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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INDIGENOUS ENVIRONMENTAL NETWORK, *et al.*,
Plaintiffs–Appellees–Cross-Appellants,

NORTHERN PLAINS RESOURCE COUNCIL, *et al.*,
Plaintiffs–Appellees–Cross-Appellants,

and

FORT BELKNAP INDIAN COMMUNITY, *et al.*,
Intervenors,

v.

UNITED STATES DEPARTMENT OF STATE, *et al.*,
Defendants–Appellants–Cross-Appellees,

and

TRANSCANADA KEYSTONE PIPELINE, LP, *et al.*,
Intervenor-Defendants–Appellants–Cross-Appellees.

On Appeal from the U.S. District Court for the District of Montana
Nos. 4:17-cv-00029-BMM and 4:17-cv-00031-BMM

NORTHERN PLAINS' COMBINED OPPOSITION TO TRANSCANADA'S AND FEDERAL DEFENDANTS' MOTIONS TO DISMISS AS MOOT

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INTRODUCTION

On March 15, this Court refused to stay the district court's injunction barring construction of the Keystone XL pipeline pending appeal. Just two weeks later, President Trump revoked the permit for the project issued by Defendant Department of State in 2017 and reissued it himself. The goal of this action was plain: to divest this Court of jurisdiction over the pending appeal and circumvent the district court's orders invalidating the project's environmental review documents and enjoining construction. Because Intervenor TransCanada is poised to begin construction immediately, issuing a new permit would theoretically allow the company to begin building the pipeline right away, in spite of the district court's injunction and without waiting to see how this Court rules on the merits of the appeal.

The Court should not allow this gamesmanship. This case is not moot simply because there is a new permit for the same pipeline. There is no dispute that the law requires environmental review for this project, yet State and Defendant U.S. Fish and Wildlife Service (collectively "Federal Defendants") have not remedied the violations found by the district court. To the extent it is unclear whether and how Federal Defendants will continue to play a role in the environmental review of this pipeline, the Court should remand the case to the district court for fact-finding on that issue.

Furthermore, multiple exceptions to mootness—collateral legal consequences, voluntary cessation, and capable of repetition yet evading review—apply here. The government cannot unilaterally sweep away two years of litigation and an adverse final judgment, especially when the same legal issues still apply to ongoing federal approval processes for this pipeline.

Finally, even if the appeal were moot, there is no circumstance in which the Court should vacate the district court's judgment and injunction, when it is the government itself that caused any mootness, and when TransCanada has offered no evidence that it did not contribute to that outcome.

The Court should deny Federal Defendants' and TransCanada's motions to dismiss as moot, and either find that the appeal is not moot or remand to the district court for a determination about mootness in the first instance.

BACKGROUND

I. Factual background

This case challenges the federal environmental review for the proposed Keystone XL pipeline, a massive pipeline that would transport up to 830,000 barrels per day of tar sands crude oil from Alberta, Canada across Montana,

South Dakota, and Nebraska, where it would connect to an existing pipeline that supplies refineries on the Gulf Coast. Appx002; Appx008.[1]

TransCanada applied for a cross-border permit for Keystone XL in 2008 and again in 2012, pursuant to Executive Order 13,337, which delegated permitting authority to State. Appx009*;* 69 Fed. Reg. 25,299, 25,299-300 (May 5, 2004), *revoked by* 84 Fed. Reg. 15,491 (April 15, 2019). Because issuance of the permit is a "major Federal action" triggering the requirements of the National Environmental Policy Act (NEPA), State prepared an Environmental Impact Statement (EIS) for the project, 74 Fed. Reg. 5019, 5020 (Jan. 28, 2009), which it last supplemented in 2014. Appx003; Appx005. Pursuant to the Endangered Species Act (ESA), State submitted a Biological Assessment to the Service in 2012, and in 2013, the Service issued a Biological Opinion and concurrence. Appx006; Appx067.

In both instances, State denied the permit, ultimately finding that Keystone XL was contrary to the national interest, citing foreign policy and climate concerns. Appx060-62; Appx009.

In January 2017, President Trump, shortly after taking office, invited TransCanada to reapply once again. 82 Fed. Reg. 8663 (Jan. 30, 2017). State

[1] "AppxXXX" refers to the Appendix submitted by TransCanada in support of its motion to dismiss as moot, ECF No. 35-2. All ECF citations are to Appeal No. 18-36068.

issued a new approval and Record of Decision for TransCanada's application on March 23, 2017, reversing its prior decision and concluding that Keystone XL would serve the national interest. Appx031. Rather than update the environmental review documents prepared under NEPA and the ESA, State relied on the existing ones. State then issued a cross-border permit, which allowed TransCanada to construct and operate Keystone XL as described in the application. Appx031.

II. Procedural background

Plaintiffs Northern Plains Resource Council, Bold Alliance, Center for Biological Diversity, Friends of the Earth, Natural Resources Defense Council, and Sierra Club (collectively "Northern Plains") filed suit against Federal Defendants under NEPA, the ESA, and the Administrative Procedure Act (APA) in March 2017. TransCanada intervened to defend the approval.

In a series of rulings, the district court found that it had jurisdiction over the case and that Federal Defendants broke the law. The court first rejected the argument that Northern Plains' NEPA claims were unreviewable, finding that State's issuance of the permit was not "presidential action." Appx069-86. The court similarly rejected the argument that State's and the Service's actions were unreviewable under the ESA. Appx089-93.

