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INDIGENOUS ENVIRONMENTAL NETWORK
and NORTH COAST RIVERS ALLIANCE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

INDIGENOUS ENVIRONMENTAL NETWORK
and NORTH COAST RIVERS ALLIANCE,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF STATE;
THOMAS A. SHANNON, JR., in his official capacity
as U.S. Under Secretary of State; UNITED STATES
FISH AND WILDLIFE SERVICE, a federal agency;
JAMES W. KURTH, in his official capacity as Acting
Director of the U.S. Fish and Wildlife Service; and
RYAN KEITH ZINKE, in his official capacity as
U.S. Secretary of the Interior,

Defendants.

Civ. No. _____
**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTION

1
2 1. On March 23, 2017, the U.S. Department of State (“State Department”)
3 rendered its decision to issue a Presidential Permit (“Permit”) to TransCanada Keystone
4 Pipeline, L.P., a limited Delaware partnership owned by affiliates of TransCanada
5 Corporation of Canada, to construct, connect, operate, and maintain an 875-mile long
6 pipeline and related facilities commonly known as the Keystone XL Pipeline (the
7 “Project”) to transport up to 830,000 barrels per day (“BPD”) of crude oil from Alberta,
8 Canada and the Bakken shale formation in Montana to existing pipeline facilities near
9 Steele City, Nebraska. From there, the oil would eventually be delivered to Cushing,
10 Oklahoma and the Gulf Coast region. The Project would pose grave risks to the
11 environment, including the climate, water resources and wildlife, and to human health
12 and safety.

13 2. Plaintiffs the Indigenous Environmental Network (“IEN”) and North Coast
14 Rivers Alliance (“NCRA”) (collectively, “plaintiffs”) challenge the approval of the
15 Project by defendants UNITED STATES DEPARTMENT OF STATE and Under
16 Secretary of State THOMAS A. SHANNON, JR. (collectively, “State Department”), and
17 Secretary of the Interior RYAN KEITH ZINKE, Acting Director of the United States Fish
18 and Wildlife Service JAMES W. KURTH, and the UNITED STATES FISH AND
19 WILDLIFE SERVICE (collectively, “FWS”) for violations of the National
20 Environmental Policy Act (“NEPA”), 42 U.S.C. section 4321 *et seq.*, the Endangered
21 Species Act (“ESA”), 16 U.S.C. section 1531 *et seq.*, the Migratory Bird Treaty Act
22 (“MBTA”), 16 U.S.C. section 701 *et seq.*, the Bald Eagle and Golden Eagle Protection
23 Act (“Eagle Act”), 16 U.S.C. 24 section 668, the Administrative Procedure Act (“APA”),
24 5 U.S.C. section 701 *et seq.*, and regulations promulgated thereunder. The State
25 Department’s approval of the Permit violates four principal environmental laws.

26 3. First, the State Department’s NEPA review of the Project was inadequate.
27 The State Department’s Final Supplemental Environmental Impact Statement (“FSEIS”)
28 fails to (1) provide a detailed and independent Project purpose and need, (2) analyze all

1 reasonable alternatives to the Project, (3) study the Project's transboundary effects, (4)
2 disclose and fully analyze many of the Project's adverse environmental impacts, (5)
3 formulate adequate mitigation measures, and (6) respond adequately to comments. In
4 addition, the FSEIS was irredeemably tainted because it was prepared by Environmental
5 Resources Management ("ERM"), a company with a substantial conflict of interest. The
6 State Department violated its own guidelines when it selected ERM, and this selection
7 was therefore arbitrary and capricious, in violation of the APA.

8 4. Second, the State Department and FWS violated the Endangered Species Act
9 ("ESA"), 16 U.S.C. section 1531 *et seq.*, because they failed to fully analyze the Project's
10 potential effects on threatened and endangered species, failed to use the best scientific
11 and commercial data available, and entirely failed to consider the Project's effects on the
12 endangered northern swift fox, contrary to 16 U.S.C. section 1536(a)(2). The FWS'
13 violation of ESA is ripe for adjudication under the APA. The State Department's
14 violation of ESA will become ripe for adjudication following plaintiffs' compliance with
15 ESA's 60-day notice requirement. Plaintiffs are transmitting a 60-day notice of their
16 intent to sue the State Department for this violation and will amend this Complaint to
17 allege this violation when that notice matures.

18 5. Third, the State Department violated the MBTA by allowing un-permitted
19 taking of the numerous protected migratory bird species that the Project will harm,
20 contrary to 16 U.S.C. section 703(a).

21 6. Fourth, the State Department violated the Eagle Act by allowing the un-
22 permitted taking of bald and golden eagles and failing to secure a permit for the take of
23 those eagles, contrary to 16 U.S.C. section 668(b).

24 7. Accordingly, plaintiffs seek orders from this Court: (1) granting preliminary
25 injunctive relief restraining defendants from taking any action that would result in any
26 change to the physical environment in connection with the Project pending a full hearing
27 on the merits; (2) declaring that defendants violated NEPA; (3) declaring that defendants
28 violated ESA; (4) declaring that defendants violated the MBTA; (5) declaring that

1 defendants violated the Eagle Act; (6) declaring that defendants violated the APA; and
 2 (7) granting permanent injunctive relief overturning defendants' Project approvals
 3 pending defendants' compliance with NEPA, the MBTA, the Eagle Act, and the APA.

4 JURISDICTION AND VENUE

5 8. The Court has jurisdiction over this action under 28 U.S.C. sections 1331
 6 (federal question), 1337 (regulation of commerce), 1346 (U.S. as defendant), 1361
 7 (mandamus against an officer of the U.S.), 2201 (declaratory judgment), and 2202
 8 (injunctive relief); under the Administrative Procedure Act ("APA"), 5 U.S.C. sections
 9 701-706 (review of final agency action); and under the ESA, 16 U.S.C. section
 10 1540(g)(1)(C) because (1) the action arises under the APA, NEPA, the MBTA, the Eagle
 11 Act, and ESA; (2) the State Department and FWS are agencies of the U.S. government
 12 and the individual defendants are sued in their official capacities as officers of the U.S.;
 13 (3) the action seeks a declaratory judgment voiding the State Department's grant of the
 14 Permit; and (4) the action seeks further injunctive and mandamus relief until the State
 15 Department and FWS comply with applicable law.

16 9. Venue is proper in this judicial district pursuant to 28 U.S.C. section
 17 1391(e)(1)(B) and Montana Local Civil Rules 1(c)(3) and 3.2(b)(1)(A) because the
 18 proposed pipeline would cross the international border in Phillips County. Since this
 19 border crossing triggers the Presidential permit requirement, "a substantial part of the
 20 events . . . giving rise to the claim occurred" in this judicial district. 28 U.S.C. §
 21 1391(e)(1)(B); Mont. Civ.R. 3.2(b)(1)(A).

