

I.

INTRODUCTION

Plaintiffs request the Court to enter a final judgment, pursuant to Fed. R. Civ. P. 54(b), on their Sixth Claim for Relief (“Constitutional claim”), which was dismissed by this Court in its February 24, 2010 Order (“Dismissal Order”) (Doc. 185). Plaintiffs’ Constitutional claim alleged that the Department of State’s issuance of a Presidential Permit for the Alberta Clipper pipeline was unconstitutional. In its Dismissal Order, this Court determined “that Plaintiffs [] failed to state a claim that the issuance of the Permit was unconstitutional” and thereby dismissed Plaintiffs’ Constitutional claim in its entirety. Dismissal Order, at 25. The Order dismissing this claim was not a final judgment; additional claims arising under the National Environmental Policy Act (“NEPA”) that were not dismissed remain to be addressed through summary judgment. *See id.*

In their Motion, Plaintiffs have argued that entry of a final judgment on their Constitutional claim is warranted because administrative interests do not present a just reason for delay and that the consideration of equities favors entry of a final judgment. *See* Plaintiffs’ Memorandum In Support of Motion for Entry of Final Judgment, at 4-13 (Doc. 193) (“Memorandum”). However, as explained below, a Rule 54(b) certification of Plaintiffs’ Constitutional claim would lead to wasteful and expensive “piecemeal” appeals assuming, as is likely, that one party or another appeals from a final judgment on the NEPA claims. Further, Plaintiffs have not identified any cognizable hardship or injustice they will suffer which an immediate appeal would alleviate, and thus, have not

met a requirement well established in this Circuit. For these and other reasons, their Rule 54(b) certification request should be denied.

II.

ARGUMENT

Rule 54(b) allows a court dealing with multiple claims or multiple parties the discretion to direct entry of final judgment as to one or more, but fewer than all, of the claims or parties, thereby allowing interlocutory appeals of those issues as to which final judgment has been entered. Fed. R. Civ. P. 54(b). Such interlocutory appeals, however, are “generally disfavored.” *Thermal Sci., Inc. v. U.S. Nuclear Regulatory Comm’n*, 184 F.3d 803, 806 n.5 (8th Cir. 1999) (per curiam). In fact, Eighth Circuit “cases are uniform in holding that ... jurisdiction [will not be assumed] over a case certified [] under Rule 54(b) as a routine matter or as an accommodation to counsel ...” *Taco John’s of Huron, Inc. v. Bix Produce Co.*, 569 F.3d 401, 402 (8th Cir. 2009). Therefore, “it is only the special case that warrants an immediate appeal from a partial resolution of the lawsuit.” *Interstate Power Co. v. Kansas City Power & Light Co.*, 992 F.2d 804, 807 (8th Cir. 1993).

Before making an entry of judgment under Rule 54(b), a court must determine: (1) that there is a final judgment; and (2) whether there is any just reason for delaying the entry of judgment. *Northwest Airlines, Inc. v. Astraeva Aviation Services, Inc.*, 930 F. Supp. 1317, (D. Minn. 1996) (Kyle, J.) (citing *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 7-8 (1980)). Here, the Plaintiffs can satisfy only the first of these tests.

1. Final Judgment

When deciding whether to certify a ruling as a final judgment under Rule 54(b), a “district court must first determine that it is dealing with a ‘final judgment.’” *Curtiss-Wright*, 446 U.S. 1, 7 (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1956)). It must be “a ‘judgment’ in the sense that it is a decision upon a cognizable claim for relief, and it must be ‘final’ in the sense that it is ‘an ultimate disposition of an individual claim entered in the course of a multiple claims action.’ ” *Id.*

Because Plaintiffs’ Constitutional claim was dismissed in its entirety by the Dismissal Order, and the Plaintiffs’ pending NEPA claims remain, Enbridge acknowledges that it was the “ultimate disposition of an individual claim entered in the course of a multiple claim action.” *Curtiss-Wright*, 446 U.S. at 8. However, as explained below, Plaintiffs have failed to demonstrate that there is no just reason for delay. Thus, their Motion should be denied.