On the merits, the district court found that Federal Defendants violated NEPA, the ESA, and the APA. Specifically, the court held that State failed to prepare a supplemental EIS evaluating critical new information on: (1) Keystone XL's route through Nebraska, Appx100-09; (2) the significant changes in oil markets since 2014, Appx125-27; (3) the cumulative climate impacts from State's approval of another tar sands pipeline expansion, Appx128-32; and (4) major oil pipeline spills since 2014, including a spill from TransCanada's own Keystone I pipeline, Appx137-40. The court similarly found that State's 2012 Biological Assessment and the Service's 2013 Biological Opinion violated the ESA because they "relied on outdated information regarding potential oil spills," and ordered the agencies to update those analyses. Appx152. Finally, the district court held that State's reversal—first denying the project in 2015 and then approving it in 2017 on the same factual record—was arbitrary because State "simply discarded prior factual findings related to climate change to support its course reversal." Appx144.

These are not minor or technical violations. They go to the heart of the most controversial issues surrounding Keystone XL: the pipeline's impacts related to climate change, oil spills, endangered species, and its route through an entire state.

The district court found that these violations warranted vacating the 2017 Record of Decision and enjoining construction of the pipeline. Appx163. After twice narrowing the injunction, the district court denied TransCanada's motion for a stay pending appeal. Appx179-80; Appx211-12. On March 15, 2019, this Court also denied TransCanada's motion for a stay pending appeal. ECF No. 28. Just two weeks later, on March 29, President Trump purported to rescind the State-issued permit and reissue the permit himself as part of a "Presidential Memorandum." Appx213-17 ("New Permit"). Based on this New Permit, Federal Defendants and TransCanada move this Court to dismiss the case as moot.

ARGUMENT

I. This Court should remand to the district court to consider mootness in the first instance

TransCanada and Federal Defendants ask this Court to dismiss the case as moot, arguing that the New Permit eliminates all live controversies surrounding State's issuance of the 2017 permit. *See, e.g.*, Defs. Br. 2. However, there remain factual questions that Northern Plains is entitled to probe about whether the challenged conduct—the federal agencies' inadequate environmental reviews under NEPA and the ESA—is ongoing. These include whether and how State will continue to serve as the lead agency in the NEPA and ESA reviews for Keystone XL, whether State plans to correct the legal

deficiencies identified by the district court, and whether other federal permitting agencies will continue to rely on State's analysis. Accordingly, Northern Plains requests that this Court remand to the district court for further factual development.

The heart of this case is the sufficiency of the federal government's environmental review of the Keystone XL pipeline—not, as Defendants contend, whether State's issuance of the 2017 permit constituted agency action. Defs. Br. 6; TC Br. 1. The legal adequacy of the agencies' review, not the permit itself, is what Northern Plains has challenged and what matters for purposes of mootness.

Indeed, the district court held that "once an EIS's analysis has been solidified in a [Record of Decision], the agency has taken final agency action, reviewable under [APA section] 706(2)(A)." Appx77-78 (quoting *Or. Nat. Desert Ass'n v. BLM*, 625 F.3d 1092, 1118-19 (9th Cir. 2010)). After finding numerous NEPA violations, the district court vacated State's Record of Decision, remanded to State "with instructions . . . to satisfy its obligations under NEPA to take a 'hard look' at the issues through a supplement to the 2014 SEIS," and enjoined any activity in furtherance of pipeline construction until State complied. Appx160-63. The district court never reviewed the validity or terms of State's 2017 permit, nor did it ever vacate the permit. Thus,

it is not at all clear that the President's issuance of a replacement permit for Keystone XL, which is identical to State's 2017 permit in all material respects except the signature, affects State's environmental review obligations at all. Further factual development would help determine the consequence of the New Permit.

This Court has made clear that remand is appropriate where, as here, factual questions exist as to mootness. *See, e.g.*, *United States v. Brandau*, 578 F.3d 1064, 1069-70 (9th Cir. 2009) (remanding for district court to hold evidentiary hearing on mootness); *Von Kennel Gaudin v. Remis*, 282 F.3d 1178, 1183-84 (9th Cir. 2002) (same); *NRDC v. Winter*, 513 F.3d 920, 922 (9th Cir. 2008) (remanding to allow district court to consider the effect of new executive actions on injunction); *Doe v. Trump*, No. 18-35015, 2018 WL 1774089, at *1 (9th Cir. Mar. 29, 2018) (denying motions to dismiss and vacate underlying decisions, and instead remanding to the district court).

In *Brandau*, the government argued that the appeal was moot because the challenged policy had been replaced while the appeal was pending. The Court remanded the case for factual development, noting that the government had provided "no information at all regarding the practical effect of the new [policy], and whether or not the de facto policy . . . remains [the same as before]." 578 F.3d at 1067. The Court found that while the challenged policy

"at least on paper, was no longer in place," anecdotal information suggested that the "actual state of affairs had not changed." *Id*. at 1067-68. As in *Brandau*, there remain significant factual questions in this case about how, if at all, the President's issuance of the New Permit changes the obligations of State and other permitting agencies to correct their NEPA and ESA deficiencies.

Although State is the lead agency in the NEPA review of Keystone XL, ten other federal agencies are "cooperating agencies" in that process pursuant to 40 C.F.R. § 1501.6. SupplAppx001-007.[2] Some of those cooperating agencies, including the Bureau of Land Management (BLM) and the Army Corps of Engineers (Corps), intended to rely on State's NEPA review in whole or in part to satisfy their own independent NEPA obligations. SupplAppx002; SupplAppx004-005 (explaining Corps and BLM jurisdiction over Keystone XL).

