on the ground already that TransCanada is bringing to the Court saying, "We should be allowed to go on."

MS. PRANGE: Right.

THE COURT: What are those things? Worker camps? Or what?

MS. PRANGE: Yes, the worker camps and the pipe yards. I think there's -- I mean, in addition to the -- the route is one, just one example, too. I think a broader concern here is that it could affect the decision of whether to approve the project over all; or, if not that, the willingness to admit that some of the impacts could be significant.

So we're not arguing, as TransCanada says in its papers, that this is somehow a bad faith; that the government, you know, should be presumed to do the right thing. What this really goes to is just it's essentially human nature that if there's already some work on the ground, that it's more likely that that work would either be approved or post hoc rationalized.

And the courts that come up with this -- the courts that are -- have this ground disturbing bureaucratic steamroller concern, they are not bringing that up out of -- they are not making that rule up out of thin air. They are the regulations here. The NEPA regulations prohibit activity that would have an adverse environmental impact or limit their choice of reasonable alternatives. So it's not just the case law, but it's also the regulations that backup the case law.

And I think there's a similar but different concern -- similar, sort of, momentum concern with the courts,

which is the argument we're seeing here. "We've already invested this much; so, therefore, we should be able to keep going." And right now we're seeing that from -- you know, "We should be able to -- we've already built these camps. We should be able to keep going."

But that's going to come back. A few months later down the line, TransCanada is going to bring the same argument to this Court and say, "We have already done this preconstruction," even though the Ninth Circuit hasn't ruled yet and even though we don't have a revised SEIS yet and approvals from all federal authority. We want to keep going." So it affects the balancing of the harms when the Court is looking at the injunction test. TransCanada is basically stacking the deck in its favor.

I do also want to quickly address the harm to TransCanada, which is basically it's -- as we said in our paper, it's self-inflicted and temporary. And I do want to point out that on pages 21, 22, we cite a whole list of Ninth Circuit cases. And I just want to point that out because many of the cases that TransCanada relied on is out-of-circuit or district court cases, whereas we have many Ninth Circuit cases supporting our arguments.

And, of course, the harm in the Ramsey declarations is only there if TransCanada has the right to start construction in 2019. But it does not have that right. It

never had all of its permits from all of the other federal agencies. Of course, now, the ROD from the State Department has been vacated.

TransCanada says it's made those investments on its own risk, and I know the Court has reiterated that. But question whether that's true when TransCanada is using those prior investments now as a legal matter to argue for more construction.

And, finally, I just want to address that the injunction here is not the sole cause of the delay. TransCanada still needs federal approvals, not just from the State Department but from other agencies.

THE COURT: Which ones?

MS. PRANGE: The Bureau of Land Management and Army Corps.

The appeal here isn't going to be decided before the summer. The briefing schedule with the automatic extensions extends into June. So really the only chance that they have to meet that 2019 construction season is that if the government corrects the SEIS and all the agencies approve by spring. I think that's highly unlikely. It was unlikely before the shutdown. It's even more unlikely now.

And after -- it's the issuance of the SEIS, additional public comment period, response to comments, the additional agency approvals, and then perhaps time for this

Court to consider whether the new document is sufficient. That's a lot of time.

So just playing it out, again, TransCanada, if it's allowed to continue to build the pipe yards and to ship pipe and to build the worker camps, they are going to be back in this courthouse in a couple of months citing those exact changes to the environment as evidence of why they should be able to continue to go forward and why they will be harmed if they are not able to actually start construction at that later point in time, even if they don't have all of those approvals and even if they don't have a Ninth Circuit ruling reversing this Court, which I think they are likely to get, for all of the reasons that my cocounsels here have already mentioned, that Mr. Volker already mentioned.

TransCanada ignores the fundamentally different place we're in now that the Court has ruled on the merits and have set aside the ROD. TransCanada says, "All of a sudden things stopped." Well, that's how litigation works.

The Court should not stay the injunction pending appeal. Thank you, Your Honor.

THE COURT: All right. Thank you, Ms. Prange.

Mr. Steenland, a brief rebuttal.

MR. STEENLAND: Thank you, Your Honor.

THE COURT: Mr. Steenland, can you guarantee me you won't be back here in a couple of months arguing for more?