22 10. There exists now between the parties hereto an actual, justiciable controversy
 23 in which plaintiffs are entitled to have a declaration of their rights, a declaration of the
 24 State Department's obligations, and further relief because of the facts and circumstances
 25 hereinafter set forth.

26 11. This Complaint is timely filed within the applicable six-year statute of
 27 limitations set forth in 28 U.S.C. section 2401(a).

28 12. Plaintiffs have standing to assert their claims and, to the extent required,

1 have exhausted all applicable remedies.

2 **PARTIES**

3 13. Plaintiff Indigenous Environmental Network (“IEN”) is incorporated under
4 the non-profit organizational name of Indigenous Educational Network of Turtle Island.
5 Established in 1990, IEN a network of indigenous peoples from throughout North
6 America who are empowering their Indigenous Nations and communities toward
7 ecologically sustainable livelihoods, long-denied environmental justice, and full
8 restoration and protection of the Sacred Fire of their traditions. Its members include
9 chiefs, leaders and members of Indigenous Nations and communities who inhabit the
10 states and province through which the Project is proposed to be built and who would be
11 directly and irreparably harmed by its many severe adverse environmental and cultural
12 impacts. IEN has been involved in grassroots efforts throughout the United States and
13 Canada to mobilize and educate the public regarding the harmful environmental and
14 cultural impacts of the Project.

15 14. Plaintiff North Coast Rivers Alliance (“NCRA”) is an unincorporated
16 association of conservation leaders from the western and northern United States and
17 Canada. NCRA has participated in public education, advocacy before legislative and
18 administrative tribunals, and litigation in state and federal court to enforce compliance by
19 state and federal agencies with state and federal environmental laws. NCRA’s members
20 use the land and water resources that the Project would affect and therefore would be
21 materially harmed by the construction and operation of the pipeline.

22 15. Plaintiffs’ injuries are fairly traceable to the State Department’s and FWS’
23 actions. Construction and operation of the Project and connected actions will harm
24 plaintiffs’ use of the Project area for recreational, cultural and spiritual activities
25 including nature study, wildlife and wildflower viewing, scenic enjoyment, photography,
26 hiking, family outings, star gazing and meditation. These injuries are actual, concrete,
27 and imminent. Plaintiffs have no plain, speedy, or adequate remedy at law. Accordingly,
28 plaintiffs seek injunctive, mandamus, and declaratory relief from this Court to set aside

1 the State Department's and FWS' unlawful acts and redress plaintiffs' injuries.

2 16. Defendant UNITED STATES DEPARTMENT OF STATE ("State
3 Department") is a federal executive agency headquartered in Washington, D.C. Under
4 Executive Order 13337, the State Department is responsible for determining whether
5 granting a Presidential permit for the Project would serve the national interest.

6 17. Defendant THOMAS ALFRED SHANNON is the U.S. Under Secretary of
7 State, and, in that capacity, is responsible for issuing Presidential permits for energy
8 facilities that cross the United States-Canada border, including the Presidential Permit at
9 issue here, where, as here, the Secretary of State has recused himself from the matter.

10 18. Defendant UNITED STATES FISH AND WILDLIFE SERVICE ("FWS") is
11 an agency within the U.S. Department of the Interior. Under ESA, FWS is charged with
12 the preservation of endangered and threatened species and their habitat, including the
13 species that will be harmed by the Project.

14 19. Defendant JAMES W. KURTH is the Acting Director of FWS, and is
15 therefore responsible for preserving endangered and threatened species and their habitat.

16 20. Defendant RYAN KEITH ZINKE is the Secretary of the U.S. Department of
17 the Interior, and, in that capacity, is the federal official charged with responsibility for the
18 proper management of FWS and is responsible for the actions of FWS challenged herein.

19 BACKGROUND

20 21. On May 4, 2012, the Department of State received an application from
21 TransCanada Corporation, a Canadian public company organized under the laws of
22 Canada. for a Presidential permit for a proposed pipeline that would run from the
23 Canadian border to connect to a pipeline in Steele City, Nebraska.

24 22. On March 1, 2013, the Department of State released a Draft Supplemental
25 Environmental Impact Statement ("DSEIS") for the new Presidential Permit application
26 for the proposed Keystone XL pipeline.

27 23. On March 8, 2013, the U.S. Environmental Protection Agency (EPA)
28 announced the availability of the Draft SEIS on its website, starting the 45-day public

1 comment period.

2 24. On April 18, 2013, the Department of State held a public meeting in Grand
3 Island, Nebraska.

4 25. On April 22, 2013, the comment period on the Draft Supplemental
5 Environmental Impact Statement closed.

6 26. On May 15, 2013, the FWS Service issued its Biological Opinion for the
7 proposed Keystone XL pipeline to the Department of State.

8 27. The State Department provided an additional 30-day opportunity for the
9 public to comment during the National Interest Determination (NID) period that began
10 with the February 5, 2014 notice in the Federal Register announcing the release the Final
11 SEIS ("FSEIS").

12 28. On November 6, 2015, Secretary of State John Kerry determined under
13 Executive Order 13337 that issuing a Presidential permit for the proposed Keystone XL
14 pipeline's border facilities would not serve the national interest, and denied the permit
15 application.

16 29. On January 24, 2017, President Donald Trump issued a Presidential
17 Memorandum Regarding Construction of the Keystone XL Pipeline which, *inter alia*,
18 invited the permit applicant "to resubmit its application to the Department of State for a
19 Presidential permit for the construction and operation of the Keystone XL Pipeline." On
20 January 24, 2017, President Trump also issued an Executive Order on Expediting
21 Environmental Reviews and Approvals for High Priority Infrastructure Projects in which
22 he set forth the general policy of the Executive Branch "to streamline and expedite, in a
23 manner consistent with law, environmental reviews and approvals for all infrastructure
24 projects, especially projects that are a high priority for the Nation," and cited pipelines as
25 an example of such high priority projects.

26 30. On January 26, 2017, the State Department received a re-submitted
27 application from TransCanada Keystone Pipeline, L.P. ("TransCanada"), a limited
28 partnership organized under the laws of the state of Delaware and owned by affiliates of

1 TransCanada Corporation, a Canadian public company, for the proposed Project. The re-
2 submitted application includes purportedly minor route alterations due to agreements with
3 local property owners for specific right-of-ways and easement access, ostensibly within
4 the areas previously included by the Department of State in its FSEIS.

5 31. On March 23, 2017, the State Department granted a Presidential Permit to
6 TransCanada, allowing its construction and operation of the Project.

7 **FIRST CLAIM FOR RELIEF**

8 (Violation of the National Environmental Policy Act)

9 (Against All Defendants)

10 32. The paragraphs set forth above are realleged and incorporated herein by
11 reference.

