

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA  
CIVIL NO. 09-2622 (DWF / RLE)

SIERRA CLUB, INC., MINNESOTA )  
CENTER FOR ENVIRONMENTAL )  
ADVOCACY, NATIONAL )  
WILDLIFE FEDERATION, and )  
INDIGENOUS ENVIRONMENTAL )  
NETWORK, )

Plaintiffs, )

v. )

HILLARY CLINTON, in her official )  
capacity as Secretary of State, )  
JAMES STEINBERG, in his official )  
capacity as Deputy Secretary of State, )  
UNITED STATES DEPARTMENT )  
OF STATE, Lieutenant General )  
ROBERT L. VAN ANTWERP, in his )  
official capacity as U.S. Army Chief )  
of Engineers and Commanding )  
General of the U.S. Army Corps of )  
Engineers, Colonel JON L. )  
CHRISTENSEN, in his official )  
capacity as District Engineer and )  
Commander of the U.S. Army Corps )  
of Engineers, the UNITED STATES )  
ARMY CORPS OF ENGINEERS, )  
TOM TIDWELL, in his official )  
capacity as Chief of the United States )  
Forest Service, ROB HARPER, in his )  
official capacity as Forest Supervisor )  
for the Chippewa National Forest, and )  
the UNITED STATES FOREST )  
SERVICE, )

Defendants, )

and )

ENBRIDGE ENERGY, LIMITED )  
PARTNERSHIP, )

Intervenor. )

**DEFENDANTS' OPPOSITION TO  
PLAINTIFFS' MOTION FOR ENTRY  
OF FINAL JUDGMENT ON  
PLAINTIFFS' SIXTH CLAIM FOR  
RELIEF**

Hon. Donovan W. Frank  
U.S. District Judge



## **I. INTRODUCTION**

Defendants United States Department of State (“State Department”), United States Army Corps of Engineers (“Corps”), United States Forest Service (“Forest Service”) *et al.* (collectively “Defendants”) hereby submit this opposition to Plaintiffs’ Motion for Entry of Judgment on Plaintiffs’ Sixth Claim for Relief (Docket No. 191) and Memorandum in Support (“Plf. Mem.”) (Docket No. 193). Plaintiffs seek an entry of judgment on their claim alleging that the State Department’s issuance of a Presidential Permit to Enbridge Energy, Limited Partnership (“Enbridge”), allowing Enbridge to construct and maintain pipeline facilities at the U.S. - Canada border, was unconstitutional. If Plaintiffs are granted the relief that they seek, the remaining National Environmental Policy Act (“NEPA”) claims would proceed to summary judgment briefing and the constitutional claim would be immediately appealable. The Court should deny the motion because it likely will lead to piecemeal appeals and may also result in having similar issues argued twice in the court of appeals. An appeal of the constitutional issue may also be obviated by developments in the district court, thus rendering an appeal of that claim unnecessary. Plaintiffs also have not shown that they will suffer any hardship or injustice warranting an immediate appeal. Accordingly, the Court should deny Plaintiffs’ motion.

## **II. BACKGROUND**

On September 3, 2009, Plaintiffs filed a Complaint challenging the issuance of the Presidential Permit and the issuance by the Corps of Clean Water Act and Rivers and Harbor Act permits. Complaint ¶¶ 76-113 & Prayer for Relief (Docket No. 1). On the same date, Plaintiffs filed a motion requesting a temporary restraining order. The Northern District of California denied Plaintiffs’ Motion for a TRO (Docket No. 35), and subsequently granted Defendants’ Motion to Transfer venue to the District of Minnesota (Docket No. 54).

On October 1, 2009, Plaintiffs filed a First Amended Complaint, adding the Forest Service as a Defendant (Docket No. 57). Plaintiffs’ First Amended Complaint contains six claims for relief. Plaintiffs first four claims are brought against the State Department, the Corps, and the Forest Service alleging violations of NEPA for failing to: (1) evaluate a full

range of actions, (2) adequately analyze indirect and cumulative impacts, (3) adequately evaluate risks, impacts, and mitigation measures associated with spills and operational leaks, and (4) adequately analyze the no action alternative. See First Am. Compl. ¶¶ 77-104. Plaintiffs' final two claims are pled solely against the State Department and allege: (5) violation of NEPA for failure to adequately evaluate the environmental impacts of the Southern Lights LSr Pipeline (a separate pipeline) and (6) violation of the United States Constitution by issuing the Presidential Permit for the Alberta Clipper Pipeline.