2. Just Reason for Delay

“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*, 446 U.S. at 8. Therefore, even if a court finds that a claim is final, it still must determine whether “there is no just reason for delay.” *Id.* In making this determination, “the district court must consider both the equities of the situation and judicial administrative interests, particularly the interest in preventing piecemeal appeals.” *McAdams v. McCord*, 533 F.3d 924, 928 (8th Cir. 2008) (quoting *Interstate Power*, 992

F.2d at 807). In this instance, both the relevant judicial administrative interests and equities disfavor entry of a final judgment as to Plaintiffs' Constitutional claim.

A. Judicial Administrative Interests Favor Denying Plaintiffs' Request for Entry of Final Judgment

In considering whether judicial administrative interests favor entry of a final judgment as to a single claim, a court should consider judicial economy and "the interrelationship of the claims so as to prevent piecemeal appeals." *Huggins v. FedEx*, 566 F.3d 771, 774 (8th Cir. 2009) (quoting *Curtiss-Wright*, 446 U.S.10).

Plaintiffs' Constitutional and NEPA claims each arise out of the State Department's issuance of the Presidential Permit for the Alberta Clipper pipeline. In issuing a Presidential Permit, the State Department was required to determine whether the proposed cross-border project was in the "national interest." Executive Order 13337, 69 Fed. Reg. 25299 (April 30, 2004). In making this determination, the State Department considered numerous factual issues related to the Alberta Clipper Pipeline's intended purpose/function and its environmental impacts. *See* DOS August 3, 2009 Record of Decision/National Interest Determination (Doc. 83-1). These same factual issues were also incorporated into/considered within the Final EIS, the sufficiency of which has been placed at issue by the Plaintiffs' NEPA claims. In fact, Plaintiffs specifically challenge the purpose and need of the Alberta Clipper pipeline as identified in the Final EIS, which is the same purpose found by the State Department to be in the national interest in connection with issuing the Presidential Permit, which the Plaintiffs claim is

unconstitutional. *See* Amended Complaint, Claims IV and VI (Doc. 57). Therefore, Plaintiffs' Constitutional challenge to the Presidential Permit and their challenge to the Final EIS under NEPA "stem from essentially the same factual allegations," a factor that weighs against Rule 54(b) certification. *See Hayden v. McDonald*, 719 F.2d 266, 269 (8th Cir. 1983) (internal quotation omitted).

Further, Plaintiffs' Constitutional claim is based in part on their argument that the State Department's action in imposing mitigation measures along the full length of the Alberta Clipper Pipeline exceeds the Executive's authority under the Constitution because Congress never delegated such regulatory authority to the President or State Department. *See* Opp. to Motion to Dismiss, at 46-47 (Doc. 150). This claim requires consideration of issues closely intertwined with NEPA. Specifically, the appellate court will be required to consider the scope of the State Department's NEPA obligations in determining whether the State Department acted within its constitutional rights in imposing mitigation measures for the entire U.S. portion of the pipeline. Likewise, the scope of the State Department's NEPA obligations has been placed at issue by Plaintiffs' NEPA claims. *See, e.g.*, Amended Complaint, Claim I, ¶¶ 78-81 (alleging that the State Department failed to consider the impacts of the Southern Lights Diluent Pipeline as a connected action). Therefore, contrary to Plaintiffs' contention, there are interrelationships between Plaintiffs' constitutional and its NEPA claims. *See Hayden*, 719 F.2d at 270 ("A similarity of legal or factual issues will weigh heavily against entry of judgment under Rule 54(b)").

Moreover, if the Court were to certify Plaintiffs' Constitutional claim, "it is clear that ... piecemeal appeals arising out of the same factual allegations would almost certainly result." *McAdams*, 533 F.3d at 929. Once this Court makes a final judgment on Plaintiffs' NEPA claims, that decision very likely will also be appealed by one or more of the parties. Such a result would require an appellate court "to refamiliarize itself" with facts critical to this case and would cause limited judicial resources and efforts to be duplicated. *See id.* Certifying Plaintiffs' Constitutional claim would therefore create exactly the kind of duplicative appeals that place unnecessary strain on already overburdened judicial resources.