12 33. By granting the Presidential Permit to TransCanada based on an inadequate
13 FSEIS, the State Department violated NEPA, 42 U.S.C. section 4321 *et seq.*, and its
14 implementing regulations, 40 C.F.R. § 1500 *et seq.* By approving the Project without
15 complying with NEPA, the State Department failed to proceed in accordance with law in
16 violation of the APA, 5 U.S.C. § 706(2)(A) and (D).

17 **PROJECT PURPOSE AND NEED**

18 34. The FSEIS' purpose and need statement falls short of NEPA's
19 requirements because the stated Project objectives are far too narrow. The FSEIS states
20 that "the primary purpose of the proposed Project is to provide the infrastructure to
21 transport [Western Canadian Sedimentary Basin ("WCSB")] crude oil from the border
22 with Canada to existing pipeline facilities" in Nebraska, for eventual delivery to refineries
23 on the Gulf Coast. FSEIS 1.3-1.

24 35. By needlessly narrowing the Project's scope, the FSEIS unduly constrains
25 the available options to those that are preemptively locked into fossil fuel dependence.
26 Therefore, the FSEIS only examines options that address moving oil from the WCSB and
27 the Bakken shale formation to market, without discussing myriad other potential ways to
28 meet global energy needs. Its narrow purpose and need statement led the State

1 Department to unreasonably restrict the range of alternatives considered, omitting feasible
 2 and much more environmentally beneficial renewable energy and energy efficiency
 3 alternatives. This violates NEPA. *National Parks & Conservation Association v. Bureau*
 4 *of Land Management* (“*NPCA v. BLM*”), 606 F.3d 1058, 1070 (9th Cir. 2010).

5 ALTERNATIVES

6 36. NEPA requires that an EIS “[r]igorously explore and objectively evaluate all
 7 reasonable alternatives” so that “reviewers may evaluate their comparative merits.” 42
 8 U.S.C. §4332(2)(C)(iii), (E); 40 C.F.R. § 1502.14. Furthermore, “[a]n agency may not
 9 define the objectives of its action in terms so unreasonably narrow that only one
 10 alternative among the environmentally benign ones in the agency’s power would
 11 accomplish the goals of the agency’s action, and the EIS would become a foreordained
 12 formality.” *NPCA v. BLM*, 606 F.3d at 1070 (internal quotations and citations omitted).
 13 “The existence of a viable but unexamined alternative renders an environmental impact
 14 statement inadequate.” *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038
 15 (9th Cir. 2008).

16 37. Here, the State Department *entirely* failed to consider the feasible and
 17 environmentally beneficial alternatives of adopting aggressive renewable energy and
 18 energy efficiency measures to obviate the claimed need for more crude oil. The EPA
 19 raised this objection in its comments on the Keystone XL DSEIS, and the FSEIS fails to
 20 remedy the DEIS’, FEIS’, and DSEIS’ failure to analyze renewable energy and energy
 21 efficiency alternatives. Rather, after a cursory discussion, the FSEIS states that “use of
 22 alternative energy sources and energy conservation in meeting needs for transportation
 23 fuel have not been carried forward for further analysis as an alternative to the proposed
 24 Project.” FSEIS 2.2-44. As EPA concluded in assigning the DSEIS a failing grade of
 25 “insufficient,” this violates NEPA. 40 C.F.R. § 1502.14; *NPCA v. BLM*, 606 F.3d at
 26 1070; *Friends of Yosemite Valley*, 520 F.3d at 1038.

27 ENVIRONMENTAL IMPACTS

28 38. An EIS must take a “hard look” at the environmental impacts of proposed

major federal actions and provide a “full and fair discussion” of those impacts. 40 C.F.R. § 1502.1; *National Parks & Conservation Association v. Babbitt* (“*NPCA v. Babbitt*”), 241 F.3d 722, 733 (9th Cir. 2001). Here, however, the FSEIS’ discussion of many environmental and cultural impacts is absent or inadequate, as explained below.

A. Extraterritorial Impacts

39. Federal agencies must consider the international impacts of their proposed actions. *Backcountry Against Dumps v. Chu*, ___ F.Supp.3d ___, 2015 WL 12697959 *7 (S.D. Cal. 2015) (“under NEPA, agencies must analyze extraterritorial effects of actions before they can issue a permit”); *Government of the Province of Manitoba v. Salazar*, 691 F.Supp.2d 37, 51 (D.D.C. 2010) (federal agencies must consider the effects of their actions taken within the United States that are felt across sovereign borders, such as in Canada); *Border Power Plant Working Group v. Department of Energy*, 260 F.Supp.2d 997 (S.D. Cal. 2003) (same); *Hirt v. Richardson*, 127 F.Supp.2d 833, 844 (W.D. Mich. 1999) (holding that “the facts in this case warrant extraterritorial application of NEPA”); *National Organization for Reform of Marijuana Laws v. United States Department of State*, 452 F.Supp. 1226, 1232-33 (D.D.C. 1978) (court “assume[d] without deciding, that NEPA is fully applicable to the Mexican herbicide spraying program” in which the U.S. was participating, and required an analysis of the program’s impacts in Mexico); *Sierra Club v. Adams*, 578 F.2d 389, 392 (D.C. Cir. 1978) (“[i]n view of the conclusions we reach in this case, we need only assume, without deciding, that NEPA is fully applicable to construction in Panama”); *Wilderness Society v. Morton*, 463 1261 (D.C.Cir. 1972) (holding that Canadian citizens had standing to intervene in a NEPA-based suit on the basis of their claims that possible oil spills from the Trans-Alaskan oil pipeline might cause damage to Canada).

40. Here, the State Department claims that it is not legally required to “conduct an in depth assessment of the potential impacts of the Canadian portion of the proposed pipeline,” but that, “as a matter of policy,” the State Department included information regarding potential impacts in Canada.” FSEIS 4.15-93. However, the State Department

1 is wrong in its assertion that it need not analyze the Project's effects in Canada, and its
 2 proffered "information" falls far short of the "hard look" that NEPA requires. *Natural*
 3 *Resources Defense Council v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972).

4 41. Among the extraterritorial impacts that should have been – but were not –
 5 fully analyzed in the EIS are the impacts of an increase in bitumen tar sands mining in
 6 Canada that will result from the Project. The very premise of the FSEIS' limited
 7 discussion of the impacts of oil sands extraction – that the "Project would not contribute
 8 to cumulative impacts associated with bitumen extraction activities" – is fundamentally
 9 incorrect. FSEIS 4.15-104. It defies logic to claim, as does the FEIS, that because the
 10 pipeline (which will carry bitumen) is located slightly southeast of the point of extraction
 11 of the bitumen it will carry, the pipeline bears no relation to that extraction. FSEIS 4.15-
 12 104.