MR. STEENLAND: Your Honor, given what's been going on in Washington the past few weeks, I am loathe to make any representations.

THE COURT: I'm not sure we'll be here in a couple months.

MR. STEENLAND: Your Honor, I wish I had a crystal ball.

THE COURT: Everyone but me in this room will be working for free next week.

MR. STEENLAND: It's breathe taking, Your Honor. It just really, really is.

And I don't know where we're going to be, but what I do know is the following: It's almost 3:00 o'clock, and I need to get out of here so you can move on to the next thing. And we thank you very much for squeezing us in to an otherwise busy calendar. We're grateful for the hearing.

Two points: First of all, with regard to the infamous paragraph 18 of the Ramsey declaration that was filed in the middle of November, we are only talking about those three items. None of them are in wetlands. None of them require federal permits.

The reference to those other activities was to the right-of-way and to things that may ultimately occur on the right-of-way. It is true, Mr. Ramsey did talk about two things on the right-of-way. But we're not here for those. One was

mowing, and the other was patrolling to discourage migratory birds. Well, Your Honor, we're not going to mow snow, and the migratory birds are where they belong. They are in Florida and Louisiana and Texas.

So those activities are not before you today. We are here on the three things that we discussed earlier. And while we reaffirm our desire for the sweeping more comprehensive stay that would address construction as well, the primary focus, as I indicated at the very outset, is on preconstruction.

And I would close by simply saying that the Court is very familiar with this dispute. You have seen us a bunch of times. We are grateful for your patience. And the quicker Your Honor can rule, the more grateful we will be.

THE COURT: Mr. Steenland, let me ask you -- well, a few updates. Let me tell you, I will rule as soon as I can. I've got a trial starting today. I've got a trial next Tuesday, and I have a trial on the 28th. I will work around as much as I can.

What is the status at this point, if you're aware, of any efforts by the government to supplement the EIS?

MR. STEENLAND: The supplementation of the EIS is ongoing. It is being done by a private consultant. As best we can learn, it has not been affected by the shutdown. We expect that the supplementation will result in a draft for agency comments. At some point --

THE COURT: How long is that comment period? Is it 60 or 90 days?

MR. STEENLAND: It's going to be, I think, a 30-day or a 45-day comment period.

But as of now, Your Honor, it is entirely reasonable for we, as the applicant, to presume that the remaining permits, licenses, authorizations -- in other words, State Department, Corps, and the Bureau of Land Management -- will have a decision probably in earlier May, and that everything that Your Honor has ordered to be remediated with respect to the NEPA process will have been done. There will be drafts. There will be opportunity for comment. There will be a final, and there will be records of decision.

THE COURT: Does that include Nebraska?

MR. STEENLAND: No. Because the Nebraska issue is dependent in part upon a decision from the Nebraska Supreme Court, and that is an entirely separate matter. The State Department is, obviously, restudying the new route in Nebraska, and the Fish & Wildlife Service is engaged in consultation on the new route in the Nebraska. All of that will come to fruition in early 2019.

We would not be here asking for this relief if we did not believe that through diligent advocacy and highly focused decision making we could get back out in the field and begin work in order to save this construction season.

THE COURT: All right. Anything else, Mr. Steenland?
MR. STEENLAND: No. Thank you very much, Your Honor.
THE COURT: Thanks for your time. I will have a decision out as soon as possible.
MR. STEENLAND: Thank you so much.
THE COURT: Thank you, Counsel. We'll be in recess.
(The proceedings concluded at 2:48 p.m.)
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REPORTER'S CERTIFICATE

I, Yvette Heinze, a Registered Professional Reporter and Certified Shorthand Reporter, certify that the foregoing transcript is a true and correct record of the proceedings given at the time and place hereinbefore mentioned; that the proceedings were reported by me in machine shorthand and thereafter reduced to typewriting using computer-assisted transcription; that after being reduced to typewriting, a certified copy of this transcript will be filed electronically with the Court.

I further certify that I am not attorney for, nor employed by, nor related to any of the parties or attorneys to this action, nor financially interested in this action.

IN WITNESS WHEREOF, I have set my hand at Great Falls, Montana, this 18th day of January, 2019.