Federal Defendants have failed to provide any concrete information showing that State's role as lead agency in the NEPA process has changed. *See Ctr. for Biological Diversity v. Export-Import Bank of the U.S.*, 894 F.3d 1005, 1011 (9th Cir. 2018) (mootness burden not met where record was insufficient to support defendants' "bare assertion" of facts). The limited information

[2] "SupplAppxXXX" refers to the Supplemental Appendix submitted by Northern Plains in support of its opposition to the motions to dismiss as moot.

Northern Plains does have suggests that State's role has not changed. In response to the district court order, State published a "Notice of Intent" to prepare a supplemental EIS to further develop its analysis of oil markets, greenhouse gas emissions, and oil spills, among other things. 83 Fed. Reg. 62,398 (Dec. 3, 2018). That Notice has not been rescinded. In fact, in a recent email regarding the instant motion, counsel for Federal Defendants stated his understanding that "State is continuing to prepare the [supplemental EIS] in support of further agency action that will be required for the project . . . ." SupplAppx010-011; *see also* TC Br. 12 n.7 ("State's environmental analysis will be updated as part of the NEPA analysis that must be done in connection with the issuance of [the BLM and Corps] permits . . . ."); Defs. Br. 12 (describing ongoing federal permitting processes).

Similar factual questions surround State's ongoing role under Section 7 of the ESA. As lead agency, State consulted with the Service on impacts to protected species on the entire pipeline route, including areas within BLM and Corps jurisdiction. After finding State failed to adequately evaluate the impacts of oil spills, the district court set aside State's Biological Assessment and the Service's Biological Opinion and concurrence, and remanded to the agencies "with instructions to consider potential adverse impacts to endangered species from oil spills associated with Keystone in light of the updated data on oil

spills and leaks." Appx162. It is unclear whether State will continue to act as lead agency and comply with the district court's remand instructions, or if that obligation will fall to other agencies such as BLM or the Corps. These are factual questions that must be evaluated by the district court in the first instance.

These factual questions will also determine whether Northern Plains must amend its complaint. If State intends to withdraw from the NEPA and ESA processes altogether, BLM and the Corps would be obligated to complete the supplemental EIS and revised ESA consultation ordered by the district court prior to any pipeline construction. In that scenario, Northern Plains would seek to amend its complaint to add claims against BLM and the Corps to ensure that those agencies comply with NEPA and the ESA as required by 40 C.F.R. § 1506.1 (prohibiting action on a project prior to compliance with NEPA) and 50 C.F.R. § 402.09 (prohibiting any "irreversible or irretrievable commitment of resources" on a project until ESA consultation is complete). In fact, Northern Plains originally brought a claim against BLM, which the district court held in abeyance before ultimately dismissing without prejudice because the claim was not yet ripe. SupplAppx012-014. But BLM's decision is now imminent, and evidence suggests that the Corps has already taken final action approving at least some of the water-crossings. Thus, Northern Plains

and the district court must have the opportunity to examine the facts to determine if amendments to the complaint are warranted in light of President Trump's actions.

The many questions surrounding the federal agencies' compliance with the district court's order and their statutory obligations should be remanded to the district court for factual development. Both TransCanada and Federal Defendants have provided only unsupported statements about these processes, which are insufficient for this Court to decide whether the controversy in this case—agency compliance with NEPA and the ESA prior to pipeline construction—is moot. The Court should therefore remand to the district court to determine whether it is "absolutely clear" that "the actual state of affairs" has changed. *See Brandau*, 578 F.3d at 1068.

II. This case is not moot

In the alternative, the Court should find that this case is not moot, and/or that exceptions to the mootness doctrine apply.[3] Of course,

[3] Indigenous Environmental Network and North Coast Rivers Alliance, plaintiffs in a consolidated case, have filed a separate lawsuit challenging the New Permit and concede that the appeal is moot (but still argue that the district court's orders should not be vacated). ECF No. 47. Their concession regarding mootness has no applicability to Northern Plains' case. *See Hall v. Hall*, 138 S. Ct. 1118, 1127-30 (2018) (stating that "consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another . . . .").

TransCanada and Federal Defendants are free to voluntarily dismiss their appeals of the district court orders pursuant to Federal Rule of Appellate Procedure 42. However, the motions to dismiss go much further than that, as they request a sweeping ruling dismissing the entire case as moot as a matter of law. For the reasons set forth below, this Court should deny the motions.

A. Northern Plains still has a concrete interest in the litigation

Northern Plains still has a concrete interest in the outcome of this litigation despite the New Permit. "In seeking to have a case dismissed as moot . . . the defendant's burden is a heavy one." *NRDC v. Cty. of Los Angeles*, 840 F.3d 1098, 1102 (9th Cir. 2016) (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66 (1987)). A case becomes moot "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307-08 (2012). Here, the New Permit "does not resolve all the problems the district court identified" or "all of [plaintiffs'] bases for challenging" the agency action and therefore cannot moot the case. *Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 903 F.3d 829, 842 (9th Cir. 2018).

The district court held that Federal Defendants violated NEPA and the ESA by failing to evaluate new information on the impacts of Keystone XL, namely, new information on the route through Nebraska, the cumulative greenhouse gas emissions associated with the project, the risks and impacts of oil spills, and changes to the oil markets. Appx160-62. The district court instructed State to evaluate these issues in a supplemental EIS, and enjoined any project construction until that analysis is complete. Appx163. It appears that State is continuing to act as lead agency in preparation of that supplemental EIS despite the New Permit. Even if the New Permit were to completely relieve State of any further NEPA obligations, BLM and the Corps have remaining permitting actions that require them to conduct the requisite analysis prior to pipeline construction, and to date they have been relying on the existing State NEPA process to comply with these obligations. And there is no evidence to suggest State has withdrawn as lead agency in the ESA consultation, on which other agencies continue to rely.

