Nos. 18-36069, 19-35036, 19-35064, 19-35099
In the United States Court of Appeals for the Ninth Circuit

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

TRANSCANADA KEYSTONE PIPELINE, LP; TRANSCANADA CORPORATION, Intervenor-Defendants-Appellees.	
NORTHERN PLAINS RESOURCE COUNCIL; BOLD ALLIANCE; CENTER FOR BIOLOGICAL DIVERSITY; FRIENDS OF THE EARTH; NATURAL RESOURCES DEFENSE COUNCIL; SIERRA CLUB, Plaintiffs - Appellants, v. THOMAS A. SHANNON, Jr., in his official capacity; UNITED STATES DEPARTMENT OF STATE; RYAN K. ZINKE, in his official capacity; U.S. DEPARTMENT OF THE INTERIOR; BUREAU OF LAND MANAGEMENT; UNITED STATES FISH AND WILDLIFE SERVICE, Defendants - Appellees, and TRANSCANADA KEYSTONE PIPELINE, LP; TRANSCANADA CORPORATION, Intervenor-Defendants-Appellees.	19-35064
INDIGENOUS ENVIRONMENTAL NETWORK; NORTH COAST RIVERS ALLIANCE; NORTHERN PLAINS RESOURCE COUNCIL; BOLD ALLIANCE; CENTER FOR BIOLOGICAL DIVERSITY; FRIENDS OF THE EARTH; NATURAL RESOURCES DEFENSE COUNCIL; SIERRA CLUB, Plaintiffs - Appellees, v. UNITED STATES DEPARTMENT OF STATE; THOMAS A. SHANNON, Jr., in his official capacity; UNITED STATES FISH AND WILDLIFE SERVICE; JAMES W. KURTH; RYAN K. ZINKE, in his official capacity; U.S. DEPARTMENT OF THE INTERIOR; BUREAU OF LAND MANAGEMENT,	19-35099

Defendants - Appellants,

and

TRANSCANADA KEYSTONE PIPELINE, LP;
TRANSCANADA CORPORATION,

Intervenor-Defendants.

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

United States' Motion to Dismiss Pending Appeals and Remand with Instructions to Dismiss as Moot

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INTRODUCTION

Federal Defendants/Appellants and Defendants/Appellees (collectively, the "United States") hereby moves this Court to dismiss these consolidated appeals and to remand the cases to the district court with instructions to dismiss them as moot.

These cases had a single focus: the March 23, 2017 permit issued by the Under Secretary of State for Political Affairs under authority delegated to him by the President ("2017 permit"). The 2017 permit authorized TransCanada Keystone Pipeline, L.P. ("TransCanada") to build and operate the Keystone XL oil pipeline across the U.S.-Canada border. Each and every legal question confronted by the district court focused on the 2017 permit: Was the issuance of that permit subject to judicial review, or was it unreviewable as a delegation of Presidential authority? Did the Under Secretary explain his approval of that permit sufficiently to satisfy the Administrative Procedure Act ("APA")? Did the Under Secretary fulfill the requirements of the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA") before he issued that permit?

None of these questions matters anymore because the 2017 permit was revoked and superseded by a new permit that was issued by the President on March 29, 2019. The new permit was issued directly by the President—without any delegation to the Secretary of State or anyone else—and signed by the President himself. The President issued the new permit under his long-recognized inherent constitutional authority to authorize border crossings for

projects like this one, and not under Executive Order 13337 or under the President's previous January 24, 2017 memorandum.

The President has acted decisively and there can be no doubt that the new permit is Presidential action. Although the United States was prepared to argue that the district court was wrong in concluding that the President's delegation of his authority somehow transformed the 2017 permit from Presidential action into "agency action," that question is purely academic now that the old permit has been revoked and a new permit has been issued directly by the President. There is no live "case or controversy" surrounding the 2017 permit anymore.

Consequently, the Court should "pause to ask: Is this conflict really necessary?" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997). And because this case raises important questions of Presidential authority, that "core question" "calls for close consideration." *Id*. The answer is clear: because the 2017 permit has been revoked, the claims surrounding that permit are moot, and the Court lacks jurisdiction to hear these appeals. *See, e.g., Center for Biological Diversity v. Lohn*, 511 F.3d 960, 963 (9th Cir. 2007).