/s/ *Yvette Heinze*

Yvette Heinze
United States Court Reporter

APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

INDIGENOUS ENVIRONMENTAL NETWORK, et al.,	**CV-17-29-GF-BMM**
and	**CV-17-31-GF-BMM**
NORTHERN PLAINS RESOURCE COUNCIL, et al.	
Plaintiffs	
-vs.-	
UNITED STATES DEPARTMENT OF STATE, et al,	
Defendants,	
and	
TRANSCANADA KEYSTONE PIPELINE, et al.	
Defendant-Intervenors.	

DECLARATION OF NORRIE RAMSAY

I. INTRODUCTION

1. My name is Dr. Norrie Ramsay and I am the Senior Vice-President of Technical Centre and Liquid Projects at TransCanada Pipelines Limited. My business address is 700 Louisiana Street, Houston, Texas 77002.

2. In my role as Senior Vice-President for liquids projects, I am responsible for the overall planning and construction of the Keystone XL Pipeline Project (the "Project"). My responsibilities for the Project include general oversight of all development and implementation to bring the Project into operation. This includes acquiring the necessary property rights and securing all necessary permits to construct and operate the Project. I am also responsible for the Project's engineering, procurement, construction, testing, commissioning and start-up.

3. I am offering this Declaration to update the status of the Keystone XL Project since entry of the injunction imposed by the Court in its November 8, 2018 and December 7, 2018 orders. This Declaration also supplements my declaration of November 15, 2018, in which I identified various harms that will flow from that injunction. This declaration provides a more detailed explanation of when those harms will occur. The facts I provide are within my personal knowledge.

4. As described in detail in my prior declaration, the Keystone XL Pipeline is being developed and will be constructed and operated by several companies that are wholly owned, directly or indirectly, by TransCanada Corporation, a company organized under the laws of Canada whose stock is publicly traded on the New York and Toronto Stock Exchanges. For ease of

reference in this declaration, references to "TransCanada" includes the subsidiaries that are developing, and will construct and operate, the Keystone XL Pipeline.

5. A pipeline project the size of the Keystone XL Pipeline requires significant advance planning and pre-construction activities that must be completed before any actual pipeline construction can begin. As described in my prior declaration, TransCanada began some of these activities before this Court issued its November 8, 2018 and December 7, 2018 orders.

6. Since that time, TransCanada has continued to conduct activities permitted by the December 7, 2018 Order. These activities fall into two basic categories:

a. Permitting and internal planning activities. Since the injunction, TransCanada has continued to perform internal office work and to revise and update its engineering plans and other plans required for the prudent, safe, timely, and environmentally sound construction of the Project.

b. Contracting, hiring, surveying, regulatory, and security activities. Since the injunction, TransCanada has also continued to conduct pre-construction activities that do not involve any field work, such as pursuing remaining outstanding permits; interfacing with landowners and acquiring necessary land rights; acquiring pipe, materials and equipment, and other long lead time items; inspecting and

refurbishing work force camp modules, pipe and associated materials and equipment previously purchased; engaging with communities – including indigenous communities – as well as federal, state, and local governmental entities, agencies, and other stakeholders; hiring additional Project staff; soliciting, engaging, and working towards contracting with potential construction contractors, specialty service providers and suppliers. Additionally, TransCanada has conducted limited field activities including civil surveys; maintaining security at Project sites to ensure public safety; and maintaining environmental protections as required by permits and best practices.

7. Prior to the entry of this Court's injunction, TransCanada also had engaged in additional pre-construction activities in the field such as the preparation of off-right-of-way pipe storage and contractor yards; transportation, receipt and off-loading of pipe at off-right-of-way storage yards; preparation of sites and transportation of camp modules for off-right-of-way worker camps; and mowing areas of the right-of-way to discourage migratory bird nesting. Before the Court's November 8, 2018 Order, TransCanada completed some of these activities, specifically: all mowing for the planned 2019 construction (a total of 1,500 acres); the grading and preparation of 11 of the 14 pipe yards needed to assist planned construction activities in 2019. In addition, TransCanada had begun preparing

three out of four total work camp and contractor yards to support planned 2019 construction. The injunction, however, prohibits TransCanada from completing the worker camps and pipe yards, all of which are necessary pre-construction activities. As a result of the December 7 Order, TransCanada had to lay off approximately 650 contract workers from pre-construction activities such as pipe yard and workforce camp site preparations and transportation, receipt and off-loading of pipe and camp modules.