13 42. In addition, to the extent that the FSEIS does superficially analyze the
 14 impacts of oil sands extraction, it profoundly understates those impacts. For example, the
 15 FEIS and DSEIS claim that 232 square miles "have been disturbed by oil sands mining
 16 activity," and the FSEIS slightly increases this number, admitting that 276 square miles
 17 "of land have been disturbed."¹ FSEIS 4.15-107. However, Google Earth imagery shows
 18 that the area of land disturbed by oil sands mining is already an order of magnitude
 19 greater – an impact that will grow far greater still if the Project is allowed to operate.

20 43. The FSEIS also implies that tar sands mining sites can be and are being
 21 reclaimed. To the contrary, in fact such sites cannot be reclaimed within a human
 22 lifetime, if ever.

24 ¹ According to the statistics provided in the DSEIS, the number of square miles
 25 (232) that had been disturbed by oil sands mining activity and the number of square
 26 miles that were in the process of reclamation (26) did not change between the time of
 27 the release of the original FEIS in August, 2011 and the release of the DSEIS 19
 28 months later in March, 2013. DSEIS 4.15-113; FEIS 3.14-63. This is untrue, and is
 emblematic of the State Department's failure to provide accurate information regarding
 the Project's severe impacts in Canada and elsewhere.

1 44. The FSEIS also fails to analyze the fact that tar sands mining releases
 2 massive amounts of sulfur dioxide and elemental sulfur into the surrounding
 3 environment, including both soil and water, harming birds and other wildlife.

4 45. Finally, the FSEIS fails to adequately analyze the severe environmental
 5 hazards posed by tailings ponds, which contain a witches' brew of toxic tar sands and
 6 other contaminants, clay, sand, hydrocarbons, sulfur, and heavy metals and remain for
 7 decades after the oil extraction process. Such ponds pose massive risks to wildlife,
 8 especially birds that are attracted to and land on the ponds. For example, Syncrude
 9 Canada, the largest tar sands oil extraction company in Canada, runs one lake-sized
 10 reservoir that killed over 1,600 birds in 2008 alone.² FSEIS 4.15-113. In light of their
 11 significant risks, tailings ponds should be fully addressed in the FSEIS' analysis of
 12 environmental impacts, not simply mentioned as posing an unstudied "exposure risk" for
 13 birds, FSEIS 4.15-110, and discussed in three broad overview paragraphs – paragraphs
 14 that focus on efforts to mitigate risks of harm, rather than disclosing and analyzing the
 15 full extent of the harms themselves. FSEIS 4.15-113.

16 46. By failing to analyze the Project's foreseeable and harmful extraterritorial
 17 impacts, the FSEIS violates NEPA.

18 **B. Hydrologic Impacts**

19 47. The new pipeline route purportedly skirts some of the ecologically sensitive
 20 Nebraska Sandhills. However, it still traverses northern Holt Country, which has
 21 permeable soil and a high water table – precisely the characteristics that made the
 22 Sandhills too risky an area to cross. Therefore, any spill or release of oil or other
 23 chemicals would still pose grave risks to groundwater. Indeed, the FSEIS admits that the
 24 Project will cross areas with sandy soils similar to those in the Sandhills, and that those
 25 soils "could be potential recharge areas for underlying aquifers." FSEIS PC-71. The
 26 FSEIS dismisses this concern, claiming that preventive action and other laws would

27
 28 ² White, Patrick, October 26, 2010, "Toxic Syncrude tailings pond kills hundreds more ducks," *The Globe and Mail*.

1 mitigate oil spill risks. *Id.* However, no number of preventive measures could eliminate
2 the profound risks posed to these vulnerable and critically needed aquifers, and no known
3 mitigation measures can fully remediate and restore an aquifer contaminated by a crude
4 oil spill.

5 48. The FSEIS also inadequately analyzes the risks posed by the mixture of tar
6 sands and diluents used in the transport of tar sands bitumen commonly referred to as
7 “dilbit.” While the FSEIS includes some material describing how spilled dilbit would
8 behave in an aquifer (*see, e.g.*, FSEIS 4.3-12), the discussion lacks the necessary detail,
9 and admits risks that are simply too great to countenance. *See, e.g.*, FSEIS 4.13-84 (“The
10 release of dilbit to a river or other aquatic environment introduces the potential for
11 additional impacts and additional recovery challenges for responders of such an event to
12 the environment.”)

13 49. Furthermore, to date there has been *no* modeling of the effects of dilbit, and
14 its movement within, the Northern High Plains Aquifer System. The FSEIS admits that
15 “[n]o information regarding conditions related to large-scale petroleum releases was
16 readily accessible for the alluvial aquifers or [Northern High Plains Aquifer] along the
17 proposed pipeline area,” and that the FSEIS therefore relies solely on information from a
18 *non-dilbit* crude oil spill in Bemidji, Minnesota. FSEIS 4.3-15. This renders the FSEIS’
19 groundwater impact analysis inadequate under NEPA.

20 50. The fact that “[n]o information related to” large spills in the specific
21 conditions of the Project are “was readily accessible” does not mean that the State
22 Department was excused from addressing this issue. Rather, when “there is incomplete or
23 unavailable information” that is “essential to a reasoned choice among alternatives and
24 the overall costs of obtaining it are not exorbitant, the agency shall include the
25 information in the [EIS].” 40 C.F.R. §1502.22; *Foundation for North American Wild*
26 *Sheep v. U.S. Department of Agriculture*, 681 F.2d 1172, 1179 (9th Cir. 1982) (“[T]he
27 very purpose of NEPA’s requirement that an EIS be prepared for all actions that may
28 significantly affect the environment is to obviate the need for . . . speculation by insuring

1 that available data is gathered and analyzed prior to the implementation of the proposed
 2 action”); *Oregon Natural Desert Association v. Singleton* (“ONDA”), 47 F.Supp.2d 1182,
 3 1194 (D.Or. 1998) (“NEPA requires that the agency develop the data first, and then make
 4 a decision, not make a decision and then develop the data,” internal quotations and
 5 citation omitted); *Oregon Environmental Council v. Kunzman*, 614 F.Supp. 657, 663
 6 (D.Or. 1985). Therefore, NEPA requires that the State Department conduct or fund a
 7 study that models dilbit’s movement within the Northern High Plains Aquifer System.

8 51. Finally, the FSEIS fails to give the public any assurances – let alone
 9 demonstrate with evidentiary support – that the many trade-secret chemicals that would
 10 be used as diluents in the dilbit would not behave unexpectedly and cause significant
 11 health and environmental problems if released into an aquifer or surface waters.

12 52. In addition to these informational deficiencies, the FSEIS also does not
 13 accurately identify or evaluate the potential impacts of oil spills or pipeline leaks on the
 14 surface and subsurface water resources of the Central Plains states of Montana,
 15 Wyoming, South Dakota, Nebraska, Kansas, Oklahoma, or Texas, and fails to disclose
 16 and discuss how extensively interconnected are the water resources put at risk by the
 17 Project. The FSEIS also fails to account for and analyze the impacts of an oil spill to the
 18 thousands of unrecorded and unsealed wells in the rural areas through which the Project
 19 would pass.