Thus, Northern Plains has a concrete interest in upholding the district court decisions and ensuring that State and/or BLM and the Corps correct the legal errors identified by the court prior to any pipeline construction. A new permit does nothing to change that. *See NRDC*, 840 F.3d at 1103 ("A new permit, in and of itself, does not moot a case for injunctive relief.").

Contrary to Defendants' arguments, Defs. Br. 8-9; TC Br. 11, the courts can still provide effective relief. The federal government has yet to complete a legally adequate environmental review for Keystone XL. A decision by this Court affirming the district court's findings of NEPA and ESA violations would ensure State and other cooperating agencies remedy those violations prior to reaching decisions on the remaining permits. That could lead to meaningful changes to the project, including variations to the pipeline route, more protective mitigation measures, or even a denial of those permits altogether. And the district court can still ensure that State and/or cooperating agencies complete that analysis before construction is allowed to proceed. As such, effective relief is still available, which renders Federal Defendants' reliance on *Nevada v. United States*, 699 F.2d 486, 487 (9th Cir. 1983), and similar cases misplaced. *See* Defs. Br. 4-6.

As the district court found, construction of any portion of the pipeline before full environmental review would spur bureaucratic momentum towards further agency approval of the preferred route. *See* Appx173-76; Appx207-09. Federal Defendants argue that there is no risk of bureaucratic momentum because State will not need to approve or disapprove the project, Defs. Br. 11, but that reasoning ignores that other agencies, such as BLM and the Corps, will be considering approvals. Any construction before review would prejudice

those approvals in the same way it would have prejudiced State's approval. *See Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1128 (D.C. Cir. 1971) (review process "may become a hollow exercise" if there is an irreversible commitment of resources); *Colo. Wild Inc. v. U.S. Forest Serv.*, 523 F. Supp. 2d 1213, 1221 (D. Colo. 2007) (recognizing the bureaucratic momentum problem); 40 C.F.R. § 1506.1; 50 C.F.R. § 402.09. NEPA and ESA review must be completed *before* a project is built, not after. *See N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1083 (9th Cir. 2011) (NEPA); *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003) (ESA).

This Court has repeatedly emphasized that "defendants in NEPA cases face a particularly heavy burden in establishing mootness." *Cantrell v. City of Long Beach*, 241 F.3d 674, 678 (9th Cir. 2001). Even where projects have been completed, courts have refrained from finding NEPA cases moot so as not to allow entities to "merely ignore the requirements of NEPA, build [their] structures before a case gets to court, and then hide behind the mootness doctrine." *Columbia Basin Land Prot. Ass'n v. Schlesinger*, 643 F.2d 585, 591 n.1 (9th Cir. 1981). Likewise here, Federal Defendants should not be permitted to hide behind the mootness doctrine and evade judicial oversight of an ongoing environmental review for an unbuilt project simply by changing the signature

on a permit. TransCanada and Federal Defendants have failed to meet their burden of establishing mootness.

B. Northern Plains' cross-appeal against the Service is not moot

Northern Plains has a pending cross-appeal where it intends to argue that the district court erred when it found that the Service did not violate the ESA and APA. Specifically, the Service failed to rely on the best available science to analyze Keystone XL's harm to endangered whooping cranes and failed to apply its own guidance for mitigating harm to cranes from power line collisions—the greatest source of mortality for the species. These claims are not moot, and remain entirely unaffected by the New Permit.

Northern Plains' cross-appeal is not premised on the permit itself, but rather challenges the Service's analysis of the project's potential harm to the critically endangered whooping crane. Regardless of whether State or the President issued the cross-border permit, the Service has a duty under section 7 of the ESA to ensure that construction and operation of the pipeline—including the entire route, the ancillary facilities, and all federal approvals—will not jeopardize the continued existence of listed species. 16 U.S.C. § 1536(a)(2), (4). The New Permit does nothing to remedy or eradicate the effects of the Service's failure to properly analyze the project's impacts using

the best available science or to apply the appropriate mitigation guidance to develop adequate conservation measures.

The New Permit does not include any specific conservation measures for any species, let alone the crane. Instead, it appears to rely on measures previously incorporated into the State permit,[4] suggesting that other agencies, such as BLM and the Corps, will continue to rely on those measures too.[5] Whether the conservation measures set forth in the Service's Biological Opinion and incorporated into State's permit comply with the ESA is still at issue. *See Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1053-54 (9th Cir. 2013) (holding claims are not moot where the agencies continue precisely the same behavior that was challenged). Thus, the issues presented in Northern Plains' cross-appeal are not moot. *See Jacobus v. Alaska*, 338 F.3d 1095, 1104 (9th Cir. 2003) (holding an issue is not moot if there are present effects that are legally significant).

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[4] However, it is unclear how those measures would be enforceable if State no longer has authority over the permit. *See Ctr. for Biological Diversity v. BLM*, 698 F.3d 1101, 1113 (9th Cir. 2012) (conservation measures need to be specifically included as part of the project such that they are enforceable).

[5] The Biological Assessment notes that while State is the lead agency consulting with the Service pursuant to Section 7 of the ESA, the "proposed action" under review includes actions by BLM and the Corps. SupplAppx016. The Service's Biological Opinion also acknowledges it applies to BLM and Corps actions, not just areas within State's jurisdiction. SupplAppx015.