8. Normal pipeline construction is constrained by winter weather. In the Project location, the construction season runs from spring through fall. As my prior declaration explained, TransCanada had been planning to construct the Keystone XL Pipeline over two construction seasons in 2019 and 2020. Under that schedule, construction would begin in June 2019, and is planned to be completed and tested in late 2020. The Project is scheduled to be commissioned and placed in service in early 2021. TransCanada needs to resume pre-construction activities before February 1, 2019, in order to commence actual construction by June 1, 2019, and thus to be certain of meeting its in-service arrangements and various contractual undertakings to shippers that are tied to that in-service date. Shippers, in turn, are planning activities to support their use of the pipeline both in Canada and in the United States and require certainty into the in-service date of the Project to support those activities.

9. If pre-construction activities resume after February 1st, but before March 15, 2019, TransCanada could complete pre-construction activities in time to begin construction by August 1, 2019. In those circumstances, TransCanada might be able to meet its scheduled in-service date, but timely completion of the Project would be seriously jeopardized. To attempt to meet the in-service date, TransCanada would have to increase the construction workforce (assuming additional workforce personnel are even available) and extend the construction season into the winter months, with attendant uncertainties. This effort would come at an increased cost of more than $155 million.

10. Moreover, if pre-construction activities are delayed until March 15 and actual construction does not start until August 1st, TransCanada will be required to "carry" over 100 "idle" employees and contractors for several months, as it would not be possible to lay off and rehire those personnel.

11. If TransCanada cannot resume pre-construction activities before March 15, 2019, and cannot begin construction on August 1, 2019, then it will be unable to perform any construction in 2019. A one-year delay in the construction schedule would impose very significant financial consequences on TransCanada.

a. TransCanada estimates that a one-year delay would result in lost earnings before interest, taxes, depreciation, and amortization (EBITDA) of approximately $949 million between March 2021 and

March 2022, based on the minimum take-or-pay shipper commitment. Even if TransCanada earned these revenues back at the end of the current 20-year shipper contract terms, the net EBITDA loss would be approximately $708 million, assuming an 8% discount rate. This loss results because the net-present value of lost revenue TransCanada could earn in 2021 would be worth more than revenue received in the following years.

b. A delay in the construction schedule will impact more than just financial investments. Currently, there is strong demand for pipeline construction contractors that have the experience, capability, and capacity to execute major pipeline projects, with several oil and gas pipeline projects competing for a limited pool of experienced and capable contractors and associated labor. Next year, the available capacity of these contractors is projected to be further constrained, with an increase in the number of pipeline projects forecasted to be under construction at the same time. With constrained contractor capacity and a limited pool of qualified labor to execute this work, TransCanada will, at best, face higher costs due to supply and productivity constraints or, at worst, be unable to secure qualified contractors to meet our schedule.

12. In addition, a one-year delay in construction of the pipeline would cause very substantial harm to third parties, including United States workers and TransCanada's customers that are relying on the current in-service date of the project. The total financial harm to third-party construction contractors and U.S. workers would be approximately $2.56 billion.

a. TransCanada would not be able to employ the approximately 6,600 workers who would otherwise go to work constructing the project in 2019.

b. TransCanada would not make a capital expenditure of approximately $2.08 billion for construction contractor awards and wages in the United States in 2019,

c. TransCanada would have to idle many of the approximately 100 individuals in its Houston, Texas office that support the construction of the Keystone XL Pipeline.

13. Additionally, the Project supports hundreds of indirect jobs at suppliers, manufacturers, and vendors. Further, in the first year of operations, TransCanada plans to spend approximately $488 million in payments for services and wages ($28 million), power utilities ($272 million), and taxes to State, county and municipal governments ($189 million) in the United States. The impact to customers could be substantially higher than this amount due to crude oil discounts