20 **C. Cultural Resource Impacts and Environmental Justice**

21 53. NEPA mandates that agencies analyze cultural resources impacts in
 22 environmental impact statements. 40 C.F.R. §§ 1502.16(f), 1508.8. In addition,
 23 Executive Order 12898 (February 11, 1994) requires that federal agencies, including the
 24 State Department, “make achieving environmental justice part of [their] mission[s] by
 25 identifying and addressing, as appropriate, disproportionately high and adverse human
 26 health or environmental effects of [their] programs, policies, and activities on minority
 27 populations,” including indigenous peoples.

28 54. The Project would irreparably and disproportionately harm indigenous

1 peoples and other under represented minority populations, while restricting its claimed
2 economic benefits primarily to the corporate proponents of the Project and Canadian tar
3 sands mining. The Project's social, cultural, and health impacts would extend from the
4 tar sands mining areas in Canada, along the length of the Keystone XL Pipeline, and
5 down into Texas where the tar sands dilbit would be processed and exported. Yet in
6 violation of both NEPA and Executive Order 12898, the State Department inadequately
7 addressed these environmental justice and cultural resource impacts.

8 55. The FSEIS claims that "mitigation measures" would limit the Project's
9 cultural impacts, but those measures would be ineffectual. *See, e.g.*, FSEIS 4.11-4
10 (suggesting that impacts to cultural resources could be mitigated by protecting "a similar
11 resource nearby," "detailed documentation of the resource," or establishing "interpretive
12 exhibits").

13 **D. Climate Impacts**

14 56. The FSEIS admits that the Project would emit .24 million metric tons of
15 carbon dioxide equivalents ("MMTCO₂e") during construction, and an annual 148-170
16 MMTCO₂e due to operation and production, refining, and combustion of oil sands crude
17 oil transported through the Project. FSEIS 4.14-4. The FSEIS tries to downplay the
18 Project's climate impacts by inexplicably claiming that approval of the Project is
19 "unlikely to significantly impact the rate of extraction in the oil sands, or the continued
20 demand for heavy crude oil at refineries in the U.S." FSEIS 1.4-10. Both of these claims
21 are without basis, and are therefore arbitrary and capricious.

22 57. The FSEIS' premise that tar sands in Alberta will be fully exploited
23 regardless of whether the Project is approved improperly minimizes the climate change
24 impacts of the Project by assuming that all climate change impacts of tar sands mining
25 will take place whether or not the Project is approved and constructed. This premise is
26 incorrect and is without logical or factual basis.

27 58. Despite the FSEIS' claims to the contrary, the Project will increase the rate
28 of extraction in the oil sands. It is axiomatic that adding a major mode of transport – one

1 that could carry 830,000 barrels of oil per day – would allow *more* oil to be brought from
2 the tar sands to market, thereby increasing “the rate of extraction in the oil sands.” FSEIS
3 1.4-10. Other potential modes of transport, including rail and tanker, are limited. See,
4 e.g, FSEIS 1.4-36 (noting that “transportation bottlenecks” are causing lower pricing).
5 The Keystone XL pipeline would increase *overall* transport capacity from the tar sands,
6 and therefore increase the *rate* of extraction.

7 59. Moreover, the State Department’s conclusions were largely based upon its
8 assumptions that rail transport capacity would increase sufficiently to transport as much
9 oil as could be extracted from the tar sands. However, those predictions of rapid
10 development of rail transport have not come to pass. In its March DSEIS, the State
11 Department predicted that in 2013, rail shipments of Canadian tar sands crude to the U.S.
12 Gulf Coast would reach at least 200,000 barrels per day. In fact, total Canadian crude rail
13 shipments to *all* locations in 2013 totaled only 180,000 barrels per day, with *less than*
14 *30,000 barrels per day going to the Gulf Coast.*

15 60. The State Department’s claims about the feasibility of shipping oil by rail
16 were also inflated because they failed to incorporate higher costs associated with potential
17 new regulations intended to address risks posed by the increasing practice of transporting
18 oil by rail. These regulations were recently recommended by the National Transportation
19 Safety Board and the Canadian Transportation Safety Board.

20 61. The FSEIS itself recognizes that at a certain price point, transporting oil by
21 pipeline would still be profitable, while transporting it by rail would *not*. FSEIS 1.4-8.
22 According to the FSEIS, if the price dropped below \$65 per barrel, oil sands extraction
23 might not be economically viable no matter the transportation method, mooted the
24 distinction between rail and pipeline transportation. If oil prices – which currently
25 fluctuate in the \$50 range – return to levels above \$65 per barrel, however, the Project
26 would mean the difference between extracting, processing, and burning some of the most
27 carbon-intensive – and thus climate change-inducing – fuel on the planet, and leaving it
28 in the ground.

1 62. The FSEIS seems to conclude that it is unlikely that oil prices will fall to
2 between \$65 and \$75 per barrel, see FSEIS 1.4-105, but there is no basis for this
3 conclusion. First, the FSEIS itself notes that oil prices are volatile, difficult to predict,
4 and driven by a variety of factors. FSEIS 1.4-8. Second, of course, in fact the price of oil
5 *has* fallen below \$75 per barrel and is currently fluctuating in the range of \$50 per barrel.
6 Without the Project, falling prices are even more likely. See, e.g., FSEIS 1.4-36 (noting
7 that “transportation bottlenecks” are causing lower pricing). Therefore, the FSEIS’
8 conclusion that transporting oil by rail will remain profitable is unfounded.

9 63. The FSEIS also ignores other factors pushing the Project’s total contribution
10 to greenhouse gas levels upward. For example, extracting the heavy oil for the tar sands
11 is energy intensive. Additional carbon emissions result from the energy, usually natural
12 gas, used to extract the oil, increasing the carbon footprint of the whole process by 23%
13 to 41%. Due to the amount of energy needed to extract the oil, oil sands development
14 also drives up demand for natural gas, displacing its use in electrical generation and
15 making it more likely that coal will be burned for such purposes. Therefore, considering
16 advancing extraction technologies and energy usage, the total carbon production for the
17 oil sands transported by the Project could be more than 230 gigatonnes. This carbon
18 production must be, but is not, taken into account in the FSEIS as a climate impact and as
19 a foreseeable and related cumulative impact.

20 64. The FSEIS also fails to support its assertion that approval of the Project
21 would not affect “the continued demand for heavy crude oil at refineries in the U.S.”
22 FSEIS 1.4-10. The Project may not affect the overall global demand for energy.
23 However, because the Project would allow more oil to be transported more cheaply (see,
24 e.g., FSEIS 1.4-10 (“other modes of transportation, such as rail . . . would probably (but
25 not certainly) be more expensive”)), it would disincentivize investment in and use of
26 alternative energy sources, including various forms of renewable energy. Therefore, it
27 would cause demand for oil to remain higher than it would if alternative energy sources
28 were more available and affordable.