Effective relief is also still available. A favorable decision by the Court on this live issue will provide meaningful relief by ensuring that the ongoing ESA analysis by the Service and other agencies complies with the law, and by protecting Northern Plains' interests in safeguarding the endangered whooping crane by potentially altering the route or requiring additional mitigation, including burying power lines. *See Knox*, 567 U.S. at 307 ("A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." (internal quotation marks omitted)); *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1066 (9th Cir. 2002) (case not moot where harm to species "may yet be remedied by any number of mitigation strategies").

As it stands now, Keystone XL will not employ the conservation measures necessary to mitigate harm to cranes from power lines as set forth in the Service's own guidance, and the Service has not used the best available data on cranes to determine whether they will be jeopardized by power line collisions. These claims have not been mooted by the New Permit, and Northern Plains should have the opportunity to present them to this Court and obtain the requested relief.

III. Exceptions to mootness apply here

The motions should also be denied because three exceptions to mootness apply here: collateral legal consequences, voluntary cessation, and wrongs capable of repetition yet evading review. *See In re Burrell*, 415 F.3d 994, 998 (9th Cir. 2005).

A. The collateral legal consequences exception applies

The case is not moot because the environmental review documents at issue here—and the dispute over their adequacy—have collateral legal consequences. Even if a party is no longer directly aggrieved by an action, the "collateral legal consequences exception" applies when there remains "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 122 (1974) (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). A claim is not moot if the "challenged government activity" has not "evaporated or disappeared" and, "by its continuing and brooding presence, casts what may well be a substantive adverse effect on the interests of the petitioning parties." *Id.*

The environmental review documents here have important collateral legal consequences because a determination about their adequacy has

meaningful effects for other agencies' reviews. *See Am. Fed. of Gov't Emps., AFL-CIO v. Reagan*, 870 F.2d 723, 726 (D.C. Cir. 1989) (holding that "[i]mportant collateral consequences flowing from" the initial action led "to the conclusion that the controversy remains very much alive"). The New Permit does not "completely and irrevocably eradicate[] the effects of" the agencies' prior violations; there still is no adequate environmental review for the pipeline, as required by law. *See id*. If the Court dismisses this case as moot, the agencies may continue to rely on the current, legally deficient, environmental review. Furthermore, the public has an interest in the legality of the environmental review for this massive project. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) (public interest in having the legality of the practices settled militates against mootness).

Contrary to *Nome Eskimo Community v. Babbitt*, 67 F.3d 813, 815 (9th Cir. 1995), where the mining lease sale causing the plaintiffs' harm was canceled, there is no plan to cancel Keystone XL. Thus, the relief sought here has the meaningful legal consequences of ensuring adequate environmental review and mitigation measures. *See also E.E.O.C. v. Fed. Exp. Corp.*, 558 F.3d 842, 847 (9th Cir. 2009) (holding that an agency's action to enforce an administrative subpoena was not moot even after the defendant had provided the requested

information because the underlying legal issue would have ripple effects on the agency's continuing investigation).

In sum, the collateral consequences exception applies because the dispute about the sufficiency of the environmental review for Keystone XL is still very much alive.

B. The voluntary cessation exception applies

Federal Defendants admit that the "President's revocation of the 2017 permit is, in some sense, a 'voluntary cessation.'" Defs. Br. 14. However, they ignore that a defendant's "voluntary cessation" of challenged conduct "does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). Under this mootness exception, "[t]he defendant must demonstrate that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *NRDC*, 840 F.3d at 1102, 1104 (holding that the issuance of a new permit did not moot the plaintiffs' claims for injunctive relief where the defendant could not establish that it was absolutely clear that its violations would not recur). Federal Defendants have not carried that heavy burden.

Here, it is not absolutely clear Federal Defendants' violations will not recur. Quite the opposite: TransCanada still plans to build the pipeline, and environmental analysis of the pipeline is ongoing. Federal Defendants argue

that this is "not a case where the Secretary of State has withdrawn his permit so that he might reissue it again on some other day," Defs. Br. 13, but that misses the point. The question is not whether State will reissue the permit, but rather whether the federal government will continue to fail to fully consider the project's environmental impacts. Because there can be no guarantee the agencies will adequately revise the environmental review absent the district court's order compelling them to do so, Federal Defendants fail to meet their heavy burden. *See City of Mesquite*, 455 U.S. at 289 (holding that nothing would preclude the city from reenacting precisely the same challenged ordinance if the judgment were vacated).

This exception is especially applicable where, as here, the change in the government's position was specifically designed to divest the federal courts of jurisdiction. "[W]here a change in the law is prompted by an adverse district court ruling, an appeal is generally not moot." *Chambers*, 903 F.3d at 840; *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1126 (9th Cir. 2011) (finding a case was not moot where the city adopted a new law "in direct response to the district court's" judgment); *Jacobus*, 338 F.3d at 1103 (reasoning that concerns about voluntary cessation are "of particular force in a case like the present one, in which the 'voluntary cessation' occurred only in response to the district court's judgment"). This principle applies with additional weight when the

change is not statutory, but is instead executive in nature. *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015) (stating that "an executive action that is not governed by any clear or codified procedures cannot moot a claim").

In this case, there is no doubt that the President issued the New Permit in response to the district court's—and this Court's—rulings. The timing alone makes this clear. On March 15, this Court rejected TransCanada's motion for a stay of the injunction pending appeal. ECF No. 28 at 4. Just two weeks later, the President issued the New Permit, ignoring the delegation to State in Executive Order 13,337. Federal Defendants have provided no other plausible explanation for why the President would suddenly issue a new permit for Keystone XL two years after State issued a nearly identical permit for the same project. Indeed, as far as Northern Plains is aware, this is the first time a President has issued a cross-border permit since permitting authority was delegated to State over 50 years ago. *See* 33 Fed. Reg. 11,741 (Aug. 20, 1968).