Since Plaintiffs' claims are closely related and an appeal of all issues in this case is likely, it is clear that "[j]udicial economy will be best preserved by delaying appeal until all issues can be confronted by [the Appellate Court] in a unified package." *Huggins*, 566 F.3d at 775 (internal quotation and citation omitted).

B. Equities Favor Denying Plaintiffs' Request for Entry of Final Judgment

Rule 54(b) "[c]ertification should be granted only if there exists some danger of hardship or injustice through delay which would be alleviated by immediate appeal." *Hayden*, 719 F.2d at 268 (internal quotation omitted). An Appellate Court will therefore not assume jurisdiction over an appeal certified under Rule 54(b) unless a danger of hardship or injustice to the moving party has been identified which an immediate appeal would alleviate. *See Taco John's*, 569 F.3d at 402.

In their Motion, Plaintiffs offer a potpourri of claimed reasons why the equities favor Rule 54(b) certification, but in fact they have failed to identify any danger of

hardship or injustice which would result if their Constitutional claim were not immediately appealed. Plaintiffs first attempt to argue that constitutional issues, in and of themselves, present a danger of hardship or injustice if appeal were not immediate. *See* Memorandum, at 8-10. However, this presumption is incorrect; not a single case cited by Plaintiffs in support of Rule 54(b) certification of a constitutional issue held that such certification is automatically appropriate whenever the claim at issue is constitutional in nature or that a constitutional issue inherently presents a hardship or injustice. Rather, the Rule 54(b) certifications in the cases cited by Plaintiffs were granted based upon the unique facts of each case. *See e.g., Loudner v. United States*, 330 F. Supp. 2d 1074, 1082 (D.S.D. 2004) (granting certification because the “validity of the 1998 Act [needed to] be finally determined before the United States [would] pay out that portion of the Judgment Fund re-apportioned to the Tribes in the 1998 Act”).¹

The fact that Plaintiffs seek to immediately appeal a constitutional issue actually counsels against a Rule 54(b) certification. Courts should not delve into constitutional issues at all if a matter can be decided upon non-constitutional grounds. *See Hagans v. Lavine*, 415 U.S. 528, 546 (1974) (“a federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available”). In their Prayer for Relief, Plaintiffs request that this Court set aside the State Department’s

¹ Similarly, in *White Motor Corp. v. Malone*, 599 F.2d 283, 284 (8th Cir. 1979) *aff’d*, 444 U.S. 911 (1979); *United States v. Carlson*, 44 Fed. App’x. 25, 27 (8th Cir. 2002); and *Waste Sys. Corp. v. County of Martin, Minn.*, 784 F. Supp. 641, 647 (D. Minn. 1992) *aff’d and remanded*, 985 F.2d 1381 (8th Cir. 1993) the certification was deemed warranted for reasons unique to each of these cases, not because the issue was constitutional in nature.

Presidential Permit by finding it was issued in violation of NEPA, the Constitution, or other law. *See* Amended Complaint, at pgs. 37-38. If this Court were to find that the State Department violated NEPA, it could vacate the issuance of the Permit. Because Plaintiffs seek identical relief under their Constitutional claim, this Court should decide Plaintiffs' pending, non-constitutional NEPA claims prior to issuing a final judgment on the Constitutional claim.

Further, Plaintiffs have not identified any cognizable hardship or injustice they will suffer if their Constitutional claim were not immediately appealable. Plaintiffs seem to suggest that an immediate appeal is necessary because the relief they seek will be more difficult to obtain once the Alberta Clipper Pipeline is operational. *See* Memorandum, at 10-11. This argument is unpersuasive; the Alberta Clipper Pipeline is already constructed and will be operational on or about April 1, 2010. Were Plaintiffs' motion granted and an appeal filed, that appeal will likely not be heard by the Eighth Circuit for approximately one year.² Therefore, the Alberta Clipper Pipeline will be in operation whether Plaintiffs are allowed to appeal now or required to wait until all pending claims have been resolved. This Court should certainly "not [be] persuaded that a final judgment should be entered solely to shorten the amount of time" the Plaintiffs must wait in order to appeal. *Loudner*, 330 F. Supp. 2d at 1082.