TransCanada does not oppose the relief sought by this motion. Plaintiffs/Cross-appellants Indigenous Environmental Network et al. does not presently intend to oppose this motion but reserves the right to first review the motion before making a final decision. Plaintiffs/Cross-appellants Northern Plains Resource Council et al. oppose this motion to dismiss. Intervenor-

Appellees Rosebud Sioux Tribe and Fort Belknap Indian Community had not yet responded at the time this motion was filed.

BACKGROUND

On January 24, 2017, the President invited TransCanada to re-submit its application for a Presidential permit to allow the construction and operation of the Keystone XL pipeline across the U.S.-Canada border. Memorandum of January 24, 2017, Construction of the Keystone XL Pipeline, 82 Fed. Reg. 8663, § 2 (Jan. 24. 2017). The President directed the Secretary of State to make a "final permitting determination" on TransCanada's application within 60 days of its receipt. *Id*. § 3(i). Pursuant to a re-delegation, that permit was approved and issued by Under Secretary of State for Political Affairs Thomas A. Shannon, Jr. on March 23, 2017.

Plaintiffs Indigenous Environmental Network et al. ("INEF") and Northern Plains Resource Council et al. ("NPRC") (collectively, "Plaintiffs") sued to challenge the permit on March 27, 2017 and March 30, 2017, respectively. The United States moved to dismiss these claims on June 9, 2017, on the grounds that the issuance of this permit was Presidential action not subject to NEPA or the ESA and not otherwise subject to judicial review under the APA.

The district court denied our motion to dismiss on November 22, 2017. Order, Docket No. 93. The court concluded that the issuance of this permit was "agency action" by the State Department, subject to judicial review,

because the President had waived "any authority that he retained to make the final decision regarding the issuance of the Presidential Permit." *Id.* at 12.

The district court then went on to review the State Department's compliance with the APA, NEPA, and the ESA. On November 8, 2018, it upheld the State Department's analysis against many of Plaintiffs' claims, but it nonetheless granted summary judgment to Plaintiffs on a few issues. Order, Docket No. 211. The court vacated the permit and remanded the matter to the State Department.

On March 29, 2019, the President issued a new permit that explicitly supersedes and revokes the March 23, 2017 permit. The President did not delegate the approval of that permit to the Secretary of State; rather, he approved and signed the permit himself. In a new action instituted in the District of Montana on April 5, 2019 (No. 4:19-cv-00028-BMM), Plaintiffs have challenged the new permit.

ARGUMENT

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

This case is moot for four fundamental reasons:

First, the case is moot because Plaintiffs challenged the 2017 permit, but that permit has now been revoked and superseded. This Court has long recognized that the withdrawal of an agency action renders a challenge to that action moot: "when actions complained of have been completed or terminated, declaratory judgment and injunctive actions are precluded by the

doctrine of mootness." *Nevada v. United States*, 699 F.2d 486, 487 (9th Cir. 1983) (holding that a challenge to Secretary of the Interior's moratorium on settlement of federal lands was rendered moot when that moratorium was rescinded); *see also, e.g., Feldman v. Bomar*, 518 F.3d 637, 643 (9th Cir. 2008) (holding that challenge to a wild pig eradication program was rendered moot by the eradication of the pigs); *Forest Guardians v. U.S. Forest Service*, 329 F.3d 1089, 1094–96 (9th Cir. 2003) (holding that challenge to Forest Service policy was rendered moot by official clarification to policy and that ESA claims were rendered moot when new biological opinion was issued); *Public Utilities Commission v. FERC*, 100 F.3d 1451, 1458–59 (9th Cir. 1996) (holding that challenge to pipeline permit was rendered moot when permittee declined to accept permit); *Nome Eskimo Community v. Babbitt*, 67 F.3d 813, 815 (9th Cir.1995) (holding that challenge to lease sale was rendered moot when lease sale was cancelled); *Aluminum Co. of America v. Bonneville Power Administration*, 56 F.3d 1075, 1078 (9th Cir. 1995) (holding that challenge to plan for dam operations was moot because plan had already been completed and current operations were being conducted under a new plan); *Idaho Dep't of Fish & Game v. Nat'l Marine Fisheries Service*, 56 F.3d 1071, 1074 (9th Cir. 1995) (holding that challenge to biological opinions was rendered moot when they were superseded by new biological opinions); *Oregon Natural Resources Council, Inc. v. Grossarth*, 979 F.2d 1377, 1379–80 (9th Cir. 1992) (holding that challenge to agency timber sale was rendered moot when sale was halted); *Headwaters, Inc.*