This Court has not, as Federal Defendants claim, limited voluntary cessation cases to those in which the government *admits* it plans to return to its old ways. *See* Defs. Br. 14 (citing *Barilla v. Ervin*, 886 F.2d 1514, 1521 (9th Cir. 1989)). To the contrary, the "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to recur *lies with the party asserting mootness*." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*,

528 U.S. 167, 170 (2000) (emphasis added); *NRDC*, 840 F.3d at 1104 (reversing a district court that "impermissibly shifted the evidentiary burden to the Plaintiffs"). "Simply dispensing with the offending provision in the face of judicial rejection fails to make the requisite showing . . . ." *Chambers*, 903 F.3d at 840. A case "is not easily mooted where the government is otherwise unconstrained" to return to its old ways. *Coral Constr. Co. v. King Cty.*, 941 F.2d 910, 928 (9th Cir. 1991).

The cases Federal Defendants rely on are inapposite for similar reasons. In *Oregon Natural Resources Council, Inc. v. Grossarth*, 979 F.2d 1377, 1379 (9th Cir. 1992), the Court held that there was no "reasonable expectation" that the government would return to the unlawful conduct of failing to prepare an EIS because the timber sale was halted precisely so that the agency could prepare an EIS. Likewise, in *Forest Guardians v. U.S. Forest Service*, 329 F.3d 1089, 1095 (9th Cir. 2003), the Court found it was "absolutely certain" the government would not return to the challenged conduct, in part because the government admitted its conduct was illegal. By contrast, Federal Defendants have never admitted that their prior environmental review was illegal.

Instead, Federal Defendants have repeatedly produced and defended legally inadequate environmental review documents, first in 2014 when the EIS was completed and then again in 2017 when they failed to update their

already inadequate review. *See supra* Background I, II. And they have consistently argued that the issuance of the permit need not comply with applicable environmental laws at all—an argument the district court rejected. Appx069-86; Appx089-93. Therefore, although it is not Northern Plains' burden to prove, it is *likely* the wrongful conduct will recur. *See Armster v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 806 F.2d 1347, 1359 (9th Cir. 1986) ("It has long been recognized that the likelihood of recurrence of challenged activity is more substantial when the cessation is not based upon a recognition of the initial illegality of that conduct.").

Federal Defendants' argument that Northern Plains could simply challenge the new approvals when they occur, Defs. Br. 12, is hardly persuasive, as that same argument could be made in *any* voluntary cessation case. The point of the doctrine is that—for reasons of both fairness and judicial efficiency—plaintiffs are able to litigate that conduct as part of the existing case. By the time mootness is an issue, "the case has been brought and litigated, often (as here) for years. To abandon the case at an advanced stage may prove more wasteful than frugal." *Friends of the Earth, Inc.*, 528 U.S. at 191-92. The Court should not countenance the government's voluntary cessation by dismissing this case as moot.

C. The case is capable of repetition yet evading review

Likewise, Federal Defendants' failure to complete adequate environmental review is capable of repetition yet evading review. This exception applies if (1) "there is a reasonable expectation that the plaintiffs will be subjected to" the unlawful action again, and (2) "the duration of the challenged action is too short to allow full litigation before it ceases." *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1329 (9th Cir. 1992). The defendant bears the burden of proving the exception does not apply. *Ackley v. W. Conference of Teamsters*, 958 F.2d 1463, 1469 (9th Cir. 1992).

The first prong is met, as Federal Defendants have not satisfied their burden to show that Northern Plains will not again be subject to the same unlawful action: approval of federal permits—for example, by BLM or the Corps—before adequate environmental review for this pipeline. In *Greenpeace Action*, the plaintiffs challenged a quota for pollock during the 1991 fishing season under NEPA and the ESA. 14 F.3d at 1329. Although the 1991 fishing season ended before the appeal was heard, and the 1992 quota was "determined based on an entirely new administrative record," the Court held the issue was likely to occur again: "The major issue—whether the [agency] has adequately examined the effects of pollock fishing on the Steller sea lions—is likely to recur in future years." *Id.* at 1329-30.

Likewise, here the major issues in the NEPA and ESA documents—the pipeline's effects on climate change, oil spills, and endangered species—will be the same, regardless of the particular permit approved and whether other agencies complete further review. *See* Defs. Br. 12. Federal Defendants argue there is no chance State will issue another permit, Defs. Br. 15, but again, that misses the point. The wrong capable of repetition is not State's issuance of a permit, but rather the federal government failing to fully consider the project's environmental impacts. *See also Wildwest Inst. v. Kurth*, 855 F.3d 995, 1003 (9th Cir. 2017) (challenge to ESA listing decision not moot even though decision had been superseded because underlying reasoning was the same); *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1018 (9th Cir. 2012) (ESA claim capable of repetition yet evading review because agency would continue to act in the same way); *NRDC v. Evans*, 316 F.3d 904, 910 (9th Cir. 2003) (because agency "has repeated the same rationale . . . year after year, there is a reasonable expectation that the same issue will recur in future years").