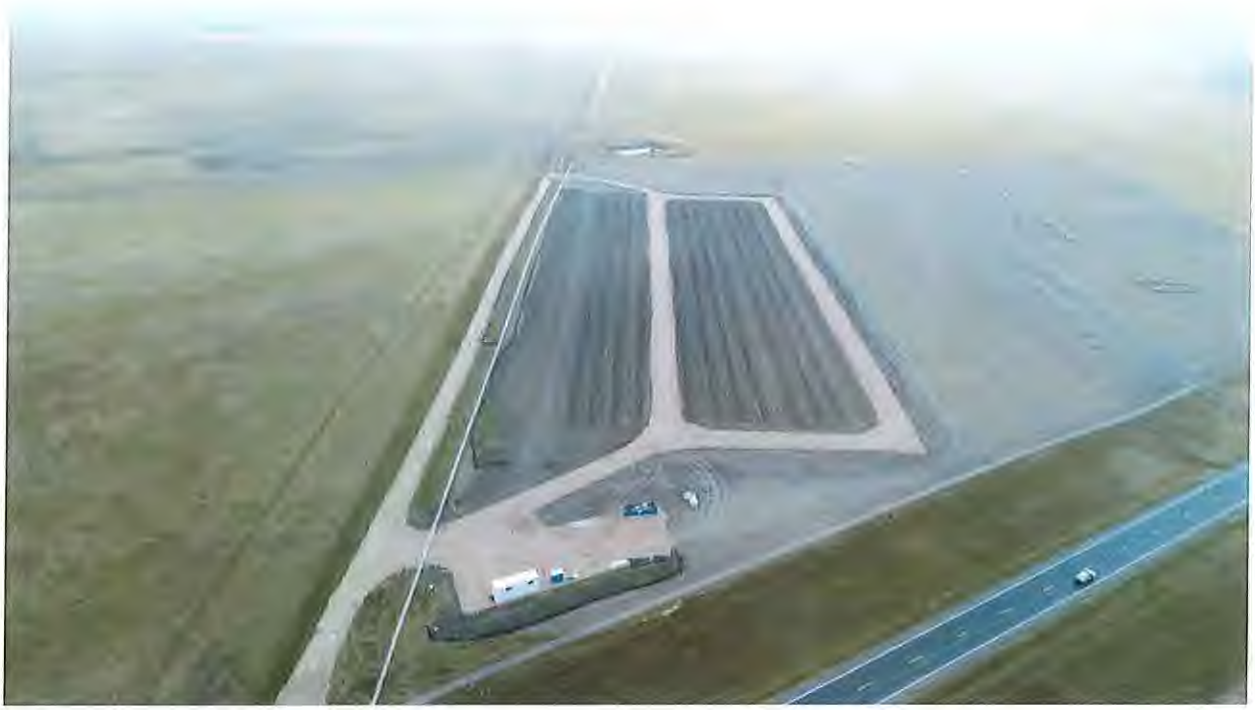
or shut-in of production. A one-year delay would mean that these operating expenditures would not occur in that year.

14. Moreover, a one-year delay in the construction schedule and in-service date would delay the ability of TransCanada's customers to make use of the services for which they have contracted. The Project would connect one of the world's largest sources of heavy crude oil production with the world's largest refining complex capable of refining heavy crude oil. TransCanada has a significant interest in being able to satisfy market demand for transportation service on the Keystone XL Pipeline. Producers and refiners, as well as the Alberta government, have been evaluating greater investments in rail cars and longer-term commitments to railways as an alternative to pipeline capacity. Further delays to the Project would result in those investments taking place which would become unnecessary once the pipeline achieves in-service.

15. The pre-construction activities that TransCanada must resume by February 1, 2019 (or, at a minimum, March 15, 2019) in order to meet the Project's in-service date involve minimal, temporary impacts to private land that TransCanada has already leased to build pipe yards, worker camps, and contractor yards. The pre-construction activities will not require construction of new private roads, will not cross or be in proximity to water bodies, and will not involve removal of any trees or any application of pesticides or herbicides. These areas

have been surveyed for protected species and cultural resources, and none were found. TransCanada already has received all state and local permits to construct these sites, and it is required by its permits to fully restore and remediate these sites when the Project is built and they are no longer needed.

16. Pre-construction field work involves minimal, temporary impacts to the land. The minimal nature of the construction can be seen from the sites that were completed prior to the issuance of this Court's injunction, such as pipe yards 14 and 15 that are shown in the photographs included below.



17. When the pipe yards and worker camps are no longer needed, TransCanada will reclaim and restore the lands to their original condition. As detailed in the photographs below for the locations used for the Keystone Pipeline construction, reclamation of the sites restores the original condition of the land. The three photographs below were taken of the same site before site-preparation, after site-preparation, and after remediation.