INADEQUATE MITIGATION MEASURES

65. NEPA requires that an EIS include a “detailed discussion of possible mitigation measures.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-52 (1989); 40 C.F.R. §1502.14(f). “[O]mit[ting] a reasonably thorough discussion of mitigation measures . . . would undermine the action-forcing goals of [NEPA].” *City of Carmel-By-The-Sea v. U.S. Department of Transportation*, 123 F.3d 1142, 1154 (9th Cir. 1997). The FSEIS fails to adequately mitigate the Project’s substantial risks.

66. For example, the FSEIS acknowledges that the risk of releases, spills, or leaks poses dangers to the environment, but it fails consider multiple available and feasible mitigation measures, including, for example, the sensors used by the Longhorn pipeline in Texas, and more frequent foot and aerial inspections. See, e.g., FSEIS 4.13-4.

67. The FSEIS also implies that the impacts to birds from the Alberta tar sands tailings ponds are sufficiently mitigated because “[t]ailings settling ponds are designed and located after environmental review and bird deterrents are used to prevent birds from landing on tailings ponds.” FSEIS 4.15-108. But the facts show otherwise. For example, over 1600 ducks died in a single tailings pond in 2008 despite highly vaunted “bird deterrents” that proved to be completely ineffectual. The FSEIS’ conclusory one-sentence description of measures to reduce these well documented and continuing impacts lacks “sufficient detail to ensure that environmental consequences have been fairly evaluated.” *Robertson*, 490 U.S. at 353; *South Fork Band Council v. U.S. Department of Transportation*, 588 F.3d 718, 727 (9th Cir. 2009).

INADEQUATE RESPONSE TO COMMENTS

68. NEPA requires that agencies solicit the public’s comments on draft environmental impact statements and respond to those comments. 40 C.F.R. §§ 1502.9(b), 1503.1(a)(4), 1503.4(a) (agency “shall assess and consider comments both individually and collectively, and shall respond, . . . stating its response in the final statement”). If the agency decides that a comment “do[es] not warrant further agency response,” the agency must provide an explanation for this decision. 40 C.F.R. §

1 1503.4(a)(5). *See also, e.g., California v. Block*, 690 F.2d 753, 773-774 (9th Cir. 1982);
 2 *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1183 (9th Cir. 2011) (EIS must
 3 “address[] substance of public comments”).

4 69. The State Department failed to adequately respond to the public’s comments
 5 on the DSEIS. First, the FSEIS repeatedly offered completely irrelevant answers to
 6 plaintiffs’ comments. *See, e.g.,* FSEIS PC-1436, PC-53 through PC-54 (responding to
 7 plaintiffs’ comment that the purpose and need statement was impermissibly narrow with a
 8 paragraph that does not address the narrowness of the purpose and need statement at all),
 9 FSEIS PC-1433 through PC-1434, PC-162, PC-168 (failing to respond to plaintiffs’
 10 comments regarding the discrepancy between the claimed and actual footprint of oil sands
 11 development, sulfur dioxide, and the infeasibility of reclaiming mining sites), FSEIS PC-
 12 1433, PC-163 (referring plaintiffs to a response that is completely irrelevant to their
 13 comments regarding inadequate mitigation measures).

14 70. Second, the FSEIS responded to numerous comments with the acronym
 15 “ACK,” rather than responding substantively – or at least referring those commentors to
 16 the “Theme Codes” for responses. *See, e.g.,* FSEIS PC-818, PC-819, PC-821, PC-822,
 17 PC-823. The acronym “ACK” is not defined. *See* FSEIS PC-iii (list of acronyms).
 18 These comments raised significant issues, including the effects of facilitating tar sands
 19 mining (FSEIS PC-818, PC-819), the Project’s indirect effects on the boreal forest and
 20 the migratory songbirds that it supports (FSEIS PC-819), the questionable safety of
 21 waste disposal procedures (FSEIS PC-821), and the risks of water pollution and oil spills
 22 (FSEIS PC-822). Responding to such comments with only an undefined acronym and no
 23 substantive discussion violates NEPA.

24 **THE ENVIRONMENTAL REVIEW PROCESS WAS IRREDEEMABLY**
 25 **TAINTED BY AN ILLEGAL CONFLICT OF INTEREST**

26 71. Federal law prescribes specific procedures to ensure that contractors
 27 preparing EISs are free of any conflicts of interest that may taint the review. 40 C.F.R.
 28 section 1506.5(c) provides that the contractor “shall execute a disclosure statement . . .

1 specifying that they have no financial or other interest in the outcome of the project.” See
 2 also Kate M. Manuel, “Responsibility Determinations Under the Federal Acquisition
 3 Regulation: Legal Standards and Procedures,” Congressional Research Service, January
 4 4, 2013 (describing “unavoidable and unmitigated organizational conflicts of interest” as
 5 an issue that would preclude the government from contracting with a given company).

6 72. The State Department selected Environmental Resources Management
 7 (“ERM”) to prepare the SEISs for the Project. This selection process was rife with
 8 problems. ERM misled the State Department regarding its potential conflicts of interest
 9 and its extensive ties to the oil and gas industry. In addition, ERM failed to disclose that
 10 it was working on another TransCanada project during the period covered by the conflict
 11 of interest disclosure statement, and that it had relationships with a number of companies
 12 that stand to benefit from approval of the Project. The State Department ignored both its
 13 own Interim Guidance procedures and the Office of the Inspector General’s (“OIG’s”)
 14 recommendations, failed to conduct any independent inquiry into ERM’s potential
 15 conflicts of interest, and selected ERM based on TransCanada’s recommendation.

16 73. The State Department required ERM to fill out a questionnaire aimed at
 17 ensuring that the company did not have any conflicts of interest. ERM intentionally
 18 misled the State Department by changing the multiple-choice questions provided on the
 19 form. One question asked:

20 Within the past three years, have you (or your organization)
 21 have a direct or indirect relationship (financial, organizational,
 22 contractual or otherwise) with any business entity that could be
 affected in any way by the proposed work?

23 The questions provided answers of “no” or “yes,” and requested more information if the
 24 answer was yes. But ERM *altered* the question by unilaterally changing the “no” option
 25 by adding “ERM has no existing contract or working relationship with TransCanada,”
 26 thus significantly narrowing the scope of information that it would have to disclose.

27 74. ERM’s alteration of the questionnaire was improper for several reasons.
 28 First, while the State Department’s question clearly asked about relationships any time

1 during the past three years, ERM's response was limited to *existing* relationships.
2 Second, while the State Department's question inquired broadly into any "direct or
3 indirect" relationships, ERM's answer was confined to "contract" or "working
4 relationship." By refusing to answer the actual question that the State Department asked,
5 ERM failed to disclose (until it submitted an addendum in August, 2012), that an ERM
6 affiliate, OASIS Environmental, Inc., worked for URS on TransCanada's Alaska Pipeline
7 Project from 2010 through 2012. ERM also later disclosed that its affiliate ERM-West
8 had also worked on the Alaska Pipeline Project in 2010 and 2011.