v. BLM, 893 F.2d 1012, 1015 (9th Cir. 1989) (holding that a challenge to a timber sale was rendered moot by the completion of logging).

So it is here. Plaintiffs complained that the 2017 permit violated the law, but that permit has now been terminated. Once the President revoked the challenged permit, that "was the end of the 'case,' constitutionally and practically." *Nome Eskimo Community*, 67 F.3d at 815. All "declaratory judgment and injunctive actions" challenging the 2017 permit are now "precluded by the doctrine of mootness." *Nevada*, 699 F.2d at 487.

Second, this case is moot because the central legal issue decided by the district court and presented on appeal—whether the Under Secretary's approval of the 2017 permit was subject to judicial review—is no longer live. Plaintiffs here did not argue that the President's direct approval of a border-crossing permit would be subject to judicial review. They did not claim that the President's actions were subject to review under the APA. *See Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (holding that, because "the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements"); *Dalton v. Specter*, 511 U.S. 462, 470 (1994) ("actions of the President . . . are not reviewable under the APA"). Nor did they argue that the President was subject to NEPA or the ESA.[1]

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[1] NEPA applies only to "agencies of the Federal Government," 42 U.S.C. §§ 4332, 4333, and NEPA's regulations explicitly define the term "Federal agency" to exclude "the President." 40 C.F.R. § 1508.12. In addition, NEPA does not provide a private right of action, and so plaintiffs can obtain judicial review of alleged NEPA violations only under the APA, which does not apply to the President. *See Nuclear Information & Resource Service v. NRC*, 457 F.3d

Instead, their theory was that the approval of the 2017 permit became an "agency action" when the President delegated his authority to the Secretary of State (and the Secretary of State then delegated that authority to the Under Secretary); and that, consequently, the Under Secretary's issuance of the permit was subject to judicial review as well as the requirements of the APA, NEPA, and the ESA. The district court accepted that argument. Order, Docket No. 93, at 28 (Nov. 22, 2017) (holding that this permit was not "presidential action" but was "agency action[] by the State Department"). The court was apparently persuaded for two reasons. First, because the President, in his January 24, 2017 memorandum, had directed the Secretary of State to act on TransCanada's application and had "waived any right . . . to review the State Department's decision." *Id*. at 10, 12 (holding that this distinction "proved persuasive"). And second, because the State Department had prepared an environmental impact statement for the permit, which the district court concluded could not be "shielded" from judicial review. *Id*. at 13–14.

Thus, the "crux" of Plaintiffs' complaint—the "touchstone" "case or controversy" that gave rise to jurisdiction and that must now be evaluated to determine "whether government's challenged conduct continues"—was the Under Secretary's issuance of the 2017 permit. *Chemical Producers & Distributors Ass'n v. Helliker*, 463 F.3d 871, 875–76 (9th Cir. 2006). It was that action

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941, 950 (9th Cir. 2006). Similarly, Section 7(a)(2) of the ESA applies only to a "Federal agency," and the statute's definition of "Federal agency" does not include the President. 16 U.S.C. §§ 1532(7), 1536(a)(2).

(Plaintiffs claimed) that violated the APA, NEPA, and the ESA, and so Plaintiffs' challenges ceased to be a live "case or controversy" when that permit was revoked. Because the Under Secretary's issuance of the old permit was the "crux" of this case, and because that permit has been revoked, this case has "lost the essential elements of a justiciable controversy." *Arizonans for Official English*, 520 U.S. at 48.