The second prong is also satisfied because the underlying action—the approval and construction of Keystone XL—is of too short a duration for Northern Plains' environmental review claims to be fully litigated before construction causes irreversible environmental harm. While completion of part, or all, of the pipeline would not moot all of Northern Plains' claims, it

could moot certain aspects of those claims by causing irreparable injury. *See, e.g.*, *Neighbors of Cuddy Mountain*, 303 F.3d at 1065-66 (holding that parts of plaintiffs' NEPA claims about a completed timber sale could not be remedied because "of course the logged trees cannot be brought back," but nonetheless finding that that the case was not moot because the court could fashion relief to mitigate the damage). It is vital that Northern Plains be able to seek judicial review of the agencies' environmental analysis before construction begins.

Federal Defendants argue that the permits are not limited in duration because they do not expire, Def. Br. 15, but focusing on the permit alone ignores the harm caused by construction of the pipeline. TransCanada intends to build worker camps *immediately* if the injunction is lifted. Appx247. And TransCanada previously stated that it planned to complete the pipeline in roughly 18 months, SupplAppx021, but now says it has an even "more ambitious" schedule planned, TC Br. 15. This Court has held that such a timeline is too short for adequate review. *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Dep't of the Interior*, 655 F. App'x 595, 597 (9th Cir. 2016) (two years too short); *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1019 (9th Cir. 2010) (three years too short). That is especially true here because the "duration of the controversy is solely within the control of the defendant[s]." *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1174 (9th Cir. 2002).

Federal Defendants and TransCanada may argue that history shows Northern Plains has adequate time for future judicial review. While it is true the parties have been litigating this case for over two years before significant construction began, that is because TransCanada was either unable or unwilling to start construction sooner. But now that TransCanada is poised to start building immediately, any future approvals likely "will run [their] course before the matter can be fully litigated in federal court, including review on appeal." *See Moore v. Urquhart*, 899 F.3d 1094, 1101 (9th Cir. 2018) (emphasis omitted). Indeed, the timing of the New Permit is prejudicial to Northern Plains for precisely this reason.

In short, the Court should not dismiss this case as moot because it is capable of repetition yet evading review.

IV. Even if the case is moot, the Court should not vacate the district court's decisions or dissolve the permanent injunction

Even if the Court were to find the appeal is moot, it should reject Defendants' attempts to vacate the district court decisions and dissolve the injunction under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). Instead, it should "remand with instructions to the district court to weigh the equities and determine whether [the district court] should vacate its own judgment." *Mayfield v. Dalton*, 109 F.3d 1423, 1427 (9th Cir. 1997).

A. The Court should not vacate the district court decisions

The Supreme Court and this Court have made clear that automatic vacatur is an "extraordinary" remedy and that the party seeking vacatur has the burden to demonstrate "equitable entitlement" to it. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994). "Because this practice is rooted in equity, the decision whether to vacate turns on the conditions and circumstances of the particular case." *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (internal quotation marks omitted); *Dilley v. Gunn*, 64 F.3d 1365, 1370, 1372 (9th Cir. 1995) (noting that "the touchstone of vacatur is equity" and remanding to district court for further factual development).

Where the party seeking vacatur caused or contributed to the alleged mootness, courts often deny vacatur. *U.S. Bancorp Mortg. Co.*, 513 U.S. at 24-26 (denying motion for vacatur where mootness caused by settlement); *Rio Grande Silvery Minnow v. Keys*, 355 F.3d 1215, 1220 (10th Cir. 2004) (noting that "when the party seeking relief is the cause of the mootness, vacatur will not be granted"); *Ringsby Truck Lines, Inc. v. W. Conference of Teamsters*, 686 F.2d 720, 722 (9th Cir. 1982) (party that moots its own appeal "is in no position to complain that [its] right of review of an adverse lower court judgment has been

lost").[6] Defendants make several arguments as to why the *U.S. Bancorp Mortgage Co.* exception does not apply here. Each argument fails.

Federal Defendants and TransCanada argue that the New Permit was issued by the President—an independent actor—and that TransCanada was in no way responsible. TC Br. 14; Defs. Br. 17-18. TransCanada even argues it would be prejudiced by the President's action in absence of vacatur because it would be unable to appeal the district court decisions. This argument strains credibility. It is difficult to believe that the personal intervention of the President in the permitting of TransCanada's project was mere "happenstance," and that TransCanada did not contribute to that outcome. *See Rio Grande Silvery Minnow*, 355 F.3d at 1220.[7] TransCanada has provided no sworn declarations or other evidence to support its statement that it was not

[6] Federal Defendants incorrectly suggest *U.S. Bancorp Mortgage Co.* is limited to appeals mooted by settlement. Defs. Br. 16 (quoting *Humane Soc'y of U.S. v. Kempthorne*, 527 F.3d 181, 185, 187 (D.C. Cir. 2008)). As this Court has made clear, the holding is not so limited. *See, e.g.*, *Dilley*, 64 F.3d at 1372 (remanding to determine whether prison officials caused mootness by transferring inmate).

[7] Although this Court has stated that "[l]obbying Congress or a state legislature cannot be viewed as 'causing' subsequent legislation for purposes of the vacatur inquiry," it has also made clear that a closer inquiry may be warranted where, as here, executive action was involved. *Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 879 (9th Cir. 2006). A company that petitions the executive branch for a new permit contributes much more directly to mootness than does a company that lobbies for general legislation.

involved in the President's actions. And if TransCanada believes it will suffer prejudice absent vacatur, it can easily avoid that result by pursuing its appeal rather than moving to dismiss it as moot. *Contra* Defs. Br. 17 (suggesting that TransCanada's appeal has been "frustrated by the vagaries of circumstance").