9 75. Third, the State Department inquired broadly into the relationships of the
10 person filling out the questionnaire, as well as that person's "organization." ERM
11 confined the scope of its answer only to ERM, conveniently omitting the fact that
12 multiple ERM staff members have connections to TransCanada and other oil and pipeline
13 companies. For example, ERM's Steven Koster played a prominent role in obtaining
14 permits for an expansion of the Wolverine Pipeline System and conducting environmental
15 review and permitting of the Mariner West Pipeline. ERM's Mark Jennings was a
16 consultant to ExxonMobil on the Alaska Pipeline Project.

17 76. Finally, the State Department's question asked about ERM's relationships
18 with "any business entity that could be affected in any way by the proposed work," but
19 ERM limited its answer to relationships with TransCanada itself. ERM failed to disclose
20 that it has a number of clients in the oil and gas industry, including Shell, Syncrude
21 Canada, Saudi Aramco, and Total. Chevron is another ERM client, and owns oil sands
22 projects in Canada and refineries in the U.S. that process oil from the tar sands. Another
23 ERM client is Plains All American Pipeline, an oil and gas transportation firm that
24 operates a storage facility in Cushing, Oklahoma, which could be directly connected to
25 the Keystone XL Pipeline. ERM failed to disclose these relationships, despite the fact
26 that those companies are clearly "business entit[ies] that could be affected . . . by the
27 proposed work."

28 77. The State Department's questionnaire also asked whether ERM was an

1 “energy concern,” defined as including any person “significantly engaged in the business
2 of conducting research” on “developing, extracting, producing, refining, [or] transporting
3 by pipeline” minerals for energy. ERM inexplicably answered “no” to this question.
4 However, ERM’s own website proclaims that “[t]he oil and gas sector remains at the core
5 of our business,” accounting for 34 percent of ERM’s sales in 2013. In addition, ERM is
6 a member of at least five oil industry trade associations, including the American
7 Petroleum Institute (“API”), which is self-described as a group “open to corporations
8 involved in the oil and natural gas industry or an allied industry,” with a goal of
9 “influenc[ing] public policy in support of a strong, viable U.S. oil and natural gas
10 industry.” API spent between 16 and 22 million dollars on its lobbying efforts in favor of
11 Keystone XL. ERM did not explain how it could be a member of multiple oil industry
12 trade associations, but not be an “energy concern” as defined by the State Department’s
13 questionnaire.

14 78. The State Department ignored OIG’s recommendation that the State
15 Department minimize TransCanada’s role in selecting a contractor to prepare the SEIS.
16 TransCanada prepared the Request for Proposals seeking third party contractors that the
17 State Department released, and provided the State Department with a list of potential
18 contractors, including ERM.

19 79. Under its own rules, as well as according to the OIG, the State Department is
20 required to independently review and evaluate the statements that contractors make in
21 their conflict-of-interest disclosures. Interim Guidance for the Use of Third-Party
22 Contractors in Preparation of Environmental Documents by the Department of State
23 (noting that 40 C.F.R. § 1506.5(c) requires that the agency “‘independently evaluate’ the
24 disclosure statement specifying that the contractor has no financial or other interest in the
25 outcome of the project”). The State Department failed to follow up on a number of red
26 flags raised by ERM’s responses.

27 80. For example, the State Department should have inquired as to why ERM
28 substantially narrowed the scope of the State Department’s question regarding ERM’s

1 potential conflicts of financial interest, as described above. In addition, the State
 2 Department seems to have done no investigation into ERM. If it had, it would have
 3 discovered that ERM is a member of API and other oil industry trade associations, and
 4 that it has clients that stand to benefit from the Project. At the very least, ERM's
 5 membership in an organization whose purpose is to promote the interests of the oil and
 6 gas industry should have prompted the State Department to investigate whether this
 7 membership made ERM an "energy concern," and to analyze whether ERM could
 8 objectively evaluate the Project's impacts.

9 81. Not only did the State Department fail to independently investigate ERM's
 10 potential conflicts of interest, as required – it also *actively concealed* such potential
 11 conflicts from the public. When the State Department posted ERM's conflict of interest
 12 disclosures on its website, it redacted the biographical information about ERM's
 13 employees – information that revealed their relationships with TransCanada and their
 14 work on other pipeline projects.

15 82. The State Department should not have relied on the FSEIS prepared by
 16 ERM. ERM misled the State Department in its conflict of interest disclosures, and the
 17 State Department violated its own rules by failing to independently verify ERM's
 18 statements and ensure that ERM was capable of an objective review of the Project. This
 19 was arbitrary and capricious and an abuse of discretion, and therefore violated the APA.
 20 The FSEIS and Project approval must be set aside.

21 **SECOND CLAIM FOR RELIEF**

22 83. Plaintiffs incorporate by reference all preceding paragraphs.

23 84. The Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, requires
 24 federal agencies to ensure that their actions are not likely to jeopardize the continued
 25 existence of any endangered or threatened species. 16 U.S.C. § 1536(a)(2). First,
 26 agencies authorizing activities such as the Project must consult with and prepare a
 27 biological assessment ("BA") for FWS. 16 U.S.C. § 1536(a). This BA is used by FWS to
 28 prepare a biological opinion ("BiOp") assessing the project's impacts on endangered and

1 threatened species. 16 U.S.C. § 1536(c); 50 C.F.R. § 402.12.

2 85. Here, the State Department's BA and FWS' BiOp failed to fully assess the
3 Project's risks to endangered and threatened species. The agencies ignored impacts to
4 animals in Canada, understated the Project's risks, put undue confidence in the efficacy of
5 unproven mitigation measures, inappropriately deferred analysis of connected actions
6 such as power lines, and completely failed to analyze risks to the endangered northern
7 swift fox. The agencies also failed to develop and use the "best scientific and commercial
8 data available" to assess the Project's adverse impacts on endangered species. These
9 omissions violate ESA.

10 86. Plaintiffs' ESA claims against FWS are ripe for adjudication under the APA.
11 Defendants' approval of the Project in violation of ESA is arbitrary, capricious, an abuse
12 of discretion and contrary to law in violation of APA, 5 U.S.C. §§ 701-706, and is subject
13 to judicial review thereunder.

14 87. Plaintiffs will pursue ESA claims against the State Department pursuant to
15 the 60-day notice requirement of the citizen suit provision described at 16 U.S.C. §
16 1540(g)(2)(C), and amend this Complaint accordingly after the 60-day notice period
17 matures.

18 **THIRD CLAIM FOR RELIEF**

19 (Violation of the Migratory Bird Treaty Act)

20 (Against All Defendants)

21 88. Plaintiffs incorporate by reference all preceding paragraphs.