This case is therefore moot. Plaintiffs are entitled to institute a new action challenging the new permit—indeed, as noted above, they have already done just that—but any claims in a new action are beyond the scope of their current complaints, which do not name the President as a defendant or present any challenges to the new permit. *See, e.g., Oregon Natural Resources Council*, 979 F.2d at 1397 (observing that challenges to a future timber sale would have to be brought in a new case); *Nevada*, 699 F.2d at 488 (observing that any "future challenges to actual or anticipated federal action with respect to federally held lands will arise in a different legal and historical context from that surrounding the 1964 moratorium which prompted this suit").

Third, this case is moot because there is no relief left for the Court to grant. *See, e.g., Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016) (holding that a case becomes moot "when it is impossible for a court to grant any effectual relief whatever to the prevailing party"); *Public Utilities Commission*, 100 F.3d at 1458 ("The court must be able to grant effective relief, or it lacks jurisdiction and must dismiss the appeal."); *Headwaters,* 893 F.2d at 1015 (explaining that the Court "cannot take jurisdiction over a claim to which no

effective relief can be granted"). Plaintiffs asked the district court to declare that the State Department had violated the APA, NEPA, and the ESA. Third Amended Complaint, Docket No. 58, at 71–73, No. 4:17-cv-00031-BMM (filed Aug. 4, 2017) ("NPRC Complaint"); First Amended Complaint, Docket No. 61, at 47–48, No. 4:17-cv-00031-BMM (filed July 14, 2017) ("INEF Complaint"). Plaintiffs then asked the court to "enjoin and set aside" the "cross-border permit" and related "record of decision" and to enjoin the State Department "to comply fully with NEPA, the ESA, and the APA." Order, Docket No. 211 at 50 (Nov. 8, 2018). The district court granted that relief and remanded the matter back to the State Department "for further consideration consistent with this order." Order, Docket No. 211, at 54 (Nov. 8, 2018).[2]

But the permit issued by the Under Secretary has now been revoked. It no longer has any legal effect. It does not authorize TransCanada to build any part of the Keystone XL pipeline. Plaintiffs sought to have the permit enjoined and set aside, and the revocation of the permit gives Plaintiffs all of the relief that they sought. Because the 2017 permit is dead and has no effect, no relief that this Court could grant that would have any effect on Plaintiffs' alleged interests, and this case is moot.

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[2] Plaintiffs also asked the district court to set aside the biological opinion and subsequent "concurrence" letters that the United States Fish and Wildlife Service ("Service") prepared after it completed its ESA consultation with the State Department on this permit. NPRC Complaint at 71–73; INEF Complaint at 47–48. As discussed below, Plaintiffs' ESA and NEPA claims, including their claims against the Service, are now moot.

Plaintiffs also sought declaratory relief, but declaratory relief cannot revive claims that are otherwise moot: when "there is no 'case' in the Constitutional sense of the word," then the Court also "lacks the power to issue a declaratory judgment." *Nome Eskimo Community*, 67 F.3d at 816; *see also Nevada*, 699 F.2d at 487 (holding that, "when actions complained of have been completed or terminated, declaratory judgment" is also "precluded by the doctrine of mootness"). The Court lacks jurisdiction to declare that the issuance of the 2017 permit violated the APA, NEPA, or the ESA now that permit has been revoked and there is no live "case or controversy." Courts have sometimes found that declaratory relief may nevertheless remain effective in unusual situations where a "challenged government activity" has not "evaporated or disappeared" and, "by its continuing and brooding presence, casts what may well be a substantive adverse effect on the interests of the petitioning parties." *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 122 (1974) (holding that claims challenging government regulations affecting striking workers were not moot, even though strike had ended, because they had a continuing effect); *see also Center for Biological Diversity*, 511 F.3d at 964. The 2017 permit, however, has no "continuing presence." It has simply "disappeared," and therefore this exception does not apply.

Plaintiffs also asked the district court to enjoin "any activities in furtherance of the Project that could result in any change or alteration of the physical environment unless and until defendants comply with the requirements of the APA, NEPA, ESA, and their implementing regulations."