Yankton South Pipe Yard

Picture taken 7/1/2007

Picture taken 8/1/2009

Picture taken 3/1/2015

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 7th day of January 2019.

Dr. Norrie Ramsay
Senior Vice President,
Technical Centre and Liquid Projects
TransCanada Corporation

[NOTARY]
David Kollenberg
Notary Public
Province of Alberta

APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

INDIGENOUS ENVIRONMENTAL NETWORK, et al.,	**CV-17-29-GF-BMM**
and	**CV-17-31-GF-BMM**
NORTHERN PLAINS RESOURCE COUNCIL, et al.	
Plaintiffs	
-vs.-	
UNITED STATES DEPARTMENT OF STATE, et al,	
Defendants,	
and	
TRANSCANADA KEYSTONE PIPELINE, et al.	
Defendant-Intervenors.	

DECLARATION OF NORRIE RAMSAY

I. INTRODUCTION

1. My name is Dr. Norrie Ramsay and I am the Senior Vice-President, Technical Centre and Liquid Projects at TransCanada Pipelines Limited. My business address is 700 Louisiana Street, Houston, Texas, 77002.

2. In my role as Senior Vice-President for liquids projects, I am responsible for the overall planning and construction of the Keystone XL Pipeline Project (the "Project"). My responsibilities for the Project include general oversight of all development and implementation to bring this project into operation. This includes acquiring the necessary property rights and securing all necessary permits to construct and operate the Project. I am also responsible for the Project's engineering, procurement, construction, testing, commissioning and start-up.

3. I have a BSc degree in Biological Sciences from Heriot-Watts University in Edinburgh, Scotland, which I received in 1985, and a PhD in Industrial Toxicology, which I received from Aberdeen University in Scotland in 1990.

4. I have worked at TransCanada for over four years. Prior to my current role, I was accountable for execution of energy infrastructure projects in the United States, Canada, and Mexico. I also have led a number of TransCanada's major business development initiatives. I have worked in the energy industry for 30 years.

5. I am offering this Declaration in support of TransCanada Keystone Pipeline, LP and TransCanada's motion to amend the injunctive relief imposed by the Court in its November 8, 2018 Order. The facts I provide are within my personal knowledge.

6. TransCanada Keystone Pipeline, LP is a Delaware limited partnership owned by TransCanada Keystone Pipeline LLC and TransCanada Keystone Pipeline GP, LLC, which are wholly owned subsidiaries of TransCanada Corporation, a Canadian public company organized under the laws of Canada. TransCanada Keystone Pipeline,

LP was created for the purpose of developing, constructing and operating pipelines to transport crude oil. TransCanada Keystone Pipeline, LP is the sponsor of the Keystone XL Pipeline and will construct the Project. Another wholly owned TransCanada Corporation subsidiary, TC Oil Pipeline Operations, Inc., operates and maintains the Keystone Pipeline System, described below, and will also operate and maintain the Keystone XL Pipeline. For the remainder of this declaration, references to "Keystone" and "Keystone XL" include both TransCanada Keystone Pipeline, LP and TC Oil Pipeline Operations, Inc., and references to "TransCanada" include both those subsidiaries and their parent TransCanada Corporation. TransCanada Corporation is a publicly traded company on the New York and Toronto Stock Exchanges.

7. TransCanada originally proposed the Keystone XL Project in 2008 as an expansion to its Keystone Pipeline System. As originally proposed, the Keystone XL Project included a 329-mile Canadian pipeline segment from Hardisty, Alberta to the U.S.-Canada border, as well as three principal segments in the United States. They were: (i) a segment from the U.S.-Canadian border to Steele City, Nebraska, connecting with the existing Keystone Pipeline (approximately 850 miles); (ii) the Gulf Coast segment (approximately 478 miles, extending from Cushing, Oklahoma to Nederland, Texas); and (iii) the "Houston Lateral" pipeline segment (approximately 47 miles long, extending from Liberty, Texas to Houston, Texas).

7. In September 2008, TransCanada first applied to the U.S. Department of State ("State Department") for a Presidential border-crossing permit for the Keystone XL Pipeline segment that would cross the U.S.-Canada border in Montana. The State

Department coordinated an extensive, multi-year review of the environmental impacts of the entire Keystone XL Project, resulting in its release of a Final Environmental Impact Statement ("FEIS") in August 2011.