Moreover, it is not clear that Plaintiffs will need to wait more than a few more months before final judgment is issued on all of the claims. The parties are presenting a

² *See* <http://www.uscourts.gov/judbus2009/appendices/B04ASep09.pdf> (indicating that the median time for disposition of appeals in the Eighth Circuit is 12.9 months)

stipulation to the Court that contemplates the completion of summary judgment briefing over the next few months and a hearing by early August.

Plaintiffs argue that an immediate appeal is necessary because they will suffer hardship or injustice from operational impacts, including increased air and water impacts, as well as harm to wildlife and greenhouse gas emissions. *See* Memorandum, at 11. These are the same operational impacts that the Plaintiffs cited in their Notice of Motion, Motion, and Memorandum in Support of Motion for Temporary Restraining Order, at 19-21 (Doc. 8), and in their Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction, at 21-23 (Doc. 93), to enjoin the Alberta Clipper pipeline. Enbridge has previously argued that these claimed harms are fully addressed in the Final EIS, and this Court has already considered Plaintiffs' arguments in the course of denying their Motion for a Preliminary Injunction. Plaintiffs are free to raise their claims of harm in an appellate court at the right time, but the generalized and unfocused claims they raise in their Motion are not sufficient to demonstrate that this is a "special case that warrants" a Rule 54(b) certification. *Interstate Power Co*, 992 F.2d at 807.

Plaintiffs also claim that an immediate appeal is necessary to provide guidance to the State Department, which is currently assessing the issuance of a Presidential Permit to another cross-border pipeline known as the Keystone XL pipeline. Memorandum, at 12-13. There is no assurance, however, that an Eighth Circuit decision would be issued prior to the issuance of a Presidential Permit for the Keystone XL pipeline even if this Rule

54(b) motion were granted.³ In addition, the Eighth Circuit has held that the need for an immediate appeal to “provide guidance to the parties and the court below” does not justify 54(b) certification. *See Taco John’s*, 569 F.3d at 402 (finding certification was not appropriate even where immediate appeal would have effect of resolving question of possible liability as to all other defendants because claims were based on same legal theory). Therefore, to the extent the Plaintiffs seek an earlier appeal to inform the Keystone XL permitting decision, their Motion is unconvincing.

Plaintiffs also fail to consider that a court must “examine the competing interests involved in a certification decision.” *McAdams*, 533 F.3d at 928. If this Court were to grant Plaintiffs’ Motion, Enbridge (and the Government Defendants) would be required to devote the additional resources and costs necessary to participate in potentially two appeals, *i.e.*, the appeal of the constitutional appeal and any appeal that may occur once this Court disposes of the remaining claims. Enbridge has a legitimate interest in avoiding such consecutive, piecemeal appeals.

III.

CONCLUSION

Plaintiffs have failed to identify any injustice or hardship which justifies a Rule 54(b) certification. *Compare, e.g., Curtiss-Wright*, 446 U.S. at 3-4 (interest rate on \$19,000,000 justified Rule 54(b) certification). Thus, Plaintiffs have failed to distinguish their case “from any civil action where some, but not all, of the [claims] are dismissed

³ Enbridge understands that the environmental process for the XL pipeline is expected to be completed and a Permit decision made before the end of this year.

before trial.” *See Huggins*, 566 F.3d at 774. Since Rule 54(b) certifications should not be granted routinely or to accommodate counsel, and because there is “no danger or hardship in allowing this case to take its ordinary course,” *see Taco John's*, 569 F.3d at 403, Plaintiffs Motion should be denied.

Respectfully submitted this 26th day of March, 2010.

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