INEF Complaint at 47–48; *see also* NPRC Complaint at 72; Order, Docket No. 211, at 50 (Nov. 8, 2018). Plaintiffs' theory—which the district court adopted—was that such on-the-ground construction activities might create "bureaucratic momentum" that could "discourage" the State Department from "rejecting the project" or "altering" it to "account for revised environmental review." Supplemental Order Regarding Permanent Injunction, Docket No. 231, at 5–6 (Dec. 7, 2018). Now that the 2017 permit has been revoked, however, and the President has issued a superseding permit, the Secretary of State will not need to approve or disapprove this project, and there is no "bureaucratic momentum" to "discourage." As such, there is no longer any grounds for the Court to grant this relief either.

Fourth, Plaintiffs' NEPA and ESA claims are also moot. Because the district court concluded that the Under Secretary's approval of the old permit was reviewable "agency action," it also concluded that the steps taken by the State Department to comply with NEPA and the ESA before issuing that permit—including the agency's preparation of an environmental impact statement and its consultation with the Fish and Wildlife Service—were also subject to judicial review. But those NEPA and ESA claims cannot survive now that the underlying agency action, the 2017 permit, has been revoked. The purpose of NEPA and the ESA was to ensure that the Under Secretary's decision would be informed by the potential environmental impacts of this permit. Now that the 2017 permit has been revoked and the Secretary of State will not be issuing any permit, there is no State Department decision to inform,

and the State Department is not required to comply with NEPA or the ESA. Moreover, without a "record of decision," there is no final environmental impact statement for this Court to review. *Oregon Natural Desert Ass'n v. BLM*, 625 F.3d 1092, 1118–19 (9th Cir. 2010) (holding that an environmental impact statement is only subject to judicial review once its "analysis has been solidified in a" "record of decision" and thus "the agency has taken final agency action"). In short, Plaintiffs' NEPA and ESA claims cannot survive the revocation of the underlying permit and are also moot.

This does not mean that the Keystone XL pipeline project will evade environmental review. Completion of this pipeline will require further action by several federal agencies, including rights-of-way permits from the Bureau of Land Management ("BLM") to cross federal lands, and permits from the Army Corps of Engineers to cross various "waters of the United States." Those permitting processes are not complete, and the appropriate federal agencies are conducting the environmental reviews required by the law and will engage in any ESA-required consultation with the Fish and Wildlife Service; they expect to complete their reviews this year. Once the agencies issue their decisions, their environmental compliance will be subject to judicial review. At this time, however, Plaintiffs' NEPA and ESA claims are moot.[3]

[3] Plaintiffs tried to bring claims against BLM to stop the issuance of these rights-of-way, but the district court properly dismissed those claims as "unripe" since the agency has not yet acted. Order, Docket No. 212 (Nov. 15, 2018).

For all of these reasons, these appeals—indeed, the entirety of these cases—are moot.

II. None of the exceptions to mootness applies here.

There are exceptions to mootness, but none of them applies here. It is "well settled," for example, "that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). The courts crafted this exception to ensure that a defendant's "mere voluntary cessation" would not "compel the courts to leave the defendant free to return to his old ways." *Helliker*, 463 F.3d at 877. In *City of Mesquite*, the Supreme Court was concerned that, while the City had repealed the challenged ordinance, nothing would "preclude it from reenacting precisely the same provision if the District Court's judgment were vacated"—indeed, the City had "announced just such an intention" to the Court at oral argument. 455 U.S. at 289 & n.11; *see also Cammermeyer v. Perry*, 97 F.3d 1235, 1238–39 (9th Cir. 1996).

But the "voluntary cessation" exception does not apply here because there can be no expectation that the Secretary of State will "return to his old ways." This is not a case where the Secretary of State has withdrawn his permit so that he might reissue it again on some other day. Instead, this is a case where the United States has "found another means to achieve the same end"; namely, the President has issued a new permit himself. *See* 13C Charles A. Wright et al., *Federal Practice and Procedure* § 3533.7 (3d ed. 2015) (discussing

"discontinued official action"). Accordingly, there is no reason to think that the specific "alleged wrongs" challenged in this case will ever be repeated. *Nevada*, 699 F.2d at 487–88.