22 89. The Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. sections 701 *et seq.*,
23 directs that unless otherwise permitted, "it shall be unlawful at any time, by any means or
24 in any manner, to . . . take [or] kill . . . any migratory bird . . . nest, or egg of any such
25 bird . . . included in the terms of the conventions between the U.S. and Great Britain . .
26 the United Mexican States . . . the government of Japan . . . and the Union of Soviet
27 Socialist Republics for the conservation of migratory birds and their environments"
28 16 U.S.C. sections 703.

90. MBTA applies with equal force to federal agencies as it does to private individuals. *Humane Society of the U.S. v. Glickman*, 217 F.3d 882, 884-88 (D.C.Cir. 2000); *American Bird Conservancy, Inc. v. F.C.C.*, 516 F.3d 1027, 1032 (D.C.Cir. 2008). And it may be enforced against the federal government by private citizens through the APA. *Id.* “[A]nyone who is ‘adversely affected or aggrieved’ by an agency action alleged to have violated the MBTA has standing to seek judicial review of that action.” *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1203-1204 (9th Cir. 2004); *see, also, Mahler v. U.S. Forest Service*, 927 F. Supp. at 1573; *Humane Society, supra*, 217 F.3d at 885; *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 438-39 (1992); Exec. Order No. 13186, Responsibilities of Federal Agencies to Protect Migratory Birds, 66 Fed. Reg. 3853 (Jan. 17, 2001). Under the MBTA, federal agencies must “seek authorization from the Secretary” of the Interior before approving activities – such as the construction and operation of the Project here – that directly kill migratory birds. *Id.* at 1225.

91. At least 130 bird species protected by the MBTA breed in, or migrate through, habitat located in the tar sands area, including species of cranes, ducks, geese, sandpipers, egrets, herons, sparrows, thrushes, phoebes, flycatchers, chickadees, woodpeckers, wrens, swallows, and finches. The Project will kill or injure many of these migratory birds during both the construction and operation phases. Despite the fact that the Project is likely to kill many migratory birds during both the construction and operation phases, defendants have not applied for or secured any permits under the MBTA for killing migratory birds. Nor did defendants condition their approvals on the applicant obtaining the necessary MBTA permits. Accordingly, defendants violated the MBTA by approving a project that will kill MBTA-protected birds.

FOURTH CLAIM FOR RELIEF

(Violation of the Bald Eagle and Golden Eagle Protection Act)

(Against All Defendants)

92. Plaintiffs incorporate by reference all preceding paragraphs.

93. The federal Bald and Golden Eagle Protection Act (“Eagle Act”), 16 U.S.C.

1 section 668, contains criminal and civil prohibitions against the taking of bald or golden
2 eagles without a permit issued by the Secretary of the Interior. Subdivision (a) makes it a
3 criminal offense to “knowingly, or with wanton disregard for the consequences of his act
4 take . . . in any manner. . . any golden eagle” 16 U.S.C. § 668(a). Subdivision (b)
5 makes it a civil offense to “take . . . in any manner. . . any golden eagle.” 16 U.S.C. §
6 668(b). Under the Eagle Act, “‘take’ includes . . . pursue, shoot, shoot at, poison, wound,
7 kill, capture, trap, collect, molest or disturb.” 16 U.S.C. § 668c; *accord*, 50 C.F.R. § 22.3
8 (“[t]ake includes . . . pursue, shoot, shoot at, poison, wound, kill, capture, collect, or
9 molest or disturb”); FSEIS 4.6-11. In *Gonzales v. Raich*, 545 U.S. 1, 26 n. 36 (2005) the
10 U.S. Supreme Court cited the prohibition on the take of eagles in the Eagle Act,
11 comparable to ESA’s take provision, as an example of “a rational (and commonly
12 utilized) means of regulating commerce.” *See also* 16 U.S.C. § 668.

13 94. Bald eagles occur throughout the proposed Project area. Surveys in 2010
14 found five active nests, and surveys in 2009 identified twelve winter roost sites in the
15 Project area. FSEIS 4.8-38. Although the FSEIS lists a number of measures that would
16 supposedly *reduce* impacts to Bald eagles, FSEIS 4.8-38 through 4.8-39, the State
17 Department does not, and cannot, assure that it will eliminate those impacts and avoid
18 taking eagles, thereby violating the Eagle Act.

19 95. The Project also poses risks to golden eagles, including collision with power
20 lines, disturbance to breeding and foraging areas, and loss of prey habitat. FSEIS 4.8-43.
21 Surveys identified eight nest sites along the pipeline route. *Id.* The State Department
22 proposes to conduct pre-construction surveys and to restrict activity near active nests
23 between March and July *in Montana*, but not in any other state through which the pipeline
24 passes, despite the fact that six of the eight nests already found were in South Dakota.
25 The Eagle Act prohibits the State Department from allowing the Project to “take” Golden
26 eagles wherever they occur, regardless of any state’s particular laws. Therefore, this
27 inadequate mitigation is not enough to bring the State Department into compliance with
28 the Eagle Act.

PRAYER FOR RELIEF

1
2 1. WHEREFORE, plaintiffs respectfully request that the Court:

3 2. Adjudge and declare that the defendants acted in an arbitrary and capricious
4 manner by certifying the Project's FSEIS and approving the Project because the FSEIS
5 is legally inadequate under the National Environmental Policy Act ("NEPA"), 42
6 U.S.C. section 4321 *et seq.*, and approval of the Project violates NEPA and the
7 Administrative Procedure Act, 5 U.S.C. section 701 *et seq.*;

8 3. Order defendants to withdraw their FSEIS and Project approvals including
9 the Presidential Permit until such time as the defendants have complied with the
10 requirements of the NEPA and their implementing regulations;

11 4. Adjudge and declare that the defendants' BiOp for the Project violated the
12 Endangered Species Act and the Administrative Procedure Act, 5 U.S.C. section 701 *et*
13 *seq.*, and order FWS to withdraw its BiOp for the Project until such time as FWS has
14 complied with the requirements of the Endangered Species Act and its implementing
15 regulations;

16 5. Preliminarily and permanently enjoin all defendants from initiating any
17 activities in furtherance of the Project that could result in any change or alteration of the
18 physical environment unless and until defendants comply with the requirements of
19 NEPA, MBTA, the Eagle Act, and their implementing regulations;

20 6. Award plaintiffs their reasonable attorneys' fees and costs and expenses
21 incurred in connection with the litigation of this action;

22 7. Grant plaintiffs such additional relief as the Court may deem just and
23 proper.

24
25 Dated: March 27, 2017

PATTEN, PETERMAN, BEKKEDAHN & GREEN,
PLLC

26
27 s/ James A. Patten
JAMES A. PATTEN

1 Dated: March 27, 2017

LAW OFFICES OF STEPHAN C. VOLKER

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