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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, v. UNITED STATES DEPARTMENT OF STATE, *et al.*, Federal Defendants, and TRANSCANADA CORPORATION, *et al.*, Defendant-Intervenors.	CV 17-29-GF-BMM CV 17-31-GF-BMM **DEFENDANT-INTERVENORS' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT**

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In their reply briefs, neither the Northern Plains Resource Council Plaintiffs (Northern Plains) nor the Indigenous Environmental Network Plaintiffs (IEN) satisfy their burden of demonstrating that the State Department (State) violated the procedural requirements of the National Environmental Policy Act (NEPA) when preparing the Final Supplemental Environmental Impact Statement (FSEIS) for the Keystone XL Pipeline project (Keystone XL). Plaintiffs' strained legal arguments and piecemeal record citations do not merit remand of State's analysis. A full and thorough review of the record before the Court shows that State took the requisite hard look at the potential impacts of Keystone XL and that the project's potential impacts did not change significantly between State's completion of the FSEIS and its issuance of the Presidential Permit.

Northern Plains and IEN also fail to show that State or the US Fish and Wildlife Service (FWS) violated the Endangered Species Act (ESA). The record shows that the agencies complied with the Section 7 consultation obligations and used the best scientific and commercial data available when analyzing the project's potential effects on threatened and endangered species. Finally, although this Court has ruled that Plaintiffs' NEPA and ESA claims are justiciable, it has not addressed its jurisdiction to adjudicate Plaintiffs' attack on State's National Interest Determination (NID), which we have demonstrated is beyond the Court's jurisdiction.

I. The APA Does Not Authorize Review of the NID

Northern Plains asserts State has violated the Administrative Procedure Act (APA) because in the Record of Decision/National Interest Determination (ROD/NID) "the State Department failed to justify its reversal of course after denying the permit for Keystone XL in 2015." (Northern Plains Pls.' Reply in Supp. of Mot. for Partial Summ. J. at 4 (Doc. 180) (hereafter, NPP Br.)). Northern Plains disclaims any effort to adjudicate whether Keystone XL is in the national interest, or whether State has the discretion to make that determination. (NPP Br. at 55). Instead, Northern Plains demands a "reasoned explanation for reversing course and ignoring earlier factual findings in its 2017 decision." *Id.* Moreover, Northern Plains asserts its entitlement to bring this claim because, in ruling on motions to dismiss, this Court allegedly rejected arguments the government and TransCanada advanced to support non-reviewability of the ROD/NID. (NPP Br. at 54). Northern Plains' arguments fail in all respects.

State fully justified its reasons for issuing this permit, and for reversing course. State recognized that it based the 2015 permit denial on the determination that in 2015, Keystone XL approval "would have undercut the credibility and influence of the United States in urging other countries to address climate change." (DOSKXLDMT2518). In contrast, the 2017 ROD/NID identified a "changed

global context" and found that "a decision to approve this proposed Project at this time would not undermine U.S. objectives in this area." *Id.*

State's candid assessment recognized the previous decision and provided a reason for a different outcome. The foreign policy impacts of State's NID underscore the discretionary, non-reviewable nature of this decision. If State's decision had involved a reversal of a grazing allotment on the public domain or issuance of a previously denied permit to discharge pollutants pursuant to the Clean Water Act, a reviewing court could apply the Federal Land Policy Management Act or the Clean Water Act, together with implementing regulations in order to determine if such a reversal was arbitrary and capricious under the APA. Here, conversely, Northern Plains has no way to establish arbitrary and capricious conduct because there is no statute or regulation that provides usable criteria for adjudicating this national interest determination. Executive Order 13337 provides only that State must determine whether a project is in the national interest.

Northern Plains is wrong to assert that NEPA provides standards to guide this Court in determining whether State's reasons for issuing TransCanada's Presidential Permit is arbitrary and capricious. Assuming NEPA applies to this permitting process, the procedural nature of that statute requires State to produce an adequate environmental impact statement (EIS) or environmental assessment

(EA). However, NEPA contains no tools for measuring State's underlying actions. *See Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 196 (D.C. Cir. 2017) ("Courts may not use their review of an agency's environmental analysis to second-guess substantive decisions committed to the discretion of the agency." (citation omitted)).

Moreover, TransCanada and the Federal Defendants are entitled to argue that State made a discretionary non-reviewable determination about the national interest. This matter involves the President's obligations implicating national security and foreign policy matters for which there is no statutory guidance and to which the APA does not apply. This Court's ruling denying motions to dismiss addressed only NEPA and ESA claims. This Court did not speak to whether Plaintiffs could challenge the ROD/NID directly. In its order, this Court determined only that State's action was not Presidential, and thus did not insulate from review a challenge to federal compliance with NEPA and the ESA. Order at 6-22 (NEPA), 23-30 (ESA) (Nov. 22, 2017) (Doc. 99). The scope of the order is apparent from the case cited therein, which found only that a FEIS is reviewable under the APA. *See Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1157 (D. Minn. 2010) ("Thus, the Court holds, based on Eighth Circuit precedent, that the State Department's FEIS constitutes a final agency action reviewable by this Court under the APA."). While this Court concluded that it has authority to review

State's compliance with NEPA, it did not address whether it had authority to review the substantive reasoning underlying State's decision to issue a Presidential Permit. *See* Order at 22 (Doc. 99) ("The State Department's regulations require a NEPA review for actions of this type.").

Northern Plains' attempt to charge State with "disregarding facts and circumstances" (NPP Br. at 59) in making a NID is not persuasive. The 2017 ROD/NID did not change any facts; indeed, the FSEIS used by this Administration in granting TransCanada's permit was the same document employed by Secretary Kerry in 2015 to deny the permit. Though facts have remained the same, priorities and national interest concerns have changed. For these reasons, the 2017 ROD/NID is as unreviewable under the APA as the 2015 ROD/NID; both inhabit a realm where there is no law to apply.

II. The Nebraska Route Change Does Not Render State's NEPA Analysis Inadequate

A. Nebraska PSC's Selection of the Mainline Alternative Does Not Require State To Conduct Supplemental NEPA Analysis

Even if we assume NEPA applies to this Presidentially-delegated action, Plaintiffs' argument that State has an ongoing duty to supplement its NEPA analysis after issuing a Presidential Permit fails as a matter of law. Once State issued a Presidential Permit to TransCanada, there was no major federal action remaining for the agency to take. Thus, any NEPA obligation no longer existed.

Northern Plains would change the legal standard for NEPA supplementation to require a federal agency to update its NEPA analysis in light of significant new information if "a project has not been fully constructed or completed." (NPP Br. at 47). This is error. The duty to supplement exists "only if there remains major Federal actio[n] to occur," and the duty expires where there is no "ongoing major Federal action." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 73 (2004) (citation omitted). Northern Plains' standard is incompatible with numerous court decisions, as many situations exist where no major federal action remains despite the fact that a project has not been fully constructed or completed. *See, e.g., Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1095 (9th Cir. 2013) (no major federal action remained after BLM approved a mining plan of operation); *Cold Mountain v. Garber*, 375 F.3d 884, 894 (9th Cir. 2004) (no major federal action remained after Forest Service issued permit).

In Executive Order 13337, the President authorized State to grant permits for petroleum export facilities "at the borders of the United States." EO 13337 § 1(a). Thus, when State completed the NID and issued the Presidential Permit authorizing construction of pipeline facilities at the international border, its action was complete. State's single authorization process distinguishes this matter from *Sierra Club v. Bosworth*, where the district court determined major federal action remained after the Forest Service issued a timber lease because "the timber sale

contracts required the Forest Service's written approval of the operating plan prior to the commencement of logging." 465 F. Supp. 2d 931, 939 (N.D. Cal. 2006).

The same is true of Northern Plains' other authorities, (NPP Br. at 50-51), as the federal agencies in each of those cases had not completed their federal actions. *Defs. of Wildlife v. Bureau of Ocean Energy Mgmt.*, 791 F. Supp. 2d 1158, 1175-79 (S.D. Ala. 2011) (agency had not accepted bids for offshore lease); *Bundorf v. Jewell*, 142 F. Supp. 3d 1138, 1151 (D. Nev. 2015) (final right-of-way had not been issued). Here, no additional State Department approval of the project is necessary for construction to begin on the transboundary facilities. *Cf. Ohio Valley Envtl. Coal., Inc. v. U.S. Army Corps of Eng'rs*, 841 F. Supp. 2d 968, 971 (S.D. W. Va. 2012) ("Though the Corps retains discretion to reevaluate its decision on the permit at any time, . . . issuance of the permit is the major federal action requiring NEPA compliance."); *Ctr. for Biological Diversity v. Salazar*, 791 F. Supp. 2d 687, 698 (D. Ariz. 2011), *aff'd*, 706 F.3d 1085 (9th Cir. 2013).

Northern Plains improperly relies on *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989) as authority for extending State's approval authority over the pipeline until TransCanada completes construction. (NPP Br. at 47-49). But *Marsh* did not address when major federal action remains. Instead, the Court focused on whether new information merited a supplemental NEPA analysis and concluded that it did not. *Marsh*, 490 U.S. at 379-85. Nonetheless, the question of

whether major federal action remained was easy to overlook because the U.S. Army Corps of Engineers, a federal agency, was itself constructing the dam. *Or. Nat. Res. Council v. Marsh*, 628 F. Supp. 1557, 1561 (D. Or. 1986) ("Congress appropriated moneys and directed the Corps to build the dam."). Thus, the Court could equate "completion of agency action" with the dam's construction. Northern Plains errs in extending that logic here because State's only responsibility regarding Keystone XL is to act on a permit application. After issuing a permit, TransCanada is responsible for the pipeline construction.

Even though State's action is complete, the Mainline Alternative will not escape NEPA review. As the Federal Defendants explained, State, in its role as lead agency, will prepare a supplemental analysis for the Bureau of Land Management (BLM) of the Mainline Alternative route through Nebraska as part of BLM's decision-making process under the Mineral Leasing Act for a right-of-way. (U.S. Brief in Supp. of Mot. for Summ. J. at 68 (Doc. 174) (hereafter, US Br.)).

B. A Change in the Nebraska Route Does Not Render State's NEPA Analysis Inadequate

IEN's arguments that that State should have considered the Mainline Alternative route as a connected action in its 2015 FSEIS, or should have waited to perform a NEPA analysis until the route was approved by the Nebraska Public Service Commission (PSC) are also wrong. (IEN Pls.' Reply in Supp. of Mot. for Summ. J. at 22-23, 57-59 (Doc. 182) (hereafter, IEN Br.)). When State issued the

Presidential Permit, TransCanada's proposed route through Nebraska was the route reviewed by the Nebraska Department of Environmental Quality and approved by the Nebraska Governor. (Neb. Pub. Serv. Comm'n Order at 49 (Doc. 147-1) (hereafter, Neb. PSC Order)). At that time, TransCanada had no intention of constructing the Mainline Alternative, nor was it advocating for its selection. TransCanada also was not trying to divide a larger project into multiple smaller pieces. Instead, there was only a single proposed action – Keystone XL. Because there were not (and are not) multiple actions, but only a single action, the Mainline Alternative cannot be viewed as a connected action.[1]

IEN's argument that State prematurely completed its NEPA review before the Nebraska PSC finalized the route has no legal or factual support. (IEN Br. at 58). As noted above, TransCanada provided State with a fully developed proposed action, which included a route through Nebraska approved by the Nebraska Governor. Because NEPA encourages federal review early on in the process, it was appropriate for State to complete its review at that time. 40 C.F.R. § 1501.2 ("Agencies shall integrate the NEPA process with other planning at the *earliest*

[1] Moreover, TransCanada has never treated the Nebraska route as a separate independent action in order to avoid having it considered in the same NEPA analysis as the project. Thus, Plaintiffs' citation to *Border Power Plant Working Group v. Department of Energy*, 260 F. Supp. 2d 997 (S.D. Cal. 2003) is misplaced.

possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." (emphasis added)). After all, State's Presidential Permit for Keystone XL extends only to the 1.2-mile portion that traverses the international border, which is not located in Nebraska. (DOSKXLDMT2187 (US facilities defined as the portion of the pipeline extending from the US-Canadian border to the first shut-off valve in the United States located approximately 1.2 miles from the border)). Moreover, no Presidential Permit authorizes the recipient to commence construction in any state. Thus, IEN cannot show that State's review of the transboundary portion of the project was premature.

Ultimately, Northern Plains' claim that the NEPA analysis is inadequate because it does not contain an analysis of the Mainline Alternative also fails because this claim is premature. (NPP Br. at 9-10). As noted above, BLM will review the Mainline Alternative as part of its decision-making process under the Mineral Leasing Act along with a supplemental environmental analysis. Accordingly, a NEPA analysis of the complete pipeline route will be complete before the project is constructed.

III. Plaintiffs' Failed To Identify Significant New Information Mandating NEPA Supplementation

"[A]n agency need not supplement an EIS every time new information comes to light after the EIS is finalized." *Marsh*, 490 U.S. at 373. A federal

agency is obligated to supplement an EIS in light of new information only when there is remaining federal action, *id.*, and "only if the new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered." *Idaho Wool Growers Ass'n v. Vilsack*, 816 F.3d 1095, 1106 (9th Cir. 2016) (citation omitted). If new information "d[oes] not show a seriously different picture of the likely environmental harms stemming from the proposed project," then an agency does not need to supplement its analysis. *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1130 (9th Cir. 2012) (citation omitted). "[A]s long as [an agency's] decision not to supplement the FEISS was not 'arbitrary or capricious,' it should not be set aside." *Marsh*, 490 U.S. at 377.

A. Oil prices

Northern Plains cannot demonstrate that temporarily low oil prices would produce potential environmental impacts that are significantly different from those discussed in the FSEIS. (NPP Br. at 35-39). Nor can Northern Plains represent what oil prices will look like when construction of Keystone XL could be complete or over the 20-year time horizon that State relied upon as part of its analysis. Given the volatile and unpredictable nature of oil prices, State analyzed a broad range of oil prices as part of its reasonable discussion of the potential impacts of the project. (DOSKXLDMT5882-97). State indicated that there may be some

combination of operating conditions and oil price points where Keystone XL could increase oil production. (DOSKXLDMT5895). Such price points could include this month's prices (May, 2018) where oil is approximately $70 per barrel.[2] But Keystone XL is not operating today and oil prices are trending upwards. Regardless, State's analysis of the project's potential impacts was not contingent on a specific oil price. Thus, the current or future price of oil would not constitute significant new information.

Northern Plains' oil price argument also misses another vital detail—there are many factors beyond the control or influence of State that drive oil sands development.[3] As discussed in the FSEIS, a single project is unlikely to significantly impact the rate of extraction in the oil sands, as a multitude of other factors such as "oil prices, oil-sands supply costs, transport costs, and supply-demand scenarios" contribute to the rate of production. (DOSKXLDMT5890). State's conclusion in this area was informed based on "current market forecasts, modeling analysis, and the prevailing regulatory framework."

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[2] *See* https://www.eia.gov/todayinenergy/prices.php.

[3] Additionally, Northern Plains once again mischaracterize the record. They claim that State viewed the low oil price scenario as "unlikely." (NPP Br. at 37 citing DOSKXLDMT5849-87). State never asserts that the low oil price scenario is "unlikely" in any of the citations Northern Plains references.

(DOSKXLDMT5890). Because this is an area of technical analysis, State is entitled to significant deference. *Cf. Idaho Wool Growers Ass'n*, 816 F.3d at 1107 ("When an agency undertakes technical scientific analyses, as with the development of models to help analyze a problem, the court's deference to the agency's judgment is at its peak." (citation omitted)). Northern Plains cannot overcome State's conclusion or analysis, nor can they demonstrate that the potential impacts of Keystone XL are significantly different than discussed in the FSEIS.

Similarly, Northern Plains' reliance on EPA's letter remains misplaced because EPA exaggerated the relationship between low oil prices and oil production. The FSEIS indicates that production growth would slow due to transportation constraints if: (1) "prices persist below current or most projected levels *in the long run*; and 2) that *all new and expanded Canadian and cross-border pipeline capacity*, beyond just the proposed Project, is not constructed." (DOSKXLDMT5657). EPA, on the other hand, suggested that Keystone XL would "result in increased oil sands production" by referencing a later statement in the FSEIS: "Oil sands production is expected to be most sensitive to increased transport costs in a range of prices around $65 to $75 per barrel. Assuming prices fell in this range, higher transportation costs could have a substantial impact on oil sands production levels—possibly in excess of the capacity of the proposed

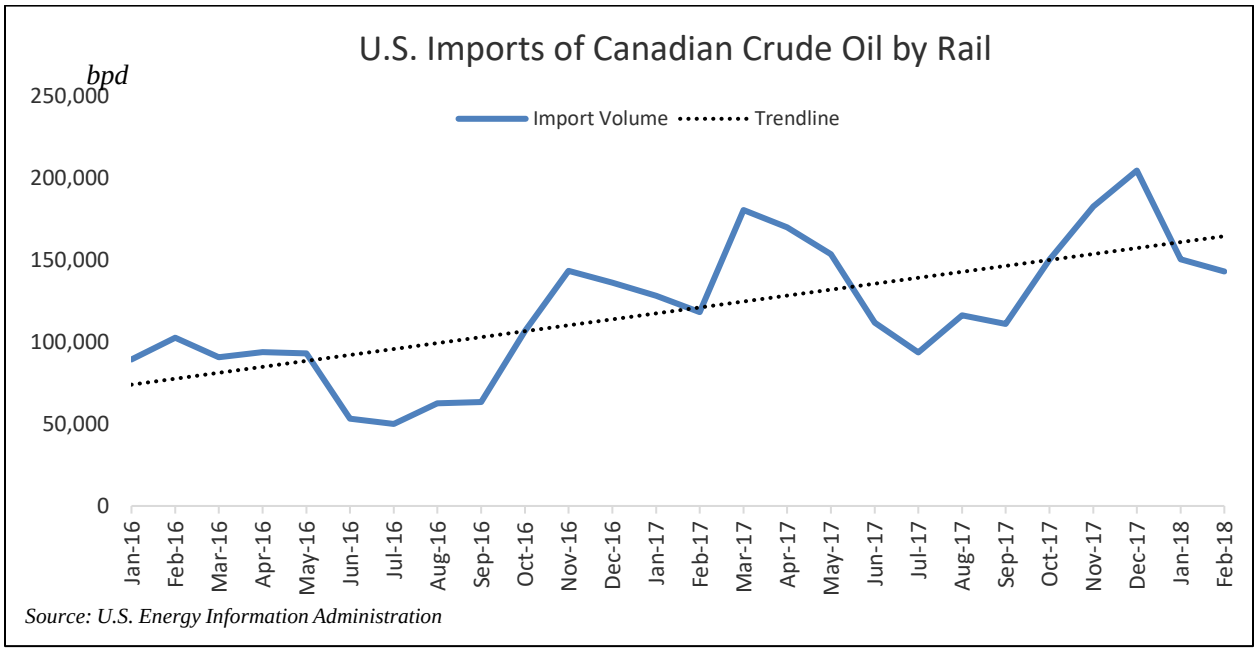
Project." (DOSKXLDMT974; DOSKXLDMT5657). It is illogical for EPA or Northern Plains to suggest that in a low oil price environment, Keystone XL, individually, *would* lead to greater net oil production, especially considering that sustained low prices could cause a decrease in production larger in than the Keystone XL's capacity. Moreover, since State concluded that many extraction operations would break even (i.e. not make a profit) in the $65 to $75 per barrel range, (DOSKXLDMT5657), EPA's statement defies logic considering that oil was less than $50 per barrel at the time. (DOSKXLDMT974).

B. Crude by Rail

Northern Plains also asserts supplementation is necessary because the current crude by rail capacity out of the WCSB is less than projected. According to Northern Plains, lower than expected rail capacity contradicts State's projections that crude by rail could adequately substitute for Keystone XL. Northern Plains claims that current crude by rail use demonstrates Keystone XL would produce additional environmental impacts, undercutting what State discussed in the FSEIS. Fundamentally, Northern Plains confounds rail utilization with rail capacity, or export capacity in general, to suggest that oil sands production would increase with the construction of Keystone XL. (NPP Br. at 39). In doing so, Northern Plains overlooks the fact that, in the absence of Keystone XL, there is sufficient infrastructure in place to transport to the United States the full amount of WCSB

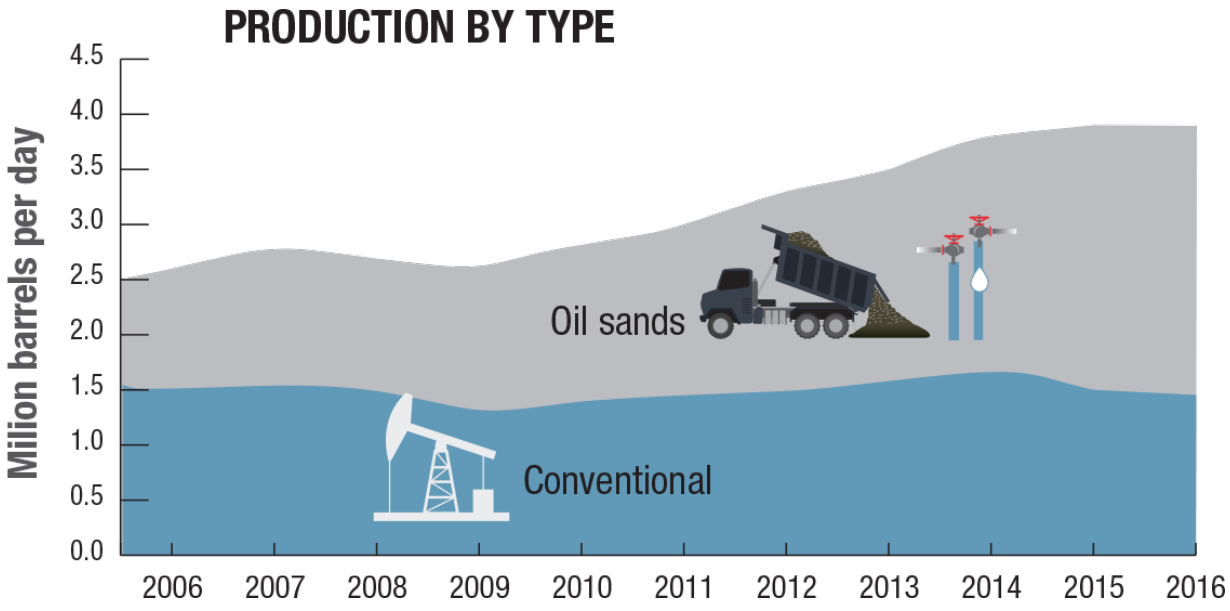
crude Canada produces. "[T]he nameplate capacity (approximately 5 million bpd) for cross-border pipelines, pipelines to tidewater (i.e., Trans Mountain), and rail is higher than the volume of Canadian crude oil exports to the United States." (DOSKXLDMT2129). In fact, it is higher than the approximately 3.87 million bpd of crude Canada produces, as well as the 4.58 million bpd of crude Canada expects to produce by 2020. (DOSKXLDMT2127).

As a result of Canada's increased exports to the United States, there has been a general increase in the utilization of rail transportation over the last two years. As demonstrated by data from the US Energy Information Administration, the US is importing more Canadian crude by rail than it did in 2016.



The graph also shows that rail transportation is quite volatile. As stated in the FSEIS, producers primarily ship crude by pipeline and rely on rail

transportation when faced with pipeline bottlenecks. (DOSKXLDMT2129). Given the extra rail export capacity, the addition of Keystone XL's capacity would be unlikely to increase oil sands production because there are no current bottlenecks limiting oil extraction. This is evident from the fact that oil sands production has increased over the last number of years without Keystone XL.



Source: Government of Canada[4]

Accordingly, Northern Plains' contention that decreased rail utilization constitutes significant new information must fail.

[4] http://www.nrcan.gc.ca/energy/facts/crude-oil/20064#L6 (last visited May 10, 2018).

C. Oil Spills

Northern Plains claims that oil releases from the earlier-constructed Keystone Pipeline constitute new information because they show the potential impacts of Keystone XL are significantly different from those discussed in the FSEIS. (NPP Br. at 40-43). There is no basis for Northern Plains' attempted correlation. As TransCanada stated in its opening brief, Keystone XL will be state-of-the-art and contain design criteria that significantly reduce the threat of releases. (TransCanada Brief in Supp. of Mot. for Summ. J. at 71-72, 82-83 (Doc. 171) (hereafter, TC Br.)). Northern Plains fails to articulate how these earlier releases from another pipeline bear upon the effectiveness of the safety measures incorporated into Keystone XL to reduce and mitigate potential releases.

Northern Plains rejects the fact that oil release risks remain exceedingly low, especially from modern pipelines, but offers only rhetorical statements to combat these stubborn facts while maintaining that a more robust risk analysis is warranted. (NPP Br. at 42). They offer no details as to what such a supplemental analysis should address, however. There is no indication that the releases from other pipelines resulted from specific designs or construction techniques that will be used for Keystone XL. Accordingly, Northern Plains' unsupported argument does not meet the legal standard necessary to trigger NEPA supplementation.

D. National Academies of Sciences (NAS) Study

Northern Plains also fails to demonstrate how the 2016 NAS study on dilbit constitutes significant new information. (NPP Br. at 43). The FSEIS acknowledges that dilbit reacts differently in water than other forms of crude, that it is less biodegradable than other forms of crude, and that it is more difficult to clean up than other crude oils. (DOSKXLDMT6613-16). As detailed in TransCanada's opening brief, the spill response plan will address the specific characteristics of dilbit. (TC Br. at 75-76). Thus, the NAS Study contains no significant new information bearing the project's potential environmental impacts.

E. GREET Model

Northern Plains cannot link the results of the GREET model with a significant change in the project's potential environmental impacts. (NPP Br. at 43-45). Instead, Northern Plains relies on the fact that climate change is controversial to suggest that a potential 5-20% increase in potential GHG emissions constitutes significant new information. (*Id*. at 44-45). State took a hard look at this issue, disclosed the difference in potential emissions based on the GREET model, and concluded it was not significant because State conservatively estimated the GHG impacts of the project. (DOSKXLDMT2501-02; DOSKXLDMT2501, n.1 (stating "If coke displaces coal, WCSB emissions would be 528 kg CO2-eq per barrel," which places it within the 485-555 kg CO2-eq per

barrel range used in the FSEIS)). Additionally, State reiterated that approval or denial of the project was unlikely to affect significantly the rate of crude extraction in the WCSB. *Id.* Northern Plains is unable to demonstrate that using the GREET model would show potential impacts significantly different from those analyzed in the FSEIS.

IV. State's FSEIS Satisfies NEPA

A. The Purpose and Need Statement is Sufficient

IEN claims that State adopted TransCanada's purpose and need as its own. (IEN Br. at 18). This is not so. In citing the purpose and need section of the FSEIS, IEN selectively omits the first part of the following sentence: "*According to Keystone's May 4, 2012, application*, the primary purpose of the proposed Project is to provide the infrastructure to transport Western Canadian Sedimentary Basin (WCSB) crude oil from the border with Canada to existing pipeline facilities near Steele City, Nebraska . . ." (DOSKXLDMT5756). By omitting the language above, IEN represents TransCanada's primary purpose to be State's primary purpose. State's purpose and need, however, is on the subsequent page, where a federal purpose and need is identified. (DOSKXLDMT5757 ("The primary focus of the Department is related to the conduct of foreign affairs . . . The Department's purpose, therefore, is to consider Keystone's application in terms of how the proposed Project would serve the national interest . . ."). The federal purpose is

grounded in Executive Order 13337, which is the only source of State's authority to issue Presidential Permits. Accordingly, State's purpose and need statement, in combination with TransCanada's purpose, satisfies NEPA.

IEN is incorrect in contending that State may not consider TransCanada's goals as part of the purpose and need. NEPA clearly allows an agency latitude in formulating a purpose and need for an action, especially when a private party is the project proponent. Ninth Circuit precedent is clear that "when granting a license or permit, the agency has discretion to determine the best way to implement its statutory objectives . . . in light of the goals stated by the applicant." *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1085 (9th Cir. 2013) (citations omitted).[5] Thus, IEN's argument that State improperly considered TransCanada's purpose fails.

B. State Considered a Reasonable Range of Alternatives

IEN believes State violated its obligation to consider a reasonable range of alternatives because it relied on TransCanada's interests. (IEN Br. at 19-23). For legal support, IEN cites *Alaska Survival*. (IEN Br. at 20). TransCanada agrees *Alaska Survival* controls, but it does not produce the outcome IEN desires.

[5] Though State is acting pursuant to the objectives of an executive order and not a statute, the same concept applies.

In *Alaska Survival*, the plaintiffs challenged the agency's authorization of a railroad construction project, claiming that the agency focused exclusively on the goals of the applicant and failed to analyze a reasonable range of alternatives. 705 F.3d at 1084-87. The court rejected both claims. It found the agency properly accounted for the project proponent's goals in the purpose and need statement. *Id.* at 1085-86. Also, the court concluded the plaintiffs' proffered alternative was not reasonable because they could not demonstrate it was a feasible option. *Id.* at 1087 ("Those challenging the failure to consider an alternative have a duty to show that the alternative is viable."). The same is true here. While IEN claims that renewable energy alternatives should have been considered, (IEN Br. at 21-22), IEN points to no alternatives that State was empowered to consider or authorize. Instead, IEN quotes broad statements from the 2015 ROD/NID relating to domestic and global *policies*, not actual concrete alternative actions.

IEN does not demonstrate how implementation of policies "promoting fuel efficiency, electrification of motor vehicles, and/or alternative fuels" or global policies "to limit climate change to 2°C over pre-industrial levels" is a feasible option. (IEN Br. at 21-22). In fact, State demonstrated that such options were not feasible. (DOSKXLDMT6089-95 (concluding that alternative fuel, energy efficiency and renewable energy options would not lower demand for crude at PADD 3 refineries sufficient to justify more detailed consideration)). Accordingly,

IEN cannot satisfy its legal burden of demonstrating that State failed to consider reasonable alternatives. *Cf. City of Alexandria, Va. v. Slater*, 198 F.3d 862, 867-69 (D.C. Cir. 1999) ("it is simply a *non sequitur* to call a proposal that does not 'offer a complete solution to the problem' a 'reasonable alternative'").

C. The No Action Alternative Provides an Appropriate Baseline

Northern Plains' argument that State could not consider more than one no action alternative is legally incorrect. The Ninth Circuit has held on more than one occasion that an agency can discuss multiple no-action alternatives to comply with NEPA. *Mont. Wilderness Ass'n v. McAllister*, 460 F. App'x 667, 670–71 (9th Cir. 2011); *e.g.*, *Protect Our Communities Found. v. Jewell*, 825 F.3d 571 (9th Cir. 2016) (valid NEPA analysis with two no-action alternatives). Here, State's consideration of a status quo baseline as well as three alternative no action alternatives was reasonable because it allowed State to identify the likely environmental impacts of denying the proposal while also accounting for other predictable consequences of rejecting TransCanada's application.

Contrary to Northern Plains' contention, (NPP Br. at 18-19), State's formulation of the no action alternative scenarios is not misleading to the public, but rather allows the public "to understand the potential effects of the implementation of other reasonable crude oil transport scenarios." (DOSKXLDMT7456). Northern Plains fails to acknowledge that included within

the no action alternatives is a true status quo baseline where "the proposed Project would not be built . . . and the impacts along the pipeline corridor associated with the proposed Project would not occur." (DOSKXLDMT7456).

Though Northern Plains attempts to compare this matter to *Center for Biological Diversity v. U.S. Department of Interior*, 623 F.3d 633 (9th Cir. 2010), there is a key distinguishing feature between the two matters. In that case, the federal agency's no action alternative assumed that a separate action over which it had authority (mining) would occur regardless of whether it approved the proposed action (a land exchange). Because the agency could control whether mining would occur absent the land exchange, the court faulted the agency for assuming that mining operations would be the same under the proposed and no action alternatives. *Id*. at 646.

Here, however, the "U.S. Department of State (the Department) has no authority to implement these [no action alternative] scenarios." (DOSKXLDMT6050). Additionally, Northern Plains' representation that the Alberta Clipper line is part of the no action alternative scenarios (NPP Br. at 19) is simply incorrect. In each of the alternatives, crude is shipped via rail or tanker into the United States. (DOSKXLDMT7458-60). Thus, this case is on all fours with *Oceana v. Bureau of Ocean Energy Management*, 37 F. Supp. 3d 147, 172 (D.D.C. 2014) because State reasonably assumed Canada would continue to develop its

crude resources to meet demand – which is precisely what Canada has done since completion of the FSEIS. *See supra* p. 17. In fact, such development is inevitable. *See Young v. Gen. Servs. Admin.*, 99 F. Supp. 2d 59, 74 (D.D.C. 2000).

D. State Adequately Considered Cumulative Effects

Northern Plains claims that an agency cannot satisfy its NEPA obligations for analyzing the cumulative impacts of two actions by conducting such analysis in the EIS for the later action. (NPP Br. at 26-34). However, as stated in TransCanada's opening brief, many courts have permitted that procedure. (TC Br. at 55-56). The authorities Northern Plains cites in support of its argument are neither controlling nor persuasive.

The first case Northern Plains cites does not involve an analysis of cumulative impacts or address whether such an analysis can take place in a later EIS. Instead, that case found an agency's failure to provide baseline data supporting its analysis before approving the project violated NEPA. *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1083 (9th Cir. 2011). Here, however, there was no absence of baseline data and there is no issue regarding whether State understood the potential impacts of Keystone XL prior to issuing a Presidential Permit. Instead, State deferred consideration of the cumulative impact of Keystone XL so that it could discuss such impacts with the later-analyzed Alberta Clipper project.

The Ninth Circuit's decision in *Kern v. U.S. Bureau of Land Management*, is equally inapplicable because this is not a case where an agency is reviewing an "action [that] is related to other actions with *individually insignificant* but cumulatively significant impacts." 284 F.3d 1062, 1075 (9th Cir. 2002) (emphasis added) (citing 40 C.F.R. § 1508.27(b)(7)). The Ninth Circuit's concern in *Kern* was that an agency was avoiding a more thorough analysis of a timber sale in an EIS by overlooking the cumulatively significant impact of the timber sale with other nearby actions. *Id.* In narrowing the scope of the project, the agency had decided an EA was sufficient because the timber sale, in isolation, did not have a significant environmental impact. *Id.* Here, however, State prepared an EIS and never claimed that Keystone XL's impacts were insignificant.[6]

The cases Defendants cite, however, are compelling and practical. There is no need for an agency to waste resources duplicating a cumulative effects analysis

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[6] *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372 (9th Cir. 1998) does not address the issue before the court either. In that case, the Forest Service analyzed a group of actions together in the same EIS. But the Forest Service failed to analyze the cumulative impact of those actions on old growth habitat. *Id.* at 1380. The same is true of *City of Tenakee Springs v. Clough*. 915 F.2d 1308, 1313 (9th Cir. 1990) ("We are cited to no provision of the [management plan] that contains any cumulative environmental impact analysis of timber harvest operating plans scheduled for implementation over the life of the contract within the Tongass National Forest."). Here, however, State addressed the cumulative climate change impact of both Keystone XL and Alberta Clipper in an EIS.

when (1) it has already determined the effect at issue is significant and (2) the cumulative impact analysis will be performed before any subsequent cumulative action will be approved. *See North Carolina v. FAA*, 957 F.2d 1125, 1131 (4th Cir. 1992); *Citizens Concerned about Jet Noise, Inc. v. Dalton*, 217 F.3d 838 (4th Cir. 2000) ("Even if the Navy could have conducted a more thorough cumulative impact analysis, given that the Navy plans to develop an Environmental Impact Statement for the replacement action, it would be duplicative for this court to order it to perform a supplemental Environmental Impact Statement at this time."); *Ctr. for Envtl. Law & Policy v. U.S. Bureau of Reclamation*, 655 F.3d 1000, 1010 (9th Cir. 2011). Moreover, the fact that Northern Plains already has access to State's cumulative impacts analysis on this issue in the Alberta Clipper EIS renders their claim moot and undermines their unsupported contention that State tried to minimize Keystone XL Pipeline's climate impacts. *See All. for the Wild Rockies v. U.S. Dep't of Agric.*, 772 F.3d 592, 597 (9th Cir. 2014) (agency's completion of the challenged analysis rendered plaintiffs' claim moot).

V. State Took a Hard Look at Potential Environmental Impacts

Plaintiffs fail to demonstrate how State's FSEIS, which spans over 2,000 pages and contains over 3,000 pages of appendices, omitted a reasonable analysis of any potential significant environmental impact.

A. State Discussed Climate Impacts

IEN grossly mischaracterizes the record in claiming that the FSEIS omits analyses of climate impacts and "weaves a blanket of false security."[7] (IEN Br. at 42). To the contrary, the FSEIS discusses not only the direct and indirect emissions attributable to the project and the lifecycle GHG emissions from the WCSB crude transported by the project, but also "how the proposed Project and lifecycle GHG emissions, along with other sources of GHGs, could cumulatively contribute to climate change." (DOSKXLDMT7198; *see also* DOSKXLDMT7196-7242). This analysis provides information sufficient to inform a decision-maker of the potential impacts of the project in the context of climate change.[8]

IEN's contention that State's NEPA analysis is inadequate because it measures the percentage of the project's potential GHG emissions against that of the emissions from total oil sands extraction instead of providing a similar

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[7] NEPA does not obligate federal agencies to provide a blanket of security.

[8] In fact, State initially denied a Presidential Permit for the project based on climate change related issues. Thus, Plaintiffs cannot maintain that State failed to analyze potential climate impacts.

comparison using a wells-to-wheels metric is the epitome of flyspecking.[9] *See, e.g.*, *WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013) (finding challenges to NEPA analysis on climate change to be of the "flyspecking variety"). The FSEIS provides a comparison in one metric – IEN cannot show how providing it in another metric serves any benefit vis-à-vis GHG emissions.

An objective reading of the FSEIS confirms that State's analysis of GHG emissions was reasonable and thorough. State provides a conservative wells-to-wheels (i.e. lifecycle) analysis of the full capacity of Keystone XL, allowing a decision-maker to understand the upper range of potential GHG emissions from the extraction to final combustion of the WCSB crude that Keystone XL could transport. (DOSKXLDMT7217-26). The FSEIS also puts that in context by comparing it to the potential emissions of WCSB development. (DOSKXLDMT7241). This satisfies NEPA's hard look requirement.[10]

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[9] It is absurd for IEN to fault State for failing to include the project's contribution to "Environment Canada's estimate of Canada's total GHG emissions in 2011," because the project did not exist in 2011. Accordingly, the contribution was 0.0%.

[10] While Plaintiffs' claim that a District of Colorado court disagreed with the Ninth Circuit's standard in *Barnes v. U.S. Department of Transportation*, 655 F.3d 1124 (9th Cir. 2011), for discussing GHG emissions in a NEPA analysis, (IEN Br. at 45), that case is inapposite because it is contrary to Ninth Circuit authority.

IEN also raises for the first time in its reply brief an argument that State needed to utilize the social cost of carbon tool. Notwithstanding that IEN cannot raise new arguments in a reply brief, *Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990), State reasonably decided not to utilize the social cost of carbon tool and instead quantified the potential impacts using other metrics. (DOSKXLDMT7879). *High Country* does not support IEN's claim that State's approach was unreasonable.

In *High Country*, the court faulted the Forest Service for calculating the costs of the proposed action in a draft EIS and then eliminating that analysis in the final EIS by stating that it was impossible to calculate.[11] *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1191 (D. Colo. 2014) (holding "it was nonetheless arbitrary and capricious to quantify the benefits of the lease modifications and then explain that a similar analysis of the costs was impossible when such an analysis was in fact possible and was included in an earlier draft EIS"). The lynchpin of the court's analysis was the fact that the Forest Service failed to "offer non-arbitrary reasons why the protocol should not have been included in the FEIS." *Id.* at 1191-92. Here, however, State "did not rely on

[11] In this FSEIS, State did not claim that it was impossible to analyze the costs of the project's potential GHG emissions as the Forest Service claimed in *High Country*. *See id.* at 1190.

a tool to provide a quantitative analysis of the cost or benefit of the Project in relation to climate change," nor did it "selectively omit which data to share in the final EIS, as the agency did in *High Country*." *League of Wilderness Defs. v. Connaughton*, No. 3:12-CV-02271-HZ, 2014 WL 6977611, at *26 (D. Or. Dec. 9, 2014); *see also W. Org. of Res. Councils v. U.S. Bureau of Land Mgmt.*, No. CV 16-21-GF-BMM, 2018 WL 1475470, at *14 (D. Mont. Mar. 26, 2018). Thus, it was not arbitrary for State to discuss qualitatively the impact of potential GHG emissions from the project instead of performing a cost-benefit analysis.[12]

IEN continues to misrepresent the 2017 ROD/NID, claiming that it treats crude oil production as a zero-sum game and trivializes the impact of the project's potential GHG emissions. State, however, never concluded that there would be zero GHG emissions from the project. Instead, State discloses that the construction of the project would generate approximately 0.24 $MMTCO_2e$ annually, while the operation and maintenance of the pipeline would generate approximately 1.44 $MMTCO_2e$ annually – equivalent to 71,928 homes using

[12] Plaintiffs' citation to *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172 (9th Cir. 2008) is irrelevant to their argument. (IEN Br. at 50). In that case, the court analyzed whether NHTSA appropriately conducted a cost-benefit analysis to determine the maximum feasible average fuel economy level as required under the Energy Policy and Conservation Act of 1975. *Id.* at 1194-1200. Here, there is no statutory obligation to conduct a cost-benefit analysis as part of a NID.

electricity for one year. (DOSKXLDMT2500). State also estimates that displacing U.S. refineries' current crude slate with WCSB crude could result in an increase in GHG emissions of 1.3 to 27.4 MMTCO_2e annually. (DOSKXLDMT2501). At the high end of this range, the emissions are similar to those of 7.8 coal-fired power plants. (DOSKXLDMT2501; *see also* DOSKXLDMT7199-7200 (FSEIS contains identical disclosures)). State does not claim that these emissions are not significant. Instead, State reserves that conclusion for the project's potential impact on WCSB crude production rate, wherein State explains "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." (DOSKXLDMT2500).

Additionally, the FSEIS never concludes that Keystone XL "would have no effect on our climate" or that GHG emissions "are not likely to occur because demand for oil is global." (NPP Br. at 14). None of the 28 citations to the administrative record Northern Plains references in its brief (NPP Br. at 14) makes either representation. Instead, State concludes only that the existence of the project is "unlikely to significantly affect the *rate of extraction* in oil sands areas." (DOSKXLDMT5760 (emphasis added)). The rate will not be affected because upstream producers in the WCSB are more heavily influenced by factors such as oil prices, oil-sands supply costs, and crude demand rather than the existence of a

single pipeline. (*Id.*; *see also* DOSKXLDMT5767 ("The dominant drivers of *oil sands development* are more global than any single infrastructural project." (emphasis added))).

At bottom, Plaintiffs simply cannot abide State's conclusion that with or without Keystone XL, the rate of extraction of oil sands in the WCSB is not likely to change. In response, Plaintiffs distort State's conclusion that the project is unlikely to significantly affect the rate of extraction of oil by asserting this must mean State believes there will be no GHG emissions from the project. (NPP Br. at 13-16, 43-45; IEN Br. at 42-52). From that misrepresentation, Plaintiffs wrongly argue that State violated NEPA. Thus, their argument does fail for both factual and legal reasons.

B. State Did Not Need To Consider Extraterritorial Impacts

TransCanada demonstrated that State had no duty to consider extraterritorial impacts of Keystone XL. First, NEPA does not apply to activities in Canada, and second, Canada thoroughly analyzed the potential impacts in Canada. IEN has failed to rebuff this showing, suggesting that State must duplicate the same analysis without regard for Canada's actions. IEN's position is in clear contradiction of the weight of legal authority on this issue, which we will not repeat here. *See*, TC Br. at 58, 61. The "oil sands development is under the jurisdiction of Canada. Because the activities in Canada here are beyond the

review of NEPA, the FEIS is not insufficient for its failure to consider or attempt to mitigate transboundary impacts." *Sierra Club v. Clinton*, 746 F. Supp. 2d 1025, 1045-46 (D. Minn. 2010).

Moreover, IEN is simply incorrect in demanding that State must discuss the impacts of crude extraction activities in the WCSB because those impacts are unrelated to Keystone XL. As the court in *Sierra Club v. Clinton* held, the "decision not to assess the trans-boundary impacts associated with the oil sands production is supported and consistent with [State's] NEPA obligations [because] . . . there is not a sufficient causal relationship between the AC Pipeline and the development of the oil sands." 746 F. Supp. 2d at 1045. The same is true here. Keystone XL is not the proximate cause of WCSB development. Oil sands development has occurred without Keystone XL, and it will continue to develop regardless of Keystone XL.

C. Cultural Resource Impacts and Environmental Justice

IEN failed to satisfy its burden of demonstrating that State's analysis of cultural resource impacts and environmental justice is inadequate. (IEN Br. at 39-42). Instead, IEN rehashes two contentions: (1) that areas potentially containing cultural resources have not been surveyed and (2) that mitigation measures are vague. Neither argument has merit.

IEN undermines its first argument with the very authority it cites. (IEN Br. at 40-41). As the Ninth Circuit held, an agency can satisfy NEPA's "hard look" requirement by imposing "avoidance and mitigation measures that account for any unpredictable impacts on cultural resources." *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 599-600 (9th Cir. 2010). While IEN reads *Te-Moak Tribe* as requiring all areas of a project be surveyed for cultural resources prior to completion of an EIS, that is not what the court held. Instead, the court upheld the agency's NEPA analysis despite the fact that the project proponent had not been able to survey all areas for cultural resources. *Id.* at 600-01.

The same situation often occurs in pipeline projects where access to the right-of-way can be dependent upon easement rights that often are acquired after the NEPA analysis has been completed. The court found that the avoidance and mitigation measures imposed as part of the project "provide for phased assessment of areas not yet surveyed for cultural resources at a Class III level, and permit the BLM to protect cultural resources when so required by law." *Id.* at 601. Accordingly, the fact that some areas of the project have not been surveyed for cultural resources does not render State's NEPA analysis inadequate because sufficient mitigation and avoidance measures are in place.

While IEN contends mitigation and avoidance measures are inadequate, it cannot articulate a reasoned basis for its conclusion. (IEN Br. at 41). TransCanada described the various features of the Programmatic Agreement (PA) in its opening brief, which provides detailed procedures for avoiding cultural resources or mitigating any potential impact. (TC Br. at 81). As stated in the FSEIS:

> Keystone is required to complete cultural resources surveys on all areas that would be potentially impacted by the proposed Project, make recommendations on National Register of Historic Places eligibility, provide information on potential effects of the proposed Project, and provide adequate mitigation in consultation with the Department, state and federal agencies, and Indian tribes. Construction would not be allowed to commence on any areas of the proposed Project until these stipulations are met.

(DOSKXLDMT5671). These specific measures in the PA are substantial and designed to ensure compliance with state and federal cultural resource protection laws and regulations. (DOSKXLDMT6553-54). They also ensure that all areas will be surveyed for cultural resources prior to any project activities in the area. *Id.* Thus, IEN's unsubstantiated challenge to these measures as ineffective fails.

D. Hydrologic Impacts

IEN's arguments regarding Keystone XL's potential impacts on water resources amount to mere flyspecking. As noted in TransCanada's opening brief, the FSEIS fully accounts for and discloses the potential range of impacts that a release could have on water resources. (TC Br. at 69-76). IEN seeks to fault State for not using a model that exactly replicates a release of dilbit into water.

This is flyspecking because the FSEIS does disclose that dilbit reacts differently in water than other forms of crude, is less biodegradable than other forms of crude, and is more difficult to clean up. (DOSKXLDMT6613-16). Moreover, State did not utilize the HSSM model to analyze the impacts of all constituents of a release in all conditions as IEN suggests. Instead, the "USEPA's Hydrocarbon Spill Screening Model (HSSM) was used to calculate the extent of *the dissolved phase* plume" in *groundwater* that could develop based on a surface release to soil (i.e. ground release). (DOSKXLDMT7117).[13] The model approximates how petroleum hydrocarbons move vertically through the unsaturated soil until they contact groundwater and then how the *soluble* hydrocarbons will dissolve into water and begin to move horizontally in the direction of groundwater. *Id*. IEN fails to comprehend that State did not rely on the HSSM model to predict potential impacts of a release to surface water.[14] IEN also fails to comprehend that the dissolved constituents from dilbit (e.g. benzene) are the proper constituents to model because they are the ones that are mobile and

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[13] "Dissolved-phase plume: The portion of a released material that becomes dissolved in groundwater and moves along the direction of groundwater flow." (DOSKXLDMT6741 n.6).

[14] The FSEIS discussed the potential impacts to surface waters from a release outside the context of the HSSM model and in a different section than the impacts to groundwater. (DOSKXLDMT7135-36, 7140-55).

affect water quality. (DOSKXLDMT7119). The non-soluble portions of dilbit are not of great concern during a ground release because they would have limited mobility in soil, and instead would likely adhere to soil particles and stay in place. (DOSKXLDMT7118 ("there are no readily available studies indicating that degradation of oil in soil would convert into a dense liquid, reach groundwater, and sink through an aquifer")). Ultimately, the HSSM model produced conservative results that allowed State to evaluate potential groundwater impacts from a ground release. (DOSKXLDMT12311 ("The model treats flow and transport as one-dimensional, which is a conservative approach as all the pollutant is assumed to move downward and contribute to aquifer contamination.")).

Contrary to IEN's representation, the FSEIS does address the potential impact of a release to alluvial aquifers – there is no "unstudied impact" or unavailable information necessary for a reasoned choice among alternatives. (IEN Br. at 33-34). A full analysis of the potential impact to alluvial aquifers, including the ones in Holt County, Nebraska, is contained in the FSEIS. (DOSKXLDMT6746-49). To analyze potential impacts, State used data from a release that occurred in a similar environment that "provides a reasonable physical model to establish expectations for the behavior of crude oil released in the NHPAQ system and alluvial aquifers." (DOSKXLDMT6746). The FSEIS notes that a large-scale release could affect groundwater quality up to 1,000 feet

downgradient of the source. (DOSKXLDMT5668). This satisfied NEPA's "hard look" requirement.

IEN fails to address TransCanada's argument that a review of the potential for the catastrophic failure of the Fort Peck dam would be conducted during the Clean Water Act Section 408 permission review. (TC Br. at 79). IEN's silence on this point undermines its argument. Regardless, the failure of the Fort Peck dam is not a reasonably foreseeable cause of a release into the Missouri River. (IEN Br. at 38). Though NEPA regulations initially required an agency to discuss a "worst-case scenario," the 1986 amendments removed that requirement and now obligate agencies to include a discussion of only "reasonably foreseeable significant adverse impacts." 40 C.F.R. § 1502.22(a)-(b); *see also* 51 Fed. Reg. 15,615, 15,620 (Apr. 25, 1986) ("the need for amendment is based upon the Council's perception that the 'worst case analysis' requirement is an unproductive and ineffective method of achieving those goals; one which can breed endless hypothesis and speculation"). Given the dam's size and structural integrity, it is unreasonable to assume that its failure is reasonably foreseeable. IEN's reference to repairs at the Oroville Dam does not mean that agencies now must analyze the possible failure of any dam within the proximity of a federal action.

Even if this dam, which is the eighth largest in the world, were to fail, the damage from floodwaters would be so severe that it would dwarf the impact of a

release from Keystone XL. The Fort Peck Dam is the largest hydraulically filled dam in the United States and supports the fifth largest reservoir in the United States.[15] It is 21,026 feet in length and 250 feet high. The reservoir created by the dam holds approximately 18,463,000 acre-feet of water.[16] Thus, if the Fort Peck Dam fails, the resulting deluge would decimate entire cities.[17]

VI. Mitigation Discussion Complies with NEPA

In their mitigation argument, IEN again seeks to transform NEPA from a procedural statute to a substantive one by claiming State was required to adopt IEN's preferred mitigation measures. (IEN Br. at 54). But NEPA requires only "a reasonably complete discussion of possible mitigation measures," *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989). It "does not require that these harms actually be mitigated," *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 727 (9th Cir. 2009).

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[15] http://www.nwo.usace.army.mil/Media/Fact-Sheets/Fact-Sheet-Article-View/Article/487625/fort-peck-project-statistics/ (last visited May 10, 2018).

[16] 1 acre-foot is approximately equivalent to 325,000 gallons.

[17] *See, e.g.*, https://www.willistonherald.com/news/when-the-dam-breaks-part/article_7098285e-5d43-5364-84c3-948a1668e2ef.html

As Defendants pointed out, the FSEIS contains a very detailed discussion of mitigation measures. (TC Br. at 82-83). NEPA did not obligate State to select the mitigation measures Plaintiffs desire, nor does NEPA require finalization of all mitigation measures prior to the issuance of a Presidential Permit. Accordingly, Plaintiffs' belief that mitigation measures are insufficient to mitigate theoretical releases is not germane to the issue of whether State reasonably discussed mitigation measures in the FSEIS.

VII. The Federal Defendants Did Not Violate the ESA

Section 7 of the ESA calls for formal consultation only when FWS concludes the proposed action is "likely to adversely affect" a listed species or critical habitat. *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 807 F.3d 1031, 1036 (9th Cir. 2015). Where the action agency makes a "may affect, *not likely* to adversely affect" finding (amounting to a finding that a "take" will not occur), informal consultation is sufficient if the FWS concurs in that determination. As TransCanada and Federal Defendants have demonstrated, State and FWS complied with the ESA in evaluating Keystone XL's potential effects on listed species and critical habitat. After conducting a multi-year informal consultation, State and FWS properly concluded that Keystone XL "may affect, but is not likely to adversely affect" the listed species that Plaintiffs identify.

Both Northern Plains and IEN convert this key term in the ESA into something it clearly is not: a guarantee that the proposed action will prevent *any* harm to the listed species. (*See, e.g.*, IEN Br. at 71 ("IEN demonstrated . . . that the Project *may impact* the threatened western prairie fringed orchid in Nebraska and South Dakota") (emphasis added)). Having created this false obligation, they assail the Federal Defendants for their failure to satisfy it. But that is neither factually nor legally accurate.

In fact, what the Biological Assessment (BA) and Biological Opinion (BiOp) concluded is that Keystone XL "may affect" but is "not likely to adversely affect" the species Plaintiffs identify. Legally, a "may affect, not likely to adversely affect" finding does not mean that the listed species will not be affected by the project, but that, based on the best available scientific information, project planning and conservation measures taken together are unlikely to result in an adverse effect on these species. Plaintiffs repeatedly interpret this fundamental provision of ESA Section 7 as requiring more than the law requires.

A. FWS and State Evaluated the Whooping Crane Using the Best Available Science

TransCanada and the Federal Defendants established that the failure to use sighting and telemetry data did not violate the command to use the best available science for the whooping crane. (TC Br. at 94-98; US Br. at 74-76). For one, the telemetry data is of limited use because it is subject to numerous limitations. (Doc.

136-4 at 16-20). Northern Plains' experts did not properly apply the data, taking into consideration its limitations. *Id.* Moreover, the telemetry data was not even available for use at the time FWS released the BiOp. (*Id*. at 16). As Federal Defendants explained, the data had been "collected" but "was protected from distribution or use." (US Br. at 76). Northern Plains asserts that because FWS Expert Rabbe did not describe in great detail the unavailability of the telemetry data, FWS "failed to adhere to the ESA's best available science mandate."[18] (NPP Br. at 73). This is pure speculation and does not amount to a finding that an agency acted arbitrarily and capriciously.

TransCanada and Federal Defendants also showed that the historical sighting data was not the best available data. (TC Br. at 94-98; US Br. at 74-79). Critically, Northern Plains is wrong to claim "it is evident from the administrative record that no such-site specific habitat analysis took place." (NPP Br. at 75). The administrative record shows that the agencies used a habitat-based analysis and considered almost 50 years of observational data that FWS had compiled. (FWS671-72; TC Br. at 96-97; Doc. 135-1 at 22). Indeed, the body of

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[18] Northern Plains further argues, for the first time, that FWS Expert Rabbe's report "does not comport with the rules of evidence." (NPP Br. at 82-83). Northern Plains cannot raise a new argument in its reply brief. *Eberle*, 901 F.2d at 818.

observational data collected over nearly 50 years is what went into defining the boundaries of the "whooping crane migration corridor." (Doc. 135-1 at 31; FWS245, FWS664 (citing CWS and USFWS 2005, p. 7 ("The migration corridor was determined by mapping confirmed sightings")).

In any event, Northern Plains' erroneous contention that the sighting and telemetry data is "unquestionably the best available science," is not for Northern Plains to decide. The agency's decision as to what constitutes the best available science "is itself a scientific determination deserving of deference." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 995 (9th Cir. 2014) (citation omitted).

Even assuming the conflicting expert reports are properly before this Court, "*an agency must have discretion to rely on the reasonable opinions of its own qualified experts* even if, as an original matter, a court might find contrary views more persuasive." *Tri-Valley CAREs*, 671 F.3d at 1124 (emphasis in original) (citation omitted). Although Northern Plains disagrees with how FWS constructed the BiOp, it has provided no evidence to suggest that FWS experts were unreasonable in their opinions and determination of what constitutes the best available science when the BiOp was released.

Even if this Court finds that FWS erred releasing the BiOp without the sighting and telemetry data, this concern is no longer significant. "As part of the

reinitiated consultation process, the State Department requested from USFWS any new information on potentially affected species along the MAR" which includes the telemetry data on the whooping crane that became available in the past year. (Doc. 176 at 2-3). Now that the telemetry data is available, State plans to consider it in the consultation process going forward. The MAR has, in fact, moved the Keystone XL route even further from the whooping crane migration corridor, removing 84.6 miles of the pipeline route from the whooping crane migration corridor. (Neb. PSC Order at 50 & n.305). As such, the whooping crane claims are now moot. (US Br. at 79-81).

B. IEN's Whooping Crane Allegations Ignore Clear Record Evidence and Consist of Misstatements of the Record

With respect to whooping cranes, the focal point of IEN's argument is that the BA and FSEIS "admit" that power lines "pose a significant collision hazard to birds." (IEN Br. at 60-61). This is a complete misstatement of the record. The record shows that power lines are a *potential* collision hazard for whooping cranes (TC Br. at 88). Indeed, this is why the agencies undertook a robust review of the new power lines and proposed conservation measures. *See, e.g.*, TC Br. at 88-91. The expert literature does not find power lines to be a "significant" collision hazard, which explains why IEN cites to no real support for its claim.

As explained above, a finding of "may affect, not likely to adversely affect" acknowledges just that – that the project *may affect* a listed species or critical

habitat. *See supra* pp. 41-43. In the agency's scientific judgment, based on years of evaluation, State concluded that the "may affect" determination on whooping cranes was not likely to adversely affect the species. State and FWS came to this conclusion based on the best available science, which acknowledged that power lines pose a potential collision hazard for birds.

Moreover, IEN continues to assert that Bird Flight Diverters (BFDs) are ineffectual. (IEN Br. at 60-62). As TransCanada showed, BFDs contribute to reducing collisions with power lines. (TC Br. at 90-93). But because it is known that BFDs are not 100 percent effective, the BA also recognized "Keystone's commitment to follow recommended conservation measures," "power providers [commitment to] consult with [FWS] regarding ways to minimize or mitigate impacts to the whooping crane and other [listed] species," and power providers' commitment to "follow recommended avoidance and conservation measures." (FWS674). The ESA provides no basis for IEN to demand more.

C. Conservation Measures and Agreements with Power Providers Are Adequate and Enforceable

Plaintiffs are wrong to assert: (1) that the agencies improperly deferred analyses of power lines (*see, e.g.*, NPP Br. at 87-90; IEN Br. at 68), and (2) that power providers' commitments regarding conservation measures and consultation are unenforceable. (*see, e.g.*, NPP Br. at 84-86; IEN Br. at 67-69). As the record shows, the agencies considered power lines as connected and interrelated actions to

the project. (FWS2085; Doc. 135-1 at 21-22). Moreover, the power providers wrote letters of intent, committing to consult with FWS regarding conservation measures. (DOSKXLDMT6909; FWS747-826). For example, West Central Electric Cooperative, Inc. stated: "we agree that we will consult with [FWS] on mitigative and protective measures that can be incorporated into the design of the power line facilities in order to minimize impacts to the Whooping crane, interior least tern, and pipeline plover that may occur in certain specific areas along the power lines corridors." (FWS771). Each of the power providers must obtain the requisite federal, state, and local approvals to construct new power lines related to the Project, and they, too, remain subject to the ESA. (TC Br. at 93; FWS671).

Northern Plains dismisses power providers' commitments to consult with FWS, asserting it is "nothing more than evasion and subterfuge." (NPP Br. at 88-89). Northern Plains further claims that "no site-specific consultations with the power providers have taken place for this project," and that Defendants are "disingenuous." *Id.* But Northern Plains misses the point. Consultations with power providers must occur before construction commences on the transmission lines; without power, the pipeline cannot operate. As TransCanada's and FWS' experts showed, such consultations will involve the conservation and mitigation measures discussed in the BA, which track FWS' Region 6 Guidance. (TC Br. at 90-94; US Br. at 81-85). Whether such consultations have already begun, or will

begin within the next several months, they will certainly occur prior to construction.

Furthermore, Northern Plains' statement that power lines are not likely to be buried is completely unfounded. As TransCanada showed, it is possible that any of the transmission lines could be buried, (TC Br. at 93), but it is the duty of each individual power provider to make these determinations as they consult and obtain the requisite government approvals in order to assure their compliance with the ESA. (FWS671). As a result, claims of harm from power lines remain wholly speculative until the power providers decide exact location of each line, how it is constructed, and other critical details are resolved.

What is more, there is no support for Northern Plains' wholly unfounded assertion that FWS would not enforce conservation measures against power providers. As TransCanada showed, the power providers will be liable for any unlawful take under Section 9 of the ESA if there is any injury or death to a listed species. (TC Br. at 93-94). The Plaintiffs fail to demonstrate what additional ESA enforcement mechanism they envision applying to power providers. Nor could they if they wanted to. "[T]he substantive and procedural provisions of the ESA are *the* means determined by Congress to ensure adequate protection [of listed species]." *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1114 (9th Cir. 2012) (citation omitted). Moreover, the Ninth Circuit has

clearly found where conservation measures are "included as part of the final [BA]" or BiOp, such measures are enforceable under the ESA. *Id.* at 1110.

D. ESA Section 7(a)(2) Does Not Apply Extraterritorially

As Federal Defendants explained, the ESA's jurisdictional reach does not extend beyond the United States' borders. (US Br. at 92-95). FWS determined that the "action area" for the Keystone XL Project "extends generally from the border of the United States with Canada to Steele City, Nebraska." (FWS2085). There is no legal support for a claim that would expand the scope of ESA Section 7(a)(2) into a foreign country. Indeed, case law suggests the opposite. "Congress . . . obviously thought about endangered species abroad and devised specific sections of the ESA to protect them, [but] the absence of any explicit statement that the consultation requirement is applicable to agency actions in foreign countries suggests that Congress did not intend that Section 7(a)(2) apply extraterritorially." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 588 (1992) (Stevens, J., concurring). This is especially so when, as here, the foreign nation has conducted its own analysis of potential impacts within its borders. If Plaintiffs take issue with the environmental review conducted in Canada by Canadian agencies, the United States District Court is not the appropriate venue in which to raise their claims.

IEN asserts that the agencies should have considered Canadian impacts to the whooping crane. (IEN Br. at 62-63). The ESA does not require this for two

reasons. First, as just demonstrated, the ESA does not apply to Canada. Second, IEN's argument suffers from attenuated causation issues. This defect invalidates many of its ESA claims as demonstrated below. Here, IEN is asking this court to invalidate FWS and State's ESA compliance because the construction of the Keystone XL Pipeline might affect oil sands development in Canada, which in turn might affect the whooping crane, and that effect on the whooping crane – despite the robust conservation measures – might result in harm to the species that would be significant enough to push the determination into a "likely to adversely affect" determination. This chain of hypothetical causality and hypothetical harm to the species is far too attenuated to be recognized under the ESA, even if these were domestic impacts. Lastly, IEN's argument still fails because it is based on an alleged increase in oil sands development that will exist whether or not the Keystone XL Pipeline is built. *See supra* pp. 14-16.

E. Northern Plains Errs In Asserting the Agencies Relied on "Outdated Guidance"

Contrary to Northern Plains' assertion, Federal Defendants and TransCanada did not "fail entirely to explain" State's reliance on both the 1996 and 2006 Avian Power Line Interaction Committee, Suggested Practices for Avian Protection on Power Lines (APLIC) report. (NPP Br. at 90). Federal Defendants and TransCanada demonstrated that State not only considered the 2006 guidelines, but also considered the 1996 guidelines and several other studies. (TC Br. at 98-100;

US Br. at 85-88). Although Northern Plains may not agree with it, State's decision to weigh certain data more heavily than other data "is itself a scientific determination deserving of deference." *San Luis & Delta-Mendota Water Auth.*, 776 F.3d at 995 (citation omitted).

F. IEN's Other ESA Claims Are Attenuated and Lack Legal Support

IEN's brief contains a series of attenuated claims of harm to species and misstatements of the record that render their claims inapposite.

1. IEN continues to mischaracterize the record with respect to potential pipeline releases as they may affect listed species, including the endangered pallid sturgeon

IEN falsely asserts that the Federal Agencies' evaluation of Keystone XL's potential releases and impacts on listed species is "devoid of any factual basis." (IEN Br. at 64-65). The record clearly shows otherwise. Three separate FSEIS appendices are devoted to pipeline incident analysis, risk assessment, and oil spill modeling, and two appendices address potential releases and pipeline safety, and spills ("Spills, Prevention, Control, and Countermeasure Plan and Emergency Response Plan"). FSEIS, Appendices B, I, K, P, T. IEN acknowledged the existence of Appendix K, but cherry-picked one figure from the data to incorrectly calculate that the Project would yield an average 4.2 incidents per year. (IEN Br. at 64). IEN used historical incident data from just one year, 2012-2013, to project this number. (DOSKXLDMT11334). Moreover, IEN's claims that Keystone XL

"was expected to spill" are entirely misleading. The FSEIS includes worst case pipeline release scenarios based on historical industry data. (DOSKXLDMT7643).

Not only does IEN misuse the oil spill modeling data, but they claim operational impacts were not considered. As TransCanada explained, impacts from all stages of the Project were adequately analyzed. (TC Br. at 106). Moreover, the record directly contradicts IEN's assertion, as the FSEIS, BA, and BiOp address conservation measures and best management practices referenced for both construction and operation. (TC Br. at 25). A significant release is unlikely (*see*, TC Br. at 70-73), and these conservation measures and best management practices are intended to "minimize the potential for releases during [both] construction and operation." (Doc. 135-1 at 37). In the event of a release, TransCanada has "incorporate[ed] additional mitigation measures in design, construction, and operation" to reduce impacts to listed species. (DOSKXLDMT2506, 6895-907; TC Br. at 70-73).

Furthermore, the BiOp discusses "[g]eneral conservation measures to prevent potential direct or indirect impacts" to listed species, including the pallid sturgeon. *Id.* Lastly, Keystone XL will have in place an Emergency Response Plan to deal with any releases, FSEIS, Appendix I, and any releases that may affect a listed species would be dealt with under the ESA's informal emergency consultations. 50 C.F.R. § 402.05. Given all of the above, IEN clearly errs by

asserting that the agencies did not sufficiently address the potential effect of oil spills on listed species, such as the whooping crane and pallid sturgeon.

2. There is no legal basis for IEN's claims regarding the Black-Footed Ferret, the Rufa Red Knot, the Northern Long-Eared Bat (NLEB), the Western Fringed Prairie Orchid (WFPO) and the Northern Swift Fox.

a. Black-Footed Ferret

IEN's claims regarding the black-footed ferret have no merit. As TransCanada explained, IEN's attempt to focus on prairie dogs fails because prairie dog habitat is not determinative of the potential impact to the black-footed ferret. (TC Br. at 100-101). The BA and FSEIS evaluated this issue and found no impacts to the ferret. *Id.* Even so, TransCanada has committed to conservation measures regarding prairie dog towns. *Id.* As such, IEN's black-footed ferret claims must fail.

b. Rufa Red Knot

IEN continues to make misleading statements about the rufa red knot, which was not listed until December 2014. As such, State and FWS lawfully did not address the species in the BA and BiOp. Once the species was listed in 2015, State and FWS engaged in a new Section 7 consultation for the rufa red knot. (Doc. 135-1 at 45). This consultation resulted in a "not likely to adversely affect" finding, with which the FWS concurred. (FWS2497-510; FWS2515-16).

IEN goes on to belittle the conservation measures State evaluated as part of the re-initiated consultation, ignoring the reinitiated consultation and claiming that Federal Defendants' only response was that "conservation measures 'implemented for other species . . . would equally mitigate any construction-related impacts to potential red knot migrants." (IEN Br. at 70). State and FWS did much more than simply make a cursory conclusion, as the Federal Defendants and TransCanada showed in their cross-motions for summary judgment. (TC Br. at 104-05; US Br. at 98-99). As FWS witness Hines explained, State determined both general and specific conservation measures would satisfactorily avoid impacts to the rufa red knot, but these conservation measures were already being implemented for other species. (Doc. 136-3 at 21).

c. NLEB

IEN claims that FWS' concurrence in State's "may affect, not likely to adversely affect" finding on the NLEB is "meaningless" and based on "inadequate information." (IEN Br. at 71). In making this mistaken assertion, IEN ignores the ample record evidence showing that State and FWS adequately evaluated the potential impacts to the NLEB. As TransCanada and the Federal Defendants have shown, the NLEB was not listed until April 2015. (TC Br. at 103-05; Doc. 135-1 at 47; 136-3 at 16-18). Following its listing, State and FWS initiated a new Section 7 consultation. *Id.* The reinitiation of consultation, which resulted in a State

Department "may affect, not likely to adversely affect determination," together with a March 2017 FWS concurrence letter, satisfied ESA Section 7. (Doc. 136-3 at 16-17; DOSKXLDMT2114-2123 (attaching NLEB Habitat Assessment for Keystone XL); DOSKXLDMT2138-2140).

The NLAA determination was based on "a commitment by [State] to implement two conservation measures." (Doc. 136-3 at 17). IEN mistakenly attributed State's commitment to these conservation measures to a mere claim by TransCanada. (IEN Br. at 71) ("*TransCanada's additional claim* that State 'committed' to implement two conservation measures when the species was listed does not excuse its failure to analyze the Project's potential impacts on the species in a BA") (emphasis added). Not only did State commit to these two conservation measures, which include avoiding tree clearing (1) during June and July in proximity of roosting areas, and (2) within 0.25 miles of any known hibernacula, but they "are consistent with the 4(d) rule for the [NLEB]."[19] (Doc. 136-3 at 17). This clearly demonstrates State and FWS' compliance with the ESA with regard to the NLEB.

[19] FWS "manages the NLEB under the '4(d)' rule of the ESA which specifically defines 'take' prohibitions and provides an optional framework for threatened species, including identification of proactive conservation measures thereby streamlining consultation process." (Doc. 135-1 at 46-47).

d. WFPO

When addressing the Western Fringed Prairie Orchid (WFPO), IEN, yet again, has layered hypothetical on top of hypothetical, claiming that several attenuated factors might lead to "possible harm." (IEN Br. at 72). As TransCanada has shown repeatedly, this is not a legitimate ESA concern. The attenuation is apparent from IEN's own statements.

For example, IEN claims that the hawk moth – which pollinates the WFPO but is not a listed species – "could be harmed" by herbicides that might be used in maintaining the Project right-of-way. (IEN Br. at 72). The likelihood of harm to the WFPO is low because the likelihood of harm to the hawk moth is low. This is because there is little likelihood that herbicides used to control noxious weed spreading will affect the moth. Herbicides will be applied by spot spraying, so no spraying will occur where the WFPO is identified. (Doc. 136-3 at 20). These conservation measures, in turn, make it even less likely that pollination of the WFPO is affected.

e. Northern Swift Fox

IEN continues to advance its claim that the agencies should have considered the northern swift fox, even while conceding that "it was never actually 'listed' pursuant to the ESA." (IEN Br. at 73 n.10). The ESA does not require agencies to consider a species that is not even listed in the United States as threatened or

endangered. (TC Br. at 102). The fact that the northern swift fox is listed in Canada is of no legal significance. In any event, the northern swift fox was addressed – as a Bureau of Land Management-sensitive species and Montana state-listed species. *Id.*

CONCLUSION

For the reasons stated above, TransCanada requests that the Court deny IEN and North Plains Plaintiffs' motions for summary judgment and grant TransCanada's and Federal Defendants' motions for summary judgment.

Respectfully submitted this 11th day of May, 2018,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), I certify that this *Defendant-Intervenors' Reply Brief in Support of Motion for Summary Judgment and in Opposition to Plaintiffs' Motions For Summary Judgment* contains 12,568 words, excluding caption and certificates of service and compliance, printed in at least 14 points and is double spaced, including for footnotes and indented quotations.

/s/ Jeffery J. Oven

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2018, a copy of the foregoing motion was served on all counsel of record via the Court's CM/ECF system.

By /s/ Jeffery J. Oven