Moreover, this Court has limited this "voluntary cessation" exception to cases—like *City of Mesquite*—where the defendant has expressed an explicit intent to "return to its old ways." *Barilla v. Ervin*, 886 F.2d 1514, 1521 (9th Cir. 1989), *overruled on other grounds*, *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1174 (9th Cir. 1996).[4] The Secretary of State has expressed no such intention here. Instead, this is a case like *Oregon Natural Resources Council, Inc. v. Grossarth*, where there was no "reasonable expectation" that a timber sale would recur once the agency had halted it, and the mere possibility of a future sale was not enough to avoid mootness. 979 F.2d at 1379–80; *see also Forest Guardians*, 329 F.3d at 1094–95 (holding that a challenge to a Forest Service policy was moot once the agency had issued an official clarification, even though the agency retained the authority to return to the old policy). Thus, this case is moot even if the President's revocation of the 2017 permit is, in some sense, a "voluntary cessation."

This is also not the kind of case that is "capable of repetition while evading review." *E.g., Public Utilities Commission*, 100 F.3d at 1459–60. That exception to mootness "applies only in exceptional circumstances," *id*. at 1460,

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[4] In this Court, the government enjoys a presumption that it is "acting in good faith." *American Cargo Transport, Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010). There is no evidence to challenge that presumption here.

and only where there is both (1) "a 'reasonable expectation' that the same complaining party will be subject to the same injury again," and (2) an injury that is so "inherently limited in duration" that "it is likely always to become moot before federal court litigation is completed," *Center for Biological Diversity*, 511 F.3d at 965 (citations and internal quotation marks omitted).

This case does not satisfy either of those criteria. As discussed above, there is no "reasonable expectation" that the Secretary of State will issue another permit for this project; to the contrary, it is perfectly clear that the Secretary of State will *not* issue such a permit because the President has already done so. These permits, moreover, are also not so "inherently limited in duration" that they would evade review—in fact, they are not "limited in duration" at all and do not expire.[5] Because neither of these requirements is met, much less both, the "capable of repetition while evading review" exception to mootness does not apply here either.

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[5] There is one exception: the permits do provide that they will expire five years from the date of their issuance if TransCanada fails to begin construction within that period. But even so, five years is more than sufficient time for a challenge to the permit to be litigated. *See Idaho Dep't of Fish & Game*, 56 F.3d at 1075 (holding that a biological opinion with a four-year term was not likely to evade review because four years was "more than enough time for litigants to obtain judicial review").

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

TransCanada, in addition to moving to dismiss these consolidated appeals, has also moved the Court to vacate the district court's judgment and dissolve its permanent injunction. The United States submits that vacatur is appropriate and that this Court should grant TransCanada's motion.

When a case becomes moot while an appeal is pending, the "established practice" is to vacate the district court's judgment below. *United States v. Munsingwear*, 340 U.S. 36, 39 (1950); *Arizonans for Official English*, 520 U.S. at 71–2; *Mayfield v. Dalton*, 109 F.3d 1423, 1427 (9th Cir. 1997). Vacatur under these circumstances "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 40. Thus, "the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." *Id*.

The Supreme Court has declined to extend the "established practice" of vacatur to cases that are settled by the parties on appeal. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24 (1994). This exception to vacatur has been interpreted narrowly and "may be limited to appeals mooted by settlement." *Humane Society of U.S. v. Kempthorne*, 527 F.3d 181, 185, 187 (D.C. Cir. 2008) ("We have interpreted *Bancorp* narrowly."). But the exception also has sometimes been applied when the party seeking relief from the judgment below caused mootness through its own "voluntary action." *Helliker*, 463 F.3d

at 878–79; *Mayfield*, 109 F.3d at 1427. Vacatur is still available in such cases, but the courts may remand the issue to the district court "to weigh the equities." *Mayfield*, 109 F.3d at 1427.

The *U.S. Bancorp Mortgage* exception does not apply here because this case has not been mooted by settlement. And even if the exception were extended to cases mooted by "voluntary action," it still would not apply here for two reasons. *First*, the President did not issue this new permit in an attempt to manipulate the judicial process improperly. The President's actions show that his goal was not to avoid the judgment of the district court so that the Secretary of State could issue a new permit for this project despite an adverse decision; if that had been his goal, he would not have issued the new permit himself, which makes any further action by the Secretary of State unnecessary. Instead, the President's plain goal here was to eliminate any doubt that this is a *Presidential* action, not an agency action, and to end any further—and now pointless—litigation about the exact meaning of his previous delegation to the Secretary of State. Because the President's efforts to issue an entirely new permit were proper and not aimed at defeating appellate review, vacatur is appropriate.