8. In November 2011, after controversy arose over the proposed pipeline route within Nebraska, the State Department decided that it needed to prepare a supplement to the FEIS prior to making the national interest determination on the Keystone XL application.

9. On December 23, 2011, President Obama signed tax legislation that included a provision requiring him to grant a permit for the Keystone XL Project within 60 days, unless he determined that the Project would not serve the national interest. Pub. L. No. 112-78, title V, subtitle A. On January 18, 2012, President Obama denied the Keystone XL Project application, explaining that the 60-day statutory window did not provide enough time to assess the then-unresolved issues concerning an alternative route in the Nebraska.

10. Shortly after President Obama's denial of the Keystone XL application, TransCanada decided that it would go forward with the Gulf Coast segment as a separate, stand-alone project because that segment had immediate utility, independent of the Hardisty, Alberta to Steele City segment. The Gulf Coast Pipeline was completed and placed in service in January 2014. The Houston Lateral was placed in service in 2016.

11. In addition, in May 2012, TransCanada submitted a renewed application to the State Department for a cross-border Presidential Permit for the proposed facility that

would cross the border in Phillips County, Montana and interconnect with the Keystone Pipeline at Steele City, Nebraska as originally proposed in 2008.

12. As the State Department was considering TransCanada's 2012 application, the Nebraska Department of Environmental Quality ("NDEQ") conducted a year-long public process to consider proposed alternative routes through Nebraska. In December 2012, the NDEQ submitted a report to the Governor of Nebraska evaluating a route that would avoid the Sandhills areas. The Governor of Nebraska approved that route and advised the President and the Secretary of State of his approval by letter dated January 22, 2013.

13. In March 2013, the State Department released a Draft Supplemental EIS ("DSEIS"), reflecting the new route through Nebraska. The State Department completed its Final Supplemental Environmental Impact Statement ("SEIS") in January 2014. On November 6, 2015, the Obama Administration announced that it had denied the border crossing permit for the Keystone XL Pipeline, based on the premise that approval would be perceived to undermine U.S. climate leadership in the international arena.

14. On January 24, 2017, President Trump invited TransCanada to re-submit its application for a Presidential Permit. On January 26, 2017, TransCanada re-submitted an application for a border crossing permit for the Keystone XL Pipeline. The re-submitted application included minor route refinements, but the route remained entirely within the surveyed areas reviewed by the Department of State in its 2014 SEIS.

15. On March 23, 2017, pursuant to E.O. 13337 and the January 24, 2017 Presidential Memorandum, the State Department determined that the issuance of a permit

to TransCanada would serve the national interest and granted the Presidential Permit as applied for on January 26, 2017. The Presidential Permit issued to TransCanada includes authorizations to construct, connect, operate and maintain facilities at the border of the United States for the transport of crude oil from Canada to the United States as described in TransCanada's Presidential Permit application.

16. Certain parties commenced litigation in this court in 2017 challenging the issuance of the Presidential Permit. During the course of the ongoing litigation, TransCanada has continued to conduct numerous pre-construction preparatory activities that are necessary well in advance of constructing a project of the magnitude of Keystone XL. These activities include a multitude of activities internal to the project team focused on detailed project engineering and conducting the extensive planning and related office work required for the prudent, safe, and environmentally sound construction of the project. These activities also include submitting reports and other administrative actions required to remain in compliance with valid state and local permits.

17. The activities also include engaging with numerous external parties in areas such as confirming the shipper contracts that form the commercial underpinning for the project; pursuing remaining outstanding permits; interfacing with landowners and acquiring necessary land rights; acquiring pipe, materials and equipment, and other long lead time items; inspecting and refurbishing work force camp modules, pipe and associated materials and equipment previously purchased; engaging with communities -- including indigenous communities – as well as federal, state, and local governmental entities, agencies, and other stakeholders; hiring additional project staff; soliciting,

engaging, and contracting with potential construction contractors, specialty service providers and suppliers; and other non-construction, non-destructive planning activities critical maintaining the ability to execute the project in a prudent, safe, and timely manner.