At a minimum, TransCanada's alleged non-involvement in the President's issuance of the New Permit is another factual question that warrants a remand. This Court has directed remand in precisely these situations so the district court can determine in the first instance "whether mootness was caused by the voluntary action of the party seeking vacatur" and, if so, to balance the equities. *Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 879 (9th Cir. 2006); *see also Dilley*, 64 F.3d at 1370-71 (when the appeal is rendered moot by the appellant, the court's "established procedure" is to remand to consider vacatur in light of "the consequences and attendant hardships" and "the competing values of finality of judgment and right to relitigation of unreviewed disputes" (internal quotation marks omitted)). The district court's familiarity with the years-long federal review of this project makes it best equipped to develop and examine the factual record surrounding issuance of the New Permit.

Federal Defendants' assertion that the President did not bring about the alleged mootness "to avoid the judgment of the district court" is nonsensical

on its face. Defs. Br. 17. The President's issuance of the New Permit was exactly that—a blatant attempt to circumvent the district court's summary judgment order and permanent injunction. *See supra* page 24.

Of course, vacatur may be appropriate in situations where the "government undertakes remedial measures that do not result in manipulation of the judicial process and eliminate the underlying cause of an injunction." *Rio Grande Silvery Minnow*, 355 F.3d at 1220. For example, an agency may make changes to a proposed project to avoid environmental impacts. That is not what happened here. The government's response to the district court order was simply to substitute the signature of the State official on the permit with that of the President. That transparent attempt to manipulate the judicial process and vacate the district court's orders should not be rewarded.

Relatedly, the public's interest in the orderly operation of the judicial system and the protection of district court decisions from "a refined form of collateral attack" weighs against vacatur. *U.S. Bancorp Mortg. Co.*, 513 U.S. at 27. "Judicial precedents are presumptively correct and valuable to the legal community . . . and should stand unless a court concludes that the public interest would be served by a vacatur." *Id.*

In short, neither TransCanada nor Federal Defendants have met their burden to warrant an automatic vacatur.

B. The Court should not dissolve the injunction

For similar reasons, the Court should not dissolve the district court's injunction because TransCanada has failed to show it did not contribute to the alleged mootness. *Dilley*, 64 F.3d at 1370-71; *U.S. Bancorp Mortg. Co.*, 513 U.S. at 24-26. At a minimum, this matter should be remanded because the district court is best equipped to resolve any factual questions surrounding whether TransCanada caused the alleged mootness. *Dilley*, 64 F.3d at 1370-71.

Furthermore, the question of whether to alter the injunction is the quintessential example of a fact-based, equitable inquiry that should be considered in the first instance by the court that issued the injunction.[8] Here, the district court enjoined TransCanada from construction of Keystone XL until Federal Defendants correct their environmental review. After entering the initial injunction, the district court carefully balanced the equities twice more as required by *Monsanto Co. v Geerston Seed Farms*, 561 U.S. 139, 156-57 (2010), narrowly tailoring the injunction on both occasions to address TransCanada's purported injury. Appx166-181; Appx182-212.

[8] TransCanada relies on *Cablevision of Texas III, L.P. v. Oklahoma Western Telelephone Co.*, but that case was an appeal of a district court's refusal to lift an injunction, and recognizes that the decision should be left to the discretion of the district court. 993 F.2d 208, 210 (10th Cir. 1993).

TransCanada's motion is an attempt to circumvent the district court's injunction and this Court's denial of the stay pending appeal, but none of the material factual circumstances on which the district court based its injunction has changed. In fact, the *only* thing that has changed is the signature on the permit.

Federal Defendants still have not completed an adequate environmental review for the pipeline as the district court instructed. The district court explained that allowing ground-disturbing activities on Keystone XL prior to compliance with environmental laws could harm Plaintiffs in the form of bureaucratic momentum, by skewing federal agencies' future analysis and decision-making in favor of project completion along the preferred route. Should the injunction be dissolved, TransCanada would likely attempt to proceed with the construction of much of the pipeline outside of the BLM and Corps jurisdictional areas, thereby skewing those agencies' decision-making processes and causing adverse environmental impacts prior to completion of the review that the district court ordered. *See supra* pages 15-16. The New Permit does nothing to alleviate those concerns.

Because the challenged conduct and the harm to Northern Plains is far from discontinued, the cases on which Federal Defendants rely are inapposite.

See Defs. Br. 19 (citing *Mayor of Phila. v. Educ. Equal. League*, 415 U.S. 605, 622-23 (1974), and *United States v. Or. State Med. Soc'y*, 343 U.S. 326, 334 (1952)).

The district court should also have an opportunity to evaluate any potential changes to TransCanada's construction plan and how it may alter the court's analysis under *Monsanto*. TransCanada claims it has developed plans for a "more ambitious" construction schedule without providing any evidence to explain what that plan entails or why the worker camps must be urgently built now when construction cannot begin until next year. *See supra* page 29.

Thus, even if this Court finds that the appeal is moot, the district court should have an opportunity to evaluate any new factual developments in the first instance and properly balance the equitable factors in deciding whether to alter the injunction.

CONCLUSION

For the foregoing reasons, the Court should remand this case to the district court, or alternatively, deny the motions to dismiss as moot.

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Respectfully submitted,

Dated: April 23, 2019

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing brief contains 8,374 words, excluding the material exempted by Federal Rules of Appellate Procedure 27(d)(2) and 32(f). This complies with the Court's Order of April 11, 2019, ECF No. 40.

I also certify that the foregoing brief has been prepared in a proportionately spaced typeface using Microsoft Word Calisto MT 14-point font. This complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6).

/s/ Jaclyn H. Prange

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing brief on April 23, 2019 with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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