Second, even if the President's issuance of this new permit triggered a "voluntary action" exception to mootness, TransCanada would still be entitled to vacatur because *TransCanada* did not moot this case. A party like TransCanada who "seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to

acquiesce in the judgment." *U.S. Bancorp Mortgage*, 513 U.S. at 25. Thus, the courts have repeatedly held that when a case is mooted by the actions of the government, vacatur must still be granted to protect the rights of intervenors like TransCanada that did not cause that mootness. *Wyoming v. Zinke*, 871 F.3d 1133, 1145 (10th Cir. 2017) (vacating judgment to preserve rights of intervenors where challenge to agency regulations became moot when agency began to rescind those regulations); *Humane Society*, 527 F.3d at 187 (vacating judgment and injunction to preserve rights of intervenor where challenge to lethal "take" of gray wolves became moot when FWS removed the gray wolf from the endangered species list); *Wyoming v. Dep't of Agriculture*, 414 F.3d 1207, 1213, 1213 n.6 (10th Cir. 2005) (vacating judgment to preserve rights of intervenors where challenge to agency regulation became moot when agency adopted new regulation); *see also Public Utilities Commission*, 100 F.3d at 1461 (vacating orders below where appeals became moot due to the actions of the permittee, not the appellant).

Finally, whether the district court's judgment is vacated or not, its injunction and remand to the agency must be vacated. The district court enjoined both the United States and TransCanada "from engaging in any activity in furtherance of the construction or operation of Keystone and associated facilities" (with certain exceptions not relevant here) "until the [State] Department has completed a supplement" to its environmental impact statement. Order, Docket No. 211, at 54 (Nov. 8, 2018); Supplemental Order Regarding Permanent Injunction, Docket No. 231, at 15–16 (Dec. 7, 2018)

(describing construction activities that may be undertaken during pendency of remand). It also remanded this matter to the State Department "for further consideration consistent with this order." Docket No. 211, at 54. The court entered this injunctive relief because it concluded that Plaintiffs could suffer irreparable injury "in the form of environmental harm and a biased NEPA process" (because it was alleged that these construction activities would "perpetuate 'bureaucratic momentum.'"). Docket No. 231, at 5.

But because this case—and the alleged violation of the law adjudged by the district court—have been rendered moot, there is no longer any basis for a permanent injunction. The 2017 permit has been revoked and has no legal effect. It no longer authorizes TransCanada to undertake any part of this project, and no work on the project will go forward under that permit. There is, in short, nothing left of the 2017 permit to enjoin.

Injunctive relief, moreover, "looks to the future" and is "designed to deter," and so it must be denied "if the conduct has been discontinued" because "the dispute has become moot and does not require the court's intervention." 11A Wright, *supra*, § 2942; *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 622–23 (1974) (holding that it was error to enjoin mayor's office against discriminatory conduct when a new mayor had been elected); *United States v. Oregon State Medical Society*, 343 U.S. 326, 334 (1952) (holding that discontinued conduct does not warrant the issuance of an injunction). Counsel for the United States are not aware of any decision where a court has left a live, binding injunction in place after a case was dismissed for

mootness, and it is difficult to see what possible justification for such an injunction could exist. *See Dilley v. Gunn*, 64 F.3d 1365, 1373 (9th Cir. 1995) (Fernandez, J., concurring) ("If the first party can no longer have any legal interest in the relief in question, it is most difficult to see how the injunction can possibly remain in place. I know of no case of ours which even hints that it can."); *cf. Rio Grande Silvery Minnow v. Keys*, 355 F.3d 1215, 1219, 1222 (10th Cir. 2004) (declining to vacate preliminary injunction, but only where "all provisions of the injunction have either been met or were never invoked," and "none of the provisions of the injunction remain").

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

(1) This motion complies with the page limitation of 9th Cir. R. 27-1(2) because it is does not exceed 20 pages, excluding the parts of the motion exempted by Fed. R. App. P. 27(a)(2)(B) & 32(f).

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

/s/ James A. Maysonett

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JAMES A. MAYSONETT