18. Further, the activities include limited field activities including cultural, biological, civil and other surveys; preparation of off-right-of-way pipe storage and contractor yards; transportation, receipt and off-loading of pipe at off-right-of-way storage yards; preparation of sites for off-right-of-way worker camps; and mowing and patrolling areas of the right-of-way to discourage migratory bird nesting. These activities also include maintaining security at project sites to ensure public safety and maintaining environmental protections as required by permits and best practices.

19. As TransCanada has informed the court, it does not plan to commence construction of the pipeline until at least the second half of the first quarter of 2019. Significant mainline construction is not planned to commence until the second quarter of 2019. Construction of the pipeline is planned to occur over two construction seasons in 2019 and 2020. Construction seasons are weather constrained to spring through fall in the area of the project. Construction is planned to be complete in late 2020, with the pipeline commissioned and tested and placed in service in early 2021. Maintaining the current pre-construction and construction schedule is critical to TransCanada's ability to meet this in-service date and its commercial undertakings with respect to its customers.

20. I understand that the court issued an order on November 8, 2018 requiring the Department of State to again supplement the environmental review of the project. I

further understand that the court's order enjoins TransCanada from "engaging in any activity in furtherance of the construction or operation" of the project until the State Department has completed that supplement. While the State Department has not yet provided a schedule for this additional supplemental review, it is my understanding based on previous supplemental reviews, that it is likely to take at least well into the first quarter of 2019 for that work to be completed, if not longer.

21. If TransCanada is prevented from continuing the type of preparatory activities described above for several weeks, it will not be able to commence construction in the 2019 construction season. As a result, it will not be able to meet the planned 2021 in-service date.

22. A one-year delay in construction of the pipeline would result in substantial harm to TransCanada, as well as to United States workers, and to TransCanada's customers relying on the current in-service date of the project.

23. Currently, preconstruction activities represent almost 700 American jobs. TransCanada is employing approximately:

- 400 workers for pipeline refurbishment work (inspector, drivers, equipment operators),
- 135 workers for work force camp refurbishment and preparation,
- 30 workers conducting equipment pre-commissioning and refurbishment work,
- 40 workers performing material fabrication, and
- 40 workers to perform civil survey routing and environmental surveys.

TransCanada also employs approximately 100 individuals in its Houston, Texas office that support the workers identified above. Additionally, the project supports hundreds of indirect jobs at suppliers, manufacturers, and vendors.

24. If, as a result of the injunction, TransCanada were to suspend the work that these individuals are performing for a matter of several weeks, the construction season would be lost and these jobs would be lost.

25. Further, a delay of one year in the construction schedule would have very significant financial impacts. It would prevent TransCanada from employing the approximately 6,600 workers who would otherwise go to work constructing the project in 2019. The 2019 capital expenditure of approximately $2.08 billion for construction contractor awards and wages in the United States would not occur in that year.

26. Additionally, TransCanada estimates that a one-year delay would result in lost earnings before interest, taxes, depreciation, and amortization (EBITDA) of approximately $949 million between March 2021 and March 2022. Even if these revenues were earned back at the end of the current 20-year shipper contract terms, the net EBITDA loss would be approximately $708 million, assuming an 8% discount rate.

27. Further, in the first year of operations, the Company plans to spend approximately $488 million in payments for services and wages, power utilities, and taxes to State, county and municipal governments in the United States. A one-year delay would mean that these operating expenditures would not occur in that year.

28. A delay in the construction schedule will impact more than just financial investments, it will also prevent the Company from entering into contracts with

construction firms to build the project. Currently, the market for pipeline construction contractors is very competitive and it likely to become more competitive next year based on the projected increase in construction projects. Several major oil and gas pipeline projects will be competing for a limited set of experienced and capable contractors. If the Company is not able to secure this work according to our proposed schedule, we face higher costs to hire skilled contractors to do the work.

29. Moreover, a delay of one year in the construction schedule and in-service date would delay the ability of TransCanada's customers to make use of the services for which they have contracted. The Project would connect one of the world's largest sources of heavy crude oil production with the world's largest refining complex capable of refining heavy crude oil. TransCanada has a significant interest in being able to satisfy market demand for transportation service on the Keystone XL Pipeline.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 15th day of November, 2018.

Dr. Norrie Ramsay
Senior Vice President,
Technical Centre and Liquid Projects
TransCanada Corporation

[NOTARY]

David M. Kohlenberg
Notary Public
Province of Alberta