On February 3, 2010, the Court issued an order denying Plaintiffs' Motion for a Preliminary Injunction. (Docket No. 183). The Court found that Plaintiffs were not likely to succeed on their NEPA claims or the constitutional claim. See id. at 10-39. On February 24, 2010, the Court issued an order granting in part and denying in part Defendants' and Intervenor's Motions to Dismiss. (Docket No. 185). The Court found that it had jurisdiction over the NEPA claims brought pursuant to the Administrative Procedure Act ("APA") and that Plaintiffs had stated valid NEPA claims and therefore denied the Motions to Dismiss as to the First through Fourth Claims for Relief. See id. at 11-22. The Court granted Defendant's Motion to Dismiss with respect to the Fifth Claim for Relief, which the Court dismissed as moot, and as to the Sixth Claim for Relief, which the Court dismissed for failure to state a claim. See id. at 22-24.

On March 19, 2010, Plaintiffs filed the motion at issue requesting that the Court enter a final judgment on its dismissal of the Sixth Claim for Relief so that Plaintiffs may seek an immediate appeal of that claim. (Docket No. 193).

### **III. LEGAL STANDARD**

Under Rule 54(b), a court may direct final entry of judgment as to one or more, but not all, claims in the lawsuit if it determines that "there is no just reason for delay." Fed. R. Civ. P. 54(b); see also McAdams v. McCord, 533 F.3d 924, 928 (8th Cir. 2008). Motions to finalize judgment under Rule 54(b) are "generally disfavored" and only the "special case" warrants certification under the rule. Clark v. Baka, 593 F.3d 712, 714-15 (8th Cir. 2010) (citations omitted). Certification under rule 54(b) should not be granted "as a routine matter

or as an accommodation to counsel.” Taco John’s of Huron, Inc. v. Bix Produce Co., LLC, 569 F.3d 401, 402 (8th Cir. 2009); see also Guerrero v. J.W. Hutton, Inc., 458 F.3d 830, 833 (8th Cir. 2006). “In determining that there is no just reason for delay, the district court must consider both the equities of the situation and judicial administrative interests, particularly the interest in preventing piecemeal appeals.” McAdams, 533 F.3d at 928 (quoting Interstate Power Co. v. Kan. City Power & Light Co., 992 F.2d 804, 807 (8th Cir. 1993)); see also Huggins v. FedEx Ground Package Sys., Inc., 566 F.3d 771, 774 (8th Cir. 2009). “Certification should be granted only if there exists some danger of hardship or injustice through delay which would be alleviated by immediate appeal.” McAdams, 533 F.3d at 928 (quoting Hayden v. McDonald, 719 F.2d 266, 268 (8th Cir. 1983)).

#### **IV. ARGUMENT**

The Court should deny Plaintiffs’ request to certify the constitutional claim for immediate appeal under Rule 54(b). Although the constitutional claim presents a separate legal theory from Plaintiffs’ NEPA claims, the claims are interrelated because the action challenged and the relief sought under both legal theories, *i.e.*, vacatur of the Presidential Permit for the Alberta Clipper Pipeline, are the same. In addition, the Court’s resolution of Plaintiffs’ NEPA claims could affect the need for appellate review of the constitutional claim and likely would result in piecemeal appeals. Further, given that the pipeline has already been constructed, Plaintiffs have not demonstrated that they will suffer any hardship or injustice while the pipeline is in operation over the next few months. Accordingly, Plaintiffs have not shown that there is “no just reason for delay” of their appeal, and the Court should deny the motion.

##### **A. Judicial Administrative Interests Weigh Against Granting Final Judgment on the Constitutional Claim**

Judicial administrative interests weigh against granting final judgment on the constitutional claim rendering it immediately appealable. “Not all final judgments on individual claims should be immediately appealable, even if they are in some sense separable from the remaining unresolved claims.” Curtiss-Wright-Corp. v. Gen. Electric Corp., 446

U.S. 1, 8 (1980). In determining whether a final judgment should be entered on a claim, the district court should exercise its discretion “in the interest of sound judicial administration.” Id. (quoting Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 437 (1956)).

In considering whether judicial administrative interests support the entry of final judgment on a claim under Rule 54(b), a district court should consider:

- (1) [T]he relationship between the adjudicated and unadjudicated claims;
- (2) the possibility that the need for review might or might not be mooted by future developments in the case;
- (3) the possibility that the reviewing court might be obliged to consider the same issue a second time;
- (4) the presence or absence of a claim or counterclaim which could result in setoff against the judgment sought to be made final;
- (5) miscellaneous factors, such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expenses, and the like.

Hayden v. McDonald, 719 F.2d 266, 269 (8th Cir. 1983) (quoting Allis-Chalmers Corp. v. Phila. Elec. Corp., 521 F.2d 360, 364 (3d Cir. 1975)); see also Nw. Airlines, Inc. v. Astraea Aviation Servs., Inc., 930 F. Supp. 1317, 1326 (D. Minn. 1996).

Upon consideration the factors applicable to this case and, in particular, the “interest in preventing piecemeal appeals,” the Court should deny the request for certification. McAdams, 533 F.3d at 928.

### **1. Interrelatedness of Claims**

Plaintiffs’ constitutional claim and their NEPA claims are interrelated in that both challenge the State Department’s issuance of a Presidential Permit for the Alberta Clipper Pipeline. Indeed, the Record of Decision finalizing the NEPA process and the National Interest Determination underlying the issuance of the Presidential Permit are one document. See Record of Decision/National Interest Determination (Docket No. 83-1). Thus, the constitutional claim and the NEPA claims arise out of the “same nucleus of operative fact.” Reyher v. Champion Int’l Corp., 975 F.2d 483, 487 (8th Cir. 1992) (citation omitted); see also Nw. Airlines, 930 F. Supp. At 1324 (“The Eighth Circuit appears to use a ‘same nucleus of operative fact’ definition of a claim.”).

Not only are the claims factually related, Plaintiffs’ arguments have overlapped as well. For example, in arguing that the issuance of the Presidential Permit was

unconstitutional, Plaintiffs asserted that, because the State Department acted as the lead agency for the Alberta Clipper Pipeline Environmental Impact Statement (“EIS”), the State Department’s Presidential Permit “regulates the entire pipeline within the United States.” Plf. Opp. to Mot. To Dismiss at 47 (Docket No. 150). Defendants rebutted those arguments by pointing out the Presidential Permit only regulates the border crossing and, by its own terms, only applies up to the first mainline cutoff valve in the United States. See Def. Reply in Supp. of Mot. to Dismiss at 19 (Docket No. 157). Thus, resolution of the constitutional claim will necessarily involve consideration of the EIS and the State Department’s role in the NEPA process. Therefore, Plaintiffs’ arguments in support of their constitutional claim and NEPA claims interrelate and are not easily separable.

In addition, the claims are related with respect to the relief sought. If Plaintiffs succeed on either the NEPA claims or constitutional claims, they request that the Court “[v]acate the Presidential permit for the Alberta Clipper.” First Am. Compl. at Prayer for Relief ¶ E. As explained by the Eighth Circuit, “a claimant who presents a number of alternative legal theories, but whose recovery is limited to only one of them, has only a single claim for relief for purposes of Rule 54(b).” Page v. Preisser, 585 F.2d 336, 339 (8th Cir. 1978) (citing Edney v. Fidelity & Guaranty Life Ins. Co., 348 F.2d 136, 138 (8th Cir. 1965)).<sup>1/</sup> Where a court dismisses one of multiple legal theories seeking the same relief, the court should deny a request to certify the dismissed legal theory for appeal because subsequent developments in the trial court could “render unnecessary an appellate determination on the dismissal.” Page, 585 F.2d at 339 (citation omitted). The Court should deny Plaintiffs’ request in this case because their alternative theory for vacating the Presidential Permit, namely, their NEPA claims, will be considered by the Court on summary judgment and may obviate the need for Plaintiffs’ appeal.

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<sup>1/</sup> See also Gen. Acquisition, Inc. v. GenCorp, Inc., 23 F.3d 1022, 1029 (6th Cir. 1994) (explaining that under the “recoveries test” adopted by some circuits, only one claim exists for purposes of Rule 54(b) if “a claimant presents a number of legal theories, but will be permitted to recover only on one of them.” (citing Wright, Miller & Kane § 2657)).

Moreover, Plaintiffs NEPA claims and their constitutional claim are interlocking components of one overall litigation strategy intended to overturn the Presidential Permit. With respect to their NEPA claims, Plaintiffs have argued that the State Department's issuance of the Presidential Permit to Enbridge was a typical agency action that could be reviewed under the APA for compliance with NEPA. See, e.g., First Am. Compl. ¶ 81. In response, Defendants argued that, in fact, the issuance of the Presidential Permit was not agency action, but presidential action, and therefore could not be reviewed under the APA. See Def. Mem. in Supp. of Mot. to Dismiss First Am. Compl. at 8-18 ("Def. Mem.") (Docket No. 74). The Court found that the State Department's Final Environmental Impact Statement was a final agency action that could be reviewed under the APA and denied the Motion to Dismiss as to Count's One through Four. February 24, 2010 Order at 14 (Docket No. 185).

Plaintiffs' Sixth Claim for relief takes a different tack and is based on a different legal theory. In that claim, Plaintiffs apparently accept that the issuance of the Presidential Permit was based upon the President's constitutional authority, but they allege that the issuance of the permit was unconstitutional because the President lacked the requisite constitutional authority to issue the permit. See First Am. Compl. ¶ 113. Defendants did not contest the reviewability of the constitutional claim but argued that it should be dismissed for failure to state a claim because the President's authority to issue permits for border crossings was well-established. See Def. Mem. at 19-20. The Court agreed and dismissed the Sixth Claim for Relief. See February 24, 2010 Order at 25. In doing so, the Court found (or at least assumed) that the State Department acted pursuant to the President's inherent constitutional authority and not pursuant to statutory authority. See id.

In short, the constitutional claim does not exist in a vacuum. Rather, it buttresses Plaintiffs' other claims and provides an alternative legal ground for both judicial review and potential legal relief. Thus, if the constitutional issue were appealed separately, the parties likely would be required to brief a variety of other issues that were argued in the district court, not just the constitutional issue. On review, it would also make sense for the court of appeals to first decide the threshold issue of whether agency action or presidential action was

at issue because that would shape its determination of all of the legal issues in the case. Thus, the claims are interrelated and the Court should deny the request for certification.

## **2. Potential for Mootness of the Partial Appeal**

The potential that an appeal of the constitutional claim may become moot also weighs against certification of the Sixth Claim for Relief. As alluded to above, the case is currently proceeding to summary judgment briefing in the district court. A schedule has not been finalized, but the parties anticipate that they will complete briefing by the end of July and have the matter heard in August. Contrary to Plaintiffs' assertions, if Plaintiffs succeed on their remaining NEPA claims in the district court, the appeal of the constitutional claim likely would become moot, depending up the remedy awarded by the Court. See Plf. Mem. at 11-12. If the Court vacated the Presidential Permit, the case would be moot because the subject of the appeal would no longer exist and the court of appeals only considers live disputes. See Roubideaux v. N.D. Dept. of Corr. and Rehab., 570 F.3d 966 (8th Cir. 2009) ("A claim is properly dismissed as moot if it has lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract questions of law.")<sup>2</sup> On the other hand, if the Court decided the merits of the NEPA claims before the appeal of the constitutional claim was decided and awarded some other remedy short of vacatur, the appeal might not be moot. But the potential for different remedies based on the ultimate resolution of the NEPA and constitutional claims is all the more reason to have the issues decided together and not allow a piecemeal appeal.

Further, if Plaintiffs succeed on the NEPA claims in the district court and the Court imposes a remedy, either Defendants or Intervenor may appeal the district court's ruling. At that point, Plaintiffs could seek to file a cross-appeal on the constitutional claim. If Plaintiffs

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<sup>2</sup> Nor would the Presidential Permit fall into the mootness exception for capable of repetition but evading review because, if a new permit were to issue, it could be subject to a separate legal challenge. See Spencer v. Kemna, 523 U.S. 1, 17 (1998) (The "capable of repetition" exception to mootness only applies if "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.") (internal quotations and citation omitted).

do not succeed on the merits of their NEPA claims and the Court grants summary judgment for Defendants, Plaintiffs could then file an appeal and could raise both the NEPA issues and the constitutional issues on appeal. Thus, regardless of whether they prevail on the NEPA claims in the district court, Plaintiffs likely will have the opportunity to have their constitutional claim heard by the court of appeals.

### **3. Potential for Court to Consider the Same Issues a Second Time**

If certification of the constitutional claim is granted, there exists the possibility that the court of appeals will have to address legal and factual issues a second time if the NEPA claims are appealed. As discussed above, the State Department's role in the preparation of the EIS and its alleged "regulation" of the Alberta Clipper Pipeline are likely to be issues raised during briefing and argument of the constitutional claim. The issue of whether the issuance of the Presidential Permit is presidential action or agency action also is likely to arise in the context of an appeal of the constitutional claim and an appeal of the NEPA claims. The court of appeals may also have to consider what, if any, remedy is appropriate in the context of the NEPA claims or the constitutional claims. Accordingly, even though the constitutional claim has a different legal basis, some of the factual and legal issues underlying the NEPA and constitutional claims are the same and may have to be addressed in an appeal of the constitutional claim and in an appeal of the NEPA claim.

Furthermore, regardless of what issues are considered in an initial appeal and a potential subsequent appeal, it is likely that allowing appeal of the constitutional claim now will result in piecemeal appeals. In the interest of judicial economy, such piecemeal appeals are to be avoided. *See McAdams*, 533 F.3d at 928 ("Judicial economy will be best preserved by delaying appeal until all issues can be confronted by this court in a unified package. Such a course is particularly desirable where . . . the adjudicated and pending claims are closely related and stem from the same factual allegations.") (quoting *Hayden*, 719 F.2d at 270).<sup>37</sup>

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<sup>37</sup> The out of circuit cases cited by Plaintiffs (*see* Plf. Mem. at 7) are distinguishable because the claims on which final judgment was entered were factually and legally distinct from the pending issues. *See Explosives Supply Co. v. Columbia Nitrogen Corp.*,

#### 4. Other Factors

A number of other factors weigh against certification of an appeal of the constitutional claim. See Hayden, 719 F.2d at 269 (A court may consider “miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expenses, and the like.”).

*First*, in general, constitutional issues are to be avoided if possible. See Spector Motor Serv. v. McLaughlin, 323 U.S. 101, 105 (1944) (“If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.”). As discussed above, resolution of the parties’ summary judgment motion may obviate the need for appeal. Or, if the case is appealed and both the NEPA and constitutional issues are heard by the court of appeals, it may not be necessary for the court of appeals to decide the constitutional claim. Given that constitutional issues are generally to be avoided if possible, the Court should not certify the constitutional claim for immediate review. Thus, Plaintiffs are incorrect when they argue that the Court should be more inclined to certify a constitutional claim for review under Rule 54(b). See Plf. Mem. at 8-9.<sup>4</sup>

*Second*, the government does not view the issue of whether the President has the authority to permit or deny a border crossing as a close question. As the Court noted in its

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691 F.2d 486, 486-87 (11th Cir. 1982) (“[T]he opinion of the lower court clearly shows the separability of the claims such that neither the same issues nor facts would be before the reviewing court more than once.”); Ginnett v. Computer Task Group, Inc., 962 F.2d 1085, 1096-97 (2d Cir. 1992) (finding that a severance pay issue involved separate factual and legal issues and therefore could be appealed separately from claims of wrongful termination and breach of contract).

<sup>4</sup> In two of the cases cited by Plaintiffs, the entry of final judgment under Rule 54(b) not disputed. See White Motor Corp. v. Malone, 599 F.2d 283, 284 (8th Cir. 1979); Waste Sys. Corp. v. County of Martin, Minn., 784 F. Supp. 641, 647 (D. Minn. 1992). In the third, only the timeliness of the appeal was disputed. See United States v. Carlson, 44 Fed. Appx. 25, 26-27 (8th Cir. 2002). And the circumstances in the fourth are much different from those presented in this case. See Loudner v. United States, 330 F. Supp.2d 1074 (D.S.D. 2003) (entering final judgment on dismissed claims alleging that an act regarding the distribution of trust funds to Indian tribes was unconstitutional because the case had been pending for over 10 years, it was uncertain when the remaining claims would be resolved, and a final court resolution was necessary before any funds could be distributed).

opinion, “Federal Defendants assert that throughout our country’s history, Presidents have exercised their inherent authority to approve or reject such border crossings.” February 24, 2010 Order at 24. And the Court went on to explain, “Further, despite the fact that cross-border permits for pipelines have been issued by Presidents in the past, Congress has not attempted to exercise any exclusive authority over the permitting process. Congress’s inaction suggests that Congress has accepted the authority of the President to issue cross-border permits.” *Id.* at 25. As set forth in Defendants previously submitted briefs in this case, the government believes that the authority of the President to permit or deny a border-crossing is well-established and therefore is not a worthy issue to be submitted as a separate issue to the court of appeals. Plaintiffs may appeal the issue in the usual course, if necessary.

Accordingly, judicial administrative interests counsel against entering final judgment on Plaintiffs’ Sixth Claim for Relief under Rule 54(b).

**B. Plaintiffs Have Not Demonstrated that They Will Suffer Any Hardship or Injustice That Would Be Alleviated by an Immediate Appeal**

In order to obtain certification of an issue for appeal under Rule 54(b), Plaintiffs must demonstrate that “there exists some danger of hardship or injustice through delay which would be alleviated by an immediate appeal.” *McAdams*, 533 F.3d at 928. Because Plaintiffs have not demonstrated a hardship or injustice or that any such hardship or injustice would be obviated by an immediate appeal, their request should be denied.

Plaintiffs argue that they will be prejudiced if an appeal is not granted because the pipeline will become operational. Plf. Mem. at 10. Further, Plaintiffs argue that, if the pipeline becomes operational, it will be more difficult for them to obtain relief on the constitutional claim and there will be environmental impacts from the operation of the pipeline. *Id.* at 10-11. These arguments are insufficient to demonstrate hardship or injustice.

*First*, the fact that the pipeline will become operational soon (a fact that is not disputed) does not demonstrate a hardship or injustice to Plaintiffs. Plaintiffs had the opportunity to file both a motion for a temporary restraining order and a motion for a preliminary injunction against the construction and operation of the pipeline. Plaintiffs

argued that the construction and operation of the pipeline would have environmental impacts, and the Court recognized those impacts in its decision. See February 3, 2010 Order at 40-42 (Docket No. 183). The Court concluded that Plaintiffs had demonstrated that they were likely to suffer “some irreparable injury” from the continued construction of the pipeline. Id. at 42. Nevertheless, balancing all of the preliminary injunction factors, including the Court’s conclusion that Plaintiffs were unlikely to succeed on their NEPA and constitutional claims, the Court denied the Motion for a Preliminary Injunction. See id. at 45. Accordingly, Plaintiffs have had a full and fair opportunity to litigate their Motion for a Preliminary Injunction and therefore Plaintiffs will suffer no hardship or prejudice from having the litigation proceed in the ordinary course.

This case stands in sharp contrast to the seminal Supreme Court case on certification under Rule 54(b), Curtiss-Wright Corp. v. Gen. Elec. Co., 446 U.S. 1 (1980). In that case, the district court granted partial summary judgment to Curtiss-Wright on a contractual claim for \$19 million and certified that claim for appeal. Id. at 4-5. Following reversal by the Third Circuit based on the existence of pending counterclaims, the Supreme Court reversed. The Court found that the district court had properly balanced the equities in that case. Id. at 11. In particular, the district court considered the fact that Curtiss-Wright would have been prejudiced by delayed payment of the \$19 million because the statutory pre-judgment interest rate was lower than the market rates and thus stood to lose a substantial amount of money if payment were delayed. Id. at 11. And given the time necessary to take the remaining claims in the case to trial, payment likely would have been delayed by “many months, if not years.” Id.

In contrast to the circumstances in Curtiss-Wright, Plaintiffs do not present any specific exigency that warrants immediate certification of the Court’s ruling on their constitutional claim. See Taco John’s, 569 F.3d at 403 (distinguishing Curtiss-Wright on the basis that “[t]he parties point to no similar exigency in the present case and we have discerned none”). To the contrary, this case is no different from the run-of-the-mill case where some claims are disposed of early in the case and others are resolved at summary

judgment or trial. See Clos v. Corr. Corp. of Am., No. 09-1816, – F.3d – , 2010 WL 785968, \*3 (8th Cir. Mar. 10, 2010) (“This case is indistinguishable from any civil action where some, but not all, claims are resolved by summary judgment.”) (citing Huggins, 566 F.3d at 774).

*Second*, aside from general assertions that the operation of the pipeline will have environmental impacts, Plaintiffs point to no specific immediate harms that will result during the first few months of the operation of the pipeline. In general, Plaintiffs allege that operation of the pipelines will cause air emissions (particularly greenhouse gas emissions), water emissions, and harm to wildlife. See Plf. Mem. at 11. But Plaintiffs fail to show how this particular pipeline’s operation will be any different from numerous other pipelines that operate daily throughout the country or from other pipelines that already transport heavy crude oil from Canada, such as the Keystone Pipeline. Moreover, the Alberta Clipper Pipeline is regulated by numerous federal and state agencies to prevent the types of harm that Plaintiffs allege will occur. See Def. Opp. to Mot. for Prelim. Inj. at 2-4, 19-20, 23-24, 28-29 (Docket No. 82). Given the environmental safeguards in place, Plaintiffs cannot demonstrate that they will suffer a hardship or injustice if the pipeline operates for roughly six months while the parties brief and argue summary judgment motions.

*Third*, Plaintiffs apparently presume that, if they are successful in the court of appeals on the constitutional claim, that the operation of the Alberta Clipper Pipeline will be enjoined pending congressional action regarding the pipeline. See Plf. Mem. at 12. That is not the case. As we explained during the briefing of the Motion to Dismiss, if a court were to find that the State Department had no authority to issue the permit, then Enbridge would be not be required to obtain *any* permit to cross the border. Instead, “[t]he result would be that no permit was required to cross the border, leaving Presidents apparently unable to protect U.S. foreign relations and national security interests in relation to permanent facilities at the U.S.

border.” Def. Opp. to Plf. Mot. for Prelim. Inj. at 12 (Docket No. 82).<sup>57</sup> Defendants disagree, of course, that an appellate court would find that the President lacked the authority to issue a permit for a border crossing. But, if it did, that would not provide Plaintiffs the relief that they seek. Therefore, even if Plaintiffs are successful in their appeal of the constitutional claim, it would not alleviate any alleged hardship or injustice caused by the operation of the pipeline.

*Fourth*, Plaintiffs’ desire to obtain a ruling on the constitutional issue before the State Department issues a permit for the Keystone XL Pipeline is not a valid ground for seeking certification. As the Eighth Circuit has explained, “We do not doubt that our resolution of this appeal would provide guidance to the parties and the court below. But the possibility that an early intervention might be helpful does not amount to the kind of justification for exercising jurisdiction that our relevant cases require.” Taco John’s, 569 F.3d at 403.<sup>67</sup> Further, an appellate ruling solely for the purpose of obtaining guidance for the parties in the Keystone XL matter would be an impermissible advisory opinion. See Flast v. Cohen, 392 U.S. 83, 96 (1968) (“And it is quite clear that the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.”) (internal quotations and citation omitted). Accordingly, the timing of a ruling from the court of appeals relevant to a potential presidential permit for the Keystone XL Pipeline should not factor into the Court’s analysis.

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<sup>57</sup> Indeed, the State Department would find itself in the same position as Attorney General Richards in 1898 when President Cleveland failed to act on applications for the landing of foreign cables: “The attitude taken by [President Cleveland’s State] Department under Mr. Gresham has resulted in the landing of two foreign cables upon our shores without permission of this Government and subject to no limitations or restrictions whatever. Must this condition continue? Is the President powerless to act until Congress legislates?”. Def. Reply in Supp. of Mot. to Dismiss at 18 (quoting U.S. Op. Atty. Gen. 13, 25 (1898)).

<sup>67</sup> To the extent that the Third Circuit endorses consideration of the “likelihood of recurrence” as a factor in considering a Rule 54(b) Motion, the Court should follow Eighth Circuit law. See Plf. Mem. at 13 (citing Int’l Union of Elec., Radio & Mach. Workers, AFL-CIO-CLC v. Westinghouse Elec. Corp., 631 F.2d 1094, 1098-99 (3d Cir. 1980)).

Accordingly, Plaintiffs have not demonstrated any hardship or injustice that would be alleviated by the granting of their Rule 54(b) Motion on the constitutional claim.

**V. CONCLUSION**

For the forgoing reasons, Plaintiffs have not demonstrated that there is no just reason for delay of an appeal on their constitutional claim, and therefore Plaintiffs' Motion for Entry of Final Judgment on Plaintiffs' Sixth Claim for Relief Should Be Denied.

Respectfully submitted this 26th day of March, 